

## Can the New York Legislature Bring Back Authentication Boards?

### The Effect of Proposed Legislation on Liability for Art Authenticators

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## INTRODUCTION

On April 11, 2016, the New York Senate passed Bill S1229A and delivered it to the New York Assembly.<sup>1</sup> The Bill is described as “an act to amend the arts and cultural affairs law, in relation to opinions concerning authenticity, attribution and authorship of works of fine art.”<sup>2</sup> The purpose of the Bill is to “enhance protections under the law for individuals who are employed as art authenticator in the visual arts community.”<sup>3</sup> Why does the New York Legislature feel the need to enhance protections for art authenticators? The Bill’s sponsors, Senators Betty Little and George Latimer, justified the Bill by stating that, “in recent years, the work of authenticators has come under pressure from meritless lawsuits against those who render opinions in good faith. Such defense of expensive and frivolous lawsuits has left many in the industry reluctant to lend their expertise in authenticating art works.”<sup>4</sup> According to Senators Little and Latimer, this reluctance to opine is a problem because authenticators are “drivers of the art market,” and they act as safeguards against copies entering and devaluing the market.<sup>5</sup> The New York City Bar Association’s report on Bill S1229A suggests that legislators may be concerned by recent high profile fraud cases, such as those arising from the sales of a number of forgeries through the former Knoedler Gallery, which may indicate that the market is not functioning properly due to a lack of freely given expert opinions.<sup>6</sup>

Since the seminal case of *Hahn v. Duveen* was decided in 1929, authenticators have feared liability for expressing their opinions.<sup>7</sup> So what has prompted the New York Legislature to act now? The legislature may be responding to the recent closures of several authentication boards, and the resulting public outcry. The boards are closing in an attempt to avoid the costs of defending more lawsuits, and have brought new attention to the chilling effect of liability on art authenticators. Senators Little and Latimer are likely referring to the suits that prompted the board closures when they mention “meritless suits” in their memorandum.<sup>8</sup>

According to Senators Little and Latimer, “[t]his bill would clarify the role of art

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1. S. 1229A, 238th Leg., Reg. Sess. (N.Y. 2016).

2. N.Y.S. ASSEMB. 238, MEMORANDUM IN SUPPORT OF A1018, Reg. Sess. (N.Y. 2016).

3. *Id.*

4. N.Y.S. ASSEMB. 238, MEMORANDUM IN SUPPORT OF S1229A, Reg. Sess. (N.Y. 2016), <https://perma.cc/9EKT-6U79>.

5. *Id.*

6. N.Y.C. BAR ASS’N, REP. ON LEGIS. BY THE ART LAW COMM., A.1018-A, S-1229-A, at 4 (2016), <https://perma.cc/W74W-944H>.

7. Lindsey A. Lovern, *The Catalogue Raisonné and the Art Market: The Price of Reciprocity* 42 (2012) (unpublished Master’s thesis, Sotheby’s Institute of Art); *Hahn v. Duveen*, 234 N.Y.S. 185 (N.Y. Sup. Ct. 1929).

8. In the Art Law Committee’s report to the Senate, the only lawsuits against authenticators (as defined in the Bill) that were cited as problematic were lawsuits against artist foundations, and not individual scholars who had independently published a catalogue raisonné. Similarities in the language used in both the report and the memorandum indicated the justification for the Bill was largely taken from the reasons the Committee gave for supporting the bill. N.Y.C. BAR ASS’N, REP. ON LEGIS. BY THE ART LAW COMM., A.1019-A, S.1229-A, at 2 (2016), <https://perma.cc/W74W-944H>.

authenticators to ensure that those who practice their profession, in good faith, would be afforded protections under the law to ensure that only valid, verifiable claims against authenticators are allowed to proceed in civil court.”<sup>9</sup> This implies that the Bill should give authenticators the power to stop the sort of “meritless suits” mentioned above on a motion to dismiss. This would make sense, since many of the commentators stress that it is not liability per se that is deterring authenticators, but the costs of defending litigation.<sup>10</sup> To avoid or lessen these costs, authenticators must have the legal tools to stop a suit on a motion to dismiss or on summary judgment.

This Note will first lay out how authenticators—particularly authentication boards and artist foundations who author catalogues raisonnés—currently function in the art market, and how the financial stake in authenticity opinions has increased. It will also delineate the existing legal protections and liabilities that apply to authenticators, and how these liabilities have likely increased due to recent court decisions in New York. In Part II, this Note will examine how the proposed legislation, as intended, would (or would not) enhance legal protections for authenticators. Finally, this Note will suggest a stronger scheme for protecting authenticators that the legislature could pass, while also recognizing the limitations the New York Legislature faces in addressing the current chilling effect on authenticators.

## I. BACKGROUND

### A. AUTHENTICITY IN THE ART MARKET

“Authentication is the process by which art experts—academic or independent art historians, museum or collection curators, art dealers, or auction house experts—attribute a work of visual art . . . to a particular artist. . . .”<sup>11</sup> Experts form their opinions through provenance, scientific testing, visual inspection (also known as connoisseurship), or some combination of those methods.<sup>12</sup> As one judge observed, “[s]ince art authentication involves the exercise of the expert’s informed judgment, it is highly subjective, and even highly regarded and knowledgeable experts may disagree on questions of authentication.”<sup>13</sup> Though the exercise is subjective, it is founded on strong evidence.<sup>14</sup> An expert can verbally convey her opinion, issue a written opinion, or implicitly opine by authoring a catalogue raisonné, which is “an annotated, illustrated comprehensive listing of [an] artist’s work.”<sup>15</sup> Authentication, like most other aspects of the art market, is not regulated, but there are best practices

9. N.Y.S. ASSEMB. 238, MEMORANDUM IN SUPPORT OF A1018, Reg. Sess. (N.Y. 2015).

10. Symposium, *Current Cases and Issues: A Roundtable Discussion*, 35 COLUM. J.L. & ARTS 419, 426 (2012).

11. *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 98-99 (N.Y. App. Div. 1st Dep’t 2009) (quoting *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* xi (Ronald D. Spencer ed., 12th ed. 2004)).

12. *Lovern*, *supra* note 7, at 26-29.

13. *Thome*, 70 A.D.3d at 98-99 (quoting *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* xi (Ronald D. Spencer ed., 12th ed. 2004)).

14. *Lovern*, *supra* note 7, at 25.

15. *Thome*, 70 A.D.3d at 88.

that are generally followed.<sup>16</sup>

An artwork's authenticity is essential to its value in the secondary art market. Authentication decreases the risk of investing in the artwork, and it also weeds out forgeries that would otherwise distort the value of the authentic works.<sup>17</sup> High-value artworks are increasingly taking on the roles of commodities for investment purposes, as opposed to simply being objects of cultural value.<sup>18</sup> To a certain extent, this has always been true, but the trend has accelerated in the past few years. Prices in the secondary art market are as high as they have ever been, and the prices have been increasing at unprecedented rates, particularly for those works sold at auction.<sup>19</sup> For example, the two most expensive prices ever paid for artwork at public auctions both occurred last year. In May 2015, Picasso's 1955 painting, *Les Femmes d'Alger (Version 'O')*, sold for \$179.4 million at Christie's "Looking Forward to the Past" auction.<sup>20</sup> More recently, Liu Yiqian, a Chinese billionaire, paid \$170.4 million for Modigliani's *Nu Couche* at Christie's "Artist's Muse" auction on November 9, 2015.<sup>21</sup> If one of these paintings turned out to be inauthentic, the market value would decrease to zero. Thus, there is a huge financial stake in artwork authenticity. As one expert put it, "[a]lthough there is no standardized pricing mechanism for art, these prices are influenced by a variety of factors including style, subject matter, personal connection, aesthetic beauty, provenance, scale, medium, and resulting social reputation. But perhaps the most fundamental characteristic is the work's authenticity."<sup>22</sup>

This increase in art value hasn't caused the recent reluctance of art experts to give their opinions. Liability has chilled authenticators for decades. However, the higher stakes in the art world are important because the more money there is in the market, the more price inaccuracies (due to absent opinions) distort the economy at large. A sixty billion dollar industry gone awry has the potential to disrupt other markets.<sup>23</sup>

16. *Procella v. Time, Inc.*, 300 F.2d 162, 166 (7th Cir. 1962); see also Catalogue Raisonné Scholars Association, *CRSA Guidelines for Issuing Scholarly Opinions about Authenticity*, <https://perma.cc/J5F8-D5L3> (last visited Sept. 29, 2016); International Foundation for Art Research, *Professional Guidelines established by College Art Association (CAA)*, revised 2014, <https://perma.cc/QX2X-8THT> (last visited Sept. 29, 2016); Appraisers Association of America, *Code of Ethics*, <https://perma.cc/RZ4J-P526> (last visited Sept. 29, 2016).

17. Apart from the market, authentication is also important to art scholarship, because it helps to maintain the scholastic integrity of a body of work. See Lovern, *supra* note 7, at 15, 25. However, this Note focuses on the importance of authenticity opinions to the market and not to academia more generally, since market efficiency is generally a stronger justification for legislative action than scholastic purity or historical accuracy.

18. Lovern, *supra* note 7, at 15.

19. See *id.* at 14 (quoting CLARE MCANDREW, *THE INTERNATIONAL ART MARKET IN 2011: OBSERVATIONS ON THE ART TRADE OVER 25 YEARS* (Helvoirt: The European Fine Art Fair, 2012)) ("According to this report, the market is estimated at €46.1. Using the conversion rate 1 EUR = 1.32 USD, this equals approximately 60.8 USD. This value is based off public auction data and estimated sales of both art galleries and private dealer.").

20. See Robin Pogrebin & Scott Reyburn, *With \$170.4 Million Sale at Auction, Modigliani Work Joins Rarefied Nine-Figure Club*, N.Y. TIMES (Nov. 9, 2015), [www.nytimes.com/2015/11/10/arts/with-170-4-million-sale-at-auction-modigliani-work-joins-rarified-nine-figure-club.html](http://www.nytimes.com/2015/11/10/arts/with-170-4-million-sale-at-auction-modigliani-work-joins-rarified-nine-figure-club.html).

21. *Id.*

22. Lovern, *supra* note 7, at 16-17.

23. Lovern, *supra* note 7, at 19.

This is particularly problematic in New York, “which is the locus for the flag-ship branches of international auction houses and art galleries.”<sup>24</sup> Thus, legislation to correct this market distortion is justified now more than ever from an economic efficiency standpoint.

### 1. The Catalogue Raisonné

Given the importance of authenticity opinions, the question becomes who determines whether a painting is authentic and a reliable investment. A buyer or seller could consult an individual expert, but in today’s market, the final word on authenticity often comes from catalogues raisonnés, at least for works by well-known artists.<sup>25</sup> “A catalogue raisonné is regarded as a definitive catalogue of the works of a particular artist; inclusion of a painting in a catalogue raisonné serves to authenticate the work, while non-inclusion suggests that the work is not genuine.”<sup>26</sup>

When an owner of an artwork tries to sell it, most consigners and buyers will make the deal contingent on the work being included in the relevant catalogue raisonné.<sup>27</sup> Without the catalogue’s stamp of approval, many pieces decrease hugely in value, or even become unsalable. As the financial stakes in the art market continue to grow, so does the importance of the catalogue raisonné.<sup>28</sup> Lindsay Lovern, a professional at online auction database Artnet, has noted that “[t]here is a general consensus that the catalogue raisonné is the bedrock of the art market.”<sup>29</sup>

Who authors these catalogues and determines what is and is not included in a particular artist’s canon? An independent expert can publish one, but the ultimate stamp of authenticity comes from a catalogue published by the relevant artist foundation. Artist foundations are non-profits that preserve the legacy of a given artist.<sup>30</sup> A panel of experts associated with the foundation determines which works will be included. The foundation does not have to include any particular work, or give a reason for not including a work in its catalogue, even if there is strong evidence that the excluded work is authentic.<sup>31</sup> Often, it takes years for a foundation to update

24. N.Y.C. BAR ASS’N, REP. ON LEGIS. BY THE ART LAW COMM. A.1018-A, S. 1229-A, at 2 (2016), <https://perma.cc/W74W-944H>.

25. Peter Kraus, *The Role of the Catalogue Raisonné in the Art Market*, in *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* 63, 71 (Ronald D. Spencer ed., 12th ed. 2004).

26. *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 94 (N.Y. App. Div. 1st Dep’t. 2009), quoting *Kirby v. Wildenstein*, 784 F.Supp. 1112, 1113 (S.D.N.Y. 1992). See also Lovern, *supra* note 7, at 26 (“While a catalogue raisonné may never explicitly warrant the authenticity of an included work, inclusion inherently underpins the work’s reputation in the market and exclusion banishes the work to a state of limbo.”).

27. See *Thome*, 70 A.D.3d at 95; *Kirby v. Wildenstein*, 784 F. Supp. at 1113-4.

28. Michael Findlay, *THE VALUE OF ART: MONEY POWER, BEAUTY* 22-25 (2012) (It is [the] transmogrification of the art world into a kind of stock exchange that has drastically altered the nature, purpose, and power of the catalogue raisonné.).

29. Lovern, *supra* note 7, at 24. See also Peter Kraus, *The Role of the Catalogue Raisonné in the Art Market*, in *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* 63 (Ronald D. Spencer ed., 12th ed. 2004).

30. N.Y.C. BAR ASS’N, REP. ON LEGIS. BY THE ART LAW COMM. A.1018-A, S. 1229-A, at 3 (2016).

31. *Thome*, 70 A.D.3d at 97.

its catalogue, as the foundation seeks out and verifies new works, reviews old works, and secures reproduction rights for each work.<sup>32</sup>

## 2. Authentication Boards

Many of these foundations establish authentication boards, which include “people with scholarly knowledge of the artist’s work, people with direct experience working with the artist, relatives of the artist, and/or people who are officers of the artist foundation.”<sup>33</sup> As the Art Law Committee of the New York City Bar Association explains, “unlike the process of preparing a catalogue raisonné, an authentication board only reviews specific artwork submitted to it, and its process of evaluation is, of necessity, generally secretive, since transparency can enable art forgers to readily ascertain ‘hallmarks’ of a work actually authored by the artist and incorporate them into fakes.”<sup>34</sup> A certification of authenticity by an authentication board often comes with the promise that the piece will be included in the forthcoming (updated) catalogue raisonné. Authentication boards are important, and they wield a lot of power in the art market, because they allow owners of artworks not yet included in the foundation’s catalogue an opportunity to quickly get the approval necessary to sell their works. Otherwise, the artwork could be unsalable or grossly undervalued for years, until the foundation comes up with the next volume or updated version of its catalogue.

But why do buyers and sellers defer to unelected, secretive authentication boards? Experts can be wrong, so why is the opinion of the experts on a board preferred over the opinions of independent experts? Donn Zaretsky, an attorney at John Silberman Associates and the author of the Art Law Blog, explains why:

It is a convention—a game—because it is too hard to find the truth . . . Five different experts could have five different views, so that the art world . . . has decided almost to just pretend to go along with whatever the experts say to bring some structure to this market. The reason that you surrender your power is to make the market work. So from the commercial side of the art world, they need a single authority. You cannot wait two years every time you want to sell something at auction. So you need somebody to go to who will tell you whether you have the thumbs up or thumbs down.<sup>35</sup>

Thus, it is a matter of market efficiency and expediency: buyers and sellers would rather defer to an imperfect authentication board than deal with the uncertainty associated with a range of independent experts.

## 3. Board Closures

However, this important market lubricant is being undermined through litigation.

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32. Kraus, *supra* note 25, at 69.

33. N.Y.C. BAR ASS’N, REP. ON LEGIS. BY THE ART LAW COMM. A.1018-A, S. 1229-A, at 3 (2016).

34. *Id.*

35. Symposium, *Current Cases and Issues: A Roundtable Discussion*, 35 COLUM. J.L. & ARTS 419, 431 (2012) (referencing *Thome*).

For fear of potential costly lawsuits, many foundations have closed their authentication boards, although they continue to publish catalogues raisonnés.<sup>36</sup> The trend started with the Andy Warhol Authentication Board. In 2007, the Board was sued for rejecting the authenticity of a painting that the plaintiff had submitted.<sup>37</sup> The lawsuit survived a motion to dismiss in 2009, and settled about a year later in November 2010.<sup>38</sup> The Andy Warhol Foundation spent about seven million dollars fighting the claim.<sup>39</sup> Less than a year after the settlement, the Foundation announced that it was closing its authentication board to focus its assets on serving Warhol's legacy instead of paying attorney fees.<sup>40</sup> Within two years at least four other authentication boards decided to disband, also due in part to fear of costly litigation.<sup>41</sup>

The board closures were met with renewed cries from the art community about the chilling effect that legal liability—particularly tort liability—has on authenticators, and how this chilling effect is distorting the market.<sup>42</sup> It is not so much liability per se that has been making authenticators less willing to give their opinions, since authenticators, including artist foundations, have rarely, if ever, been held liable for giving their opinions in good faith. It is the costs of defending and settling claims that is muzzling authenticators.

In 2014, two bills purporting to protect authenticators were introduced in New York State, one in the Senate and one in the Assembly.<sup>43</sup> Bill S1229A is the most recent version of these bills. It has passed the Senate and is awaiting approval in the Assembly.<sup>44</sup> To understand how the Bill could provide more security for authenticators, one must first understand the sort of liability to which authenticators are currently exposed.

36. Authentication Procedure, THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, <https://perma.cc/8KYW-73UR> (last visited Sept. 14, 2016). See also Jennifer Maloney, *The Deep Freeze in Art Authentication*, WALL ST. J. (April 24, 2014), <https://perma.cc/73YY-WDUU>.

37. See Maloney, *supra* note 36.

38. Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., 2009 WL 1457177, (S.D.N.Y. May 26, 2009); see also Eileen Kinsella, *The Trouble with Warhol*, (Apr. 1, 2011, 12:00 AM), ARTNEWS, <http://www.artnews.com/2011/04/01/the-trouble-with-warhol/>.

39. In addition to illustrating the general liability problems that face artist foundations and authentication boards, the *Andy Warhol Foundation* case highlighted the shortcomings of liability insurance in addressing the chilling effect of liability. The insurance company initially denied the Foundation's claim, but eventually agreed to pay the full limit of the policy, which was only two million dollars. See N.Y.C. BAR ASS'N, REP. ON LEGIS. BY THE ART LAW COMM. A.1018-A, S.1229-A, n.2 (2016).

40. Daniel Grant, *New Legislation Would Protect Art Authenticators Against 'Nuisance' Lawsuits*, N.Y. OBSERVER, June 4, 2014, <https://perma.cc/7SYC-LHWW>. See also Maloney, *supra* note 36.

41. Lovern, *supra* note 7, at 50; see also Patricia Cohen, *In Art, Freedom of Expression Doesn't Extend to 'Is It Real?'*, N.Y. TIMES (June 19, 2012), <https://perma.cc/9H4M-89EE>.

42. Kinsella, *supra* note 38; Stacy Perman, *This is Bad News for People Who Spend Millions on Art*, FORTUNE, (Sept. 24, 2015, 6:00 am), <https://perma.cc/DW7U-WC39>; Maloney, *supra* note 36; Azmina Jasani, *A New York State Bill Seeking to Protect Art Authenticators*, ART@LAW, (Aug. 17, 2015), <https://perma.cc/RD5C-VTH6>.

43. S. 6794, 2013 Leg., Reg. Sess. (N.Y. 2014) and A. 9016, 2013 Leg., Reg. Sess. (N.Y. 2014) respectively.

44. Bill S1229A was first introduced in January 2015, but it died in the New York Assembly in January 2016. The Senate reintroduced the Bill this legislative term, and passed it on April 11, 2016. The Bill once again awaits Assembly approval to become law. S. 1229A, 2015 Leg., Reg. Sess. (N.Y. 2016).

## B. COMMON LAW TORT LIABILITY FOR AUTHENTICATORS

The landmark case in tort liability for authenticators is *Hahn v. Duveen*.<sup>45</sup> Sir Joseph Duveen was an art dealer. Mrs. Andrée Hahn owned a painting called *La Belle Ferronnière*, which was then attributed to Leonardo da Vinci. Duveen saw a photograph of the painting, and declared that the real *La Belle Ferronnière* was in the Louvre, implying that Hahn's was a fake. Hahn sued Duveen on disparagement grounds for volunteering his opinion, and the parties settled out of court for \$60,000, a huge sum in 1929.<sup>46</sup>

This costly outcome for Duveen's casual remark has since made art experts wary of rendering an opinion lest they open themselves up to liability, even if the opinion would be in the public interest and even when the artwork owner solicits the opinion.<sup>47</sup> Since *Hahn v. Duveen*, authenticators have been sued for product disparagement, defamation, antitrust violations, breach of contract, negligent misrepresentation, negligence, fraud, and false advertising.<sup>48</sup> Few, if any, authenticators—including artist foundations—have been found liable for giving their opinions in good faith, but defending against these claims has been costly and has led many experts to keep their opinions to themselves.<sup>49</sup> Indeed, the New York Legislature has recognized this issue since 1966 when the New York State Attorney General “advocated a state law granting qualified immunity to ‘accredited’ art experts who judge art works to be false, unless the disgruntled seller proved bad faith by the art expert.”<sup>50</sup> That law was never passed.

### 1. Existing Legal Tools for Managing Liability

So how have authenticators been managing their liability, apart from leaving the market altogether? A modern legal innovation meant to limit liability for authenticators is the hold-harmless agreement. These contracts say that the artwork owner will not make a legal claim against the authenticator based on his authenticity opinion.<sup>51</sup> Ronald Spencer heralded hold-harmless agreements in his 2004 book, *The*

45. *Hahn v. Duveen*, 234 N.Y.S. 185, 185-87 (N.Y. Sup. Ct. N.Y. 1929).

46. *See id.*

47. Ronald D. Spencer, *A Legal Decision in New York Gives Experts Protection for Their Opinions on Authenticity*, in *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* 217 (Ronald D. Spencer ed., 12th ed. 2004); T.E. Stebbins, *Possible Tort Liability for Opinions Given by Experts*, in *ART LAW: RIGHTS AND LIABILITIES OF CREATORS AND COLLECTORS*, 519 (Franklin Feldman and Stephen E Weil, eds., 1986).

48. Spencer, *supra* note 47 at 144. All of the claims listed above sound in tort, save for breach of contract. In this Note, I do not discuss how Bill S1229A could affect breach of contract claims. *See* Judith Wallace, *Protecting Expert Opinion About Visual Art*, *SPENCER'S ART LAW JOURNAL*, Winter 2015/2016, at 9, 10-12 (discussing how Bill S1229A affects contractual liability).

49. Lovern, *supra* note 7, at 48.

50. Wallace, *supra* note 48 at 9, 10.

51. For example, the hold-harmless agreement in one case said, “I agree to hold the Authentication Board and its directors and officers in their representative and individual capacities harmless from any liability towards me or others because of its rendition of an opinion (or its refusal to render any opinion).” *Lariviere v. Thaw*, 2000 WL 33965732, at \*2 (N.Y. Sup. Ct. June 26, 2000).



Expert Versus the Object, as an excellent form of protection for authenticators.<sup>52</sup> Spencer's positive outlook was based in large part on the outcome of *Lariviere v. Thaw*.<sup>53</sup> In *Lariviere*, after the relevant authentication board concluded that the plaintiff's painting was not by Pollock, the plaintiff-owner sued for breach of contract.<sup>54</sup> The defendant-board moved for summary judgment against the plaintiff on the grounds that the Board was not liable because of the hold-harmless agreement.<sup>55</sup> The defendant also counterclaimed that the plaintiff breached the hold-harmless agreement, and was thus liable for the costs and fees of the suit.<sup>56</sup>

The court agreed with defendants that the hold-harmless agreement barred the action, and that the plaintiff had to pay the costs and fees associated with the case. The court even sanctioned the plaintiff and his attorney for bringing a frivolous suit. The plaintiff's original claim was for breach of contract, but the court's opinion applies to tort claims as well. The court reasoned that, "in the absence of a contravening public policy, exculpatory provisions in a contract, purporting to insulate one of the parties from liability resulting from that party's own negligence, although disfavored by the law and closely scrutinized by the courts, generally are enforced, subject however to various qualifications," which did not apply to this sort of authentication case.<sup>57</sup> So, *Lariviere* represents the ability of hold-harmless agreements to quash frivolous suits with a motion to dismiss. The case also provides a precedent by which defendants can be reimbursed for defending frivolous suits.

In terms of setting a precedent for costs and fees, though, *Lariviere* was an exceptional case, in that there were a variety of facts that indicated that the painting in question was a fake, and that plaintiff's suit was frivolous. The signature on the painting even spelled Jackson Pollock's name incorrectly. The plaintiff and his attorney had no expert opinion declaring the painting genuine, had no law to avoid the hold-harmless agreement, and they had been warned by the defendant-board that it would seek sanctions, counsel fees, and costs if they filed suit. The judge in *Lariviere* observed that, "the defendants have submitted overwhelming proof that every single one of the plaintiff's claims in this case are not only without any merit whatsoever, but constitutes a laughable and clumsy attempt at fraud."<sup>58</sup> He surmised that "the plaintiff and his attorney apparently decided to risk going forward given the potential value of a genuine Jackson Pollock."<sup>59</sup> Although the lawsuit was clearly frivolous, the precedent is still quite valuable to authenticators for its discussion of hold-harmless agreements.

Artist foundations' authentication boards were another legal innovation heralded as a way for authenticators to pool their liability and shield themselves from frivolous

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52. Spencer, *supra* note 47 at 217-226.

53. *Lariviere v. Thaw*, 2000 WL 33965732 (N.Y. Sup. Ct. June 26, 2000).

54. *Id.* at \*1.

55. *Id.* at \*1.

56. *Id.* at \*2.

57. The judge granted the defendant's motion for summary judgment based on the hold-harmless agreement, but implied that her grant of summary judgment was also motivated by the fact that the painting was clearly a fake. *Id.* at \*3.

58. *Id.*

59. *Lariviere*, 2000 WL 33965732 at \*3.

litigation. The members of a foundation or board can give an opinion in the name of the legal organization and not be personally liable.<sup>60</sup> The organization also has more resources and greater incentive to defend against frivolous suits.

However, two recent court decisions from 2009, *Thome v. Calder* and *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, demonstrate that hold-harmless agreements, artist foundations, and authentication boards are not as helpful in minimizing liability as some experts had hoped. Indeed, both precedents have likely increased the potential for lengthy and costly litigation against foundations and associated organizations. The chilling effect of the *Simon-Whelan* decision is already apparent in the above-mentioned authentication board closures, and the consequences of *Thome* are yet to be seen.

## 2. *Thome v. Calder*

In *Thome v. Alexander & Louisa Calder Found.*, the plaintiff owned some works that were supposedly by Alexander Calder, and he had strong evidence of their authenticity.<sup>61</sup> He “submitted the necessary documentation to the Foundation for its authentication and inclusion in the Foundation’s Calder catalogue raisonné,” but the Foundation did not authenticate the work or include it in the catalogue. The Foundation did not explicitly say that the works were not authentic, but its refusal or failure to include the works in the catalogue was an implicit declaration of inauthenticity.<sup>62</sup> Thome sued the Foundation for damages based on a product disparagement claim, seeking as remedy a declaration of authenticity by the court and a mandatory injunction to have the works included in the catalogue.<sup>63</sup> The outcome of this case does not affect authentication boards, but it does affect artist foundations in their role as catalogue raisonné authors.

### a. *Thome’s Upside for Catalogue Authors*

The *Thome* court found that it could not “by mandatory injunction affirmatively compel a private entity such as the Calder Foundation to include a particular work in its catalogue raisonné based solely on the court’s independent finding that the work is authentic.”<sup>64</sup> “Unless plaintiff can establish an independent legal right to have the Work included in the catalogue, such as an enforceable contractual promise to include it, there can be no injunction mandating the Work’s inclusion.”<sup>65</sup> The court

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60. See Francis V. O’Connor, *Authenticating the Attribution of Art*, in *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* 22 (Ronald D. Spencer ed., 12th ed. 2004): “[T]he board did provide a model bringing a consensus of respected expert opinion to bear on the authentication of a much-forged and –copied artist, while indemnifying its members from personal liability for such professional decisions.” See also Sharon Flescher, *The International Foundation for Art Research*, in *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* 95-96 (Ronald D. Spencer, 12th ed. 2004).

61. *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88 (1st Dep’t. 2009).

62. *Id.* at 95.

63. *Id.*

64. *Id.* at 97.

65. *Id.* at 98.

reasoned that the art community's acceptance of the catalogue raisonné as the definitive authority on authenticity was a function of the marketplace, and not a result of legal directives or requirements, so there was no legal obligation to include a given work absent some other duty.<sup>66</sup>

Also, the *Thome* court declined to issue a declaratory judgment on the authenticity of the works, stating that courts, as a matter of law, should not make such judgments. Disputes concerning authenticity should not be resolved by declaratory judgment because "determinations of the authenticity of art work are complex and highly subjective assertions of fact . . . The law cannot give an art owner a clear legal right to a declaration of authenticity when such a declaration by definition will not be definitive."<sup>67</sup>

This holding will deter future attempts to compel a foundation to include an artwork in its catalogue, or to have the court declare a work as authentic. If a plaintiff were to bring suit on these grounds, the foundation would probably be able to quickly end the dispute on a motion to dismiss. This holding will also deter lawsuits generally, because the expected value to the plaintiff in bringing the suit has decreased. Before, the potential upside of a suit was winning damages or establishing the authenticity of a piece, thus greatly increasing or maintaining its high value.<sup>68</sup> Now, the only upside of a suit is damages. The potential damages (and thus potential settlement) could still be enough motivation for plaintiffs, though.

*b. Thome's Downside for Catalogue Authors*

Part of the *Thome* court's opinion could make it easier for product disparagement and other tort claims against authenticators to proceed.<sup>69</sup> The plaintiff had made a claim for product disparagement, which was dismissed as time barred, but the court indicated—in dicta—that the claim was otherwise strong enough to survive a motion to dismiss.<sup>70</sup>

A plaintiff may bring a disparagement claim "against a person whose false statement about an artwork has reduced the market value of the work."<sup>71</sup> This includes authenticators who inaccurately attribute a work, such that the piece decreases in value or even becomes unsalable. To prevail on a claim of product disparagement, the plaintiff must establish four elements: (1) the falsity of statements, (2) publication to a third person, (3) malice, and (4) special damages.<sup>72</sup>

To prove the first element, falsity, the plaintiff must prove the authenticity of the

66. *Id.* at 97.

67. *Thome*, 70 A.D.3d at 99.

68. Patricia Cohen, *In Art, Freedom of Expression Doesn't Extend to 'Is It Real?'*, N.Y. TIMES (June 19, 2012), <https://perma.cc/9H4M-89EE> ("[T]he staggering rise in art prices has transformed the cost-benefit analysis of suing.")

69. Symposium, *Current Cases and Issues: A Roundtable Discussion*, 35 COLUM. J.L. & ARTS 419, 429 (2012).

70. *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88 (1st Dep't. 2009).

71. 1 Ralph E. Lerner and Judith Bresler, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* 494 (Practising Law Inst., 4th ed., 2012).

72. See *Thome*, 70 A.D.3d at 105; see also *Kirby v. Wildenstein*, 784 F. Supp. 1112, 1115 (S.D.N.Y. 1992).

work of art by a preponderance of evidence.<sup>73</sup> This is a much lower evidentiary burden than most experts use when they deem a work authentic. The second element requires that the disparaging statement be made (“published”) to third parties who are potential buyers, and not just to private individuals involved in the art market.<sup>74</sup> The key change that *Thome* makes to the common law is its strong support of the proposition that not including an artwork in a catalogue constitutes publication.<sup>75</sup> To prove the third element, the plaintiff must show that the defendant negligently made the disparaging statement, that he made it with reckless disregard for the truth, or that he made it with actual knowledge of the truth.<sup>76</sup> In terms of proving the fourth element, “special damages are limited to losses having pecuniary or economic value, and must be fully and accurately stated, with sufficient particularity to identify actual losses. In addition to this particularity requirement, special damages must be the natural and immediate consequence of the disparaging statements to be recoverable.”<sup>77</sup> If a plaintiff-owner were to arrange a sale contingent on an artwork’s inclusion in a catalogue (as was the case in *Thome*), and the sale fell through once the catalog was published without the artwork, the plaintiff would almost definitely meet the special damages element.<sup>78</sup>

If a similar situation were to arise again, namely, if an artwork was not included in a catalogue and the artwork owner lost a sale as a result, the owner as plaintiff would very likely meet the publication and special damages elements of a product disparagement claim. Falsity and malice may be hard to prove, since they are both very fact-intensive elements that would require discovery. However, it is unlikely that a judge would grant a motion to dismiss, so long as the plaintiff could provide any credible evidence that the works were authentic, and a theory on malice that was not completely conclusory. Thus, *Thome* may have made it easier for product disparagement claims to proceed against catalogue raisonné authors. It also may have made it easier for other claims that also have a publication element to proceed in court.

### 3. *Simon-Whelan*

In *Simon-Whelan*, the plaintiff-owner twice submitted his painting to the Andy Warhol Authentication Board, and twice the Board denied its authenticity.<sup>79</sup> Both times that the plaintiff submitted the painting for the Board’s consideration, he signed

73. *Boule v. Hutton*, 138 F. Supp. 2d 491, 501 (2001).

74. *Spencer*, *supra* note 47, at 152.

75. *Thome*, 70 A.D.3d at 107.

76. There does not seem to be an exact scienter standard for product disparagement claims. Different legal experts vary in their opinion, some saying it is a simple negligence standard, and others saying that the standard is reckless disregard for the truth or even ill will. See *Spencer*, *supra* note 50, at 154-55.

77. *Kirby*, 784 F. Supp. at 1116 (internal quotation marks omitted).

78. This example stands in contrast to *Kirby*, another famous product disparagement case against an artist foundation. 784 F. Supp. at 1112. The *Kirby* case was dismissed because the plaintiff had not shown any evidence of special damages in his complaint.

79. *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, 2009 WL 1457177 (S.D.N.Y. May 26, 2009).

a hold-harmless agreement not to sue the board for its opinion as to the authenticity of the piece. After the second denial, plaintiff sued the board, claiming antitrust violations and fraud. The court found that the plaintiff's antitrust allegations claiming monopolization and market restraint, insofar as they were based on the exclusionary impact of the Board's second denial of *the artwork*, were sufficiently pled to survive a motion to dismiss. The court also found the plaintiff's fraud claim sufficient to survive a motion to dismiss, despite the hold-harmless agreement. The opinion highlighted the limits of hold-harmless agreements as shields for tort liability, and it opened the door for a new source of liability: antitrust claims against authentication boards and artist foundations.

*a. Simon-Whelan's Downside for Authentication Boards Relying on Hold-Harmless Agreements*

The elements of common law fraud in New York State include: "(1) making a false representation of (2) a material fact with (3) intent to deceive [scienter] and (4) plaintiff's reasonable reliance on the representation (4) which caused damage to the plaintiff."<sup>80</sup> The plaintiff in *Simon-Whelan* alleged that he submitted the painting after the exclusive sales agent for the Foundation's Warhol paintings repeatedly and personally encouraged the plaintiff to submit it, and that even though the Board induced him to submit the painting, it had no intention of authenticating it.<sup>81</sup> This is a significant allegation, because one of the elements of fraud is an intent to deceive, a much higher scienter standard than negligence or reckless disregard for the truth.<sup>82</sup> The defendants moved to dismiss the complaint on the grounds that it was barred by the hold-harmless agreement. The court denied the motion to dismiss, reasoning that the allegations of fraud were sufficient to plausibly state a claim for invalidating the hold-harmless agreement because "[a] party may not invoke such an agreement to insulate itself from intentional wrongdoing, such as that alleged in this action."<sup>83</sup> Because the hold-harmless agreement would not withstand a claim of fraud and the pleadings were otherwise sufficient, the claim was allowed to proceed.<sup>84</sup>

Had the Board not specifically solicited Simon-Whelan's submission, the plaintiff's fraudulent inducement argument would have been weaker, and the court may have enforced the hold-harmless agreement against the plaintiff's tort claim. However, the plaintiff could still argue that the Board induced his submission by the website's general invitation for submission, and by the Board's statements to a potential buyer that the painting would have to be submitted to the Board to have the

80. See Spencer, *supra* note 47, at 168 (quoting Foxley v. Sotheby's Inc., 893 F. Supp. 1224, 1228 (S.D.N.Y. 1995)).

81. *Simon-Whelan*, 2009 WL 1457177 at \*3.

82. This intentional deceit standard often makes fraud claims less attractive to plaintiffs than claims such as product disparagement and defamation, which generally have lower scienter standards.

83. *Simon-Whelan*, 2009 WL 1457177 at \*4.

84. *Id.* See also Nurnberg v. Hobo Corp., 819 N.Y.S.2d 226, 227 (App. Div. 1st Dep't 2006) ("A party asserting fraudulent inducement is required to identify a material representation, known to be false and made with the intention of inducing reliance, and actual reliance resulting in damages.").

Board's approval as authentic.<sup>85</sup>

This precedent is problematic for authenticators, because hold-harmless agreements were previously championed as a way for authenticators to avoid or quickly dispatch claims based on their opinions.<sup>86</sup> But the *Simon-Whelan* decision showed that there is a limit to which authenticators can use this sort of agreement to secure a motion to dismiss, and this limit is largely based on the intent requirement of the relevant legal claim. Such agreements can only reliably allow a board to dispatch a claim on a motion to dismiss if the foundation acted in good faith, and if the claim requires no more than negligence for its scienter requirement.<sup>87</sup> It is unclear whether a judge would uphold a hold-harmless agreement against a claim like product disparagement, which has a scienter requirement in between negligence and intentional harm.<sup>88</sup>

*b. Simon-Whelan's Downside with Respect to Antitrust Claims*

*Simon-Whelan* also had repercussions for authentication boards and artist foundations as it opened them up to antitrust claims.<sup>89</sup> *Simon-Whelan* is the first antitrust case against an authentication board and artist foundation that survived a motion to dismiss,<sup>90</sup> and thus created a frightening precedent for authenticators that fear lengthy antitrust litigation, both in federal courts under the Sherman Act and in state courts under the Donnelly Act.

The plaintiff in *Simon-Whelan* made two antitrust claims that sounded in tort. First, he alleged a conspiracy between the Board and the Foundation to raise the prices of the Foundation's own Warhol collection and to ensure that galleries and museums choose only Foundation works.<sup>91</sup> A conspiracy in restraint of trade is a violation of Section One of the Sherman Act, and the "plaintiff must allege (1) a contract, combination or conspiracy between two legally distinct entities, (2) in restraint of trade, (3) affecting interstate commerce."<sup>92</sup> A Section One claim can only be brought when two organizations act together, because there must be more than one organization involved to create a conspiracy. If there were no Warhol Board, the Warhol Foundation could not be easily sued on Section One grounds.<sup>93</sup> For the

85. *Simon-Whelan*, 2009 WL 1457177 at \*3.

86. Spencer, *supra* note 47, at 217-26.

87. See *Lariviere v. Thaw*, 2000 WL 33965732, at \*3 (N.Y. Sup. Ct. June 26, 2000) ("In the absence of a contravening public policy, exculpatory provisions in a contract, purporting to insulate one of the parties from liability resulting from that party's own negligence, although disfavored by the law and closely scrutinized by the courts, generally are enforced, subject however to various qualifications.").

88. Spencer, *supra* note 47, at 184-85.

89. This Note assumes that any reasoning and holdings the *Simon-Whelan* court made with respect to Sherman Act claims is precedent for Donnelly Act claims, since "the New York Court of Appeals has held that the New York Donnelly Act should generally be construed in light of Sherman Act precedents." *Simon-Whelan*, 2009 WL 1457177, at \*5 (citing *X.L.O. Concrete Corp. v. Rivergate Corp.*, 634 N.E.2d 158 (N.Y. 1994)).

90. See *e.g.*, *Kramer v. the Pollock-Krasner Found., et al.*, 890 F. Supp. 250 (S.D.N.Y. 1995); *Vitale v. Marlborough Gallery, et al.*, 1994 WL 654494 (S.D.N.Y. July 5, 1994).

91. *Simon-Whelan*, 2009 WL 1457177 at \*2.

92. *Bilinski v. Keith Haring Found., Inc.*, 96 F. Supp. 3d 35, 43 (S.D.N.Y. 2015).

93. Steven Reiss, *The Rights and Responsibilities of Authenticating Art*, 35 COLUM. J.L. & ARTS

claim to proceed, there also must be a motive for the alleged conspiracy, such as a financial interest in the works owned by the Foundation.

Second, the plaintiff in *Simon-Whelan* “alleged facts indicative of anticompetitive conduct with a specific intent to monopolize and a dangerous probability of achieving monopoly power in violation of Section Two of the Sherman Act.”<sup>94</sup> To state a claim under Section Two, the “plaintiff must allege (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>95</sup> A Section Two claim can be brought against individual organizations based on their independent actions, so an artist foundation could be sued on Section Two grounds regardless of whether it had an affiliated authentication board. However, a natural monopoly—which is the sort of monopoly artist foundations generally have, if they have one at all—would not violate Section Two. To prevail on a Section Two claim, the plaintiff would have to show that the foundation misused its monopoly power. There are a variety of ways to do this, including showing that the foundation lied or had a collusive interest.<sup>96</sup> The facts to prove a collusive interest would overlap somewhat with the facts to prove a Section One conspiracy.

While the *Simon-Whelan* ruling was startling to the art community, there was evidence that the Warhol Board did indeed act in bad faith and colluded with the Foundation. For example, the Plaintiff alleged that the Board made unsolicited suggestions to the owner of the artwork to submit said artwork for authentication, even after the work had been denied once.<sup>97</sup> The Plaintiff also alleged that the Board’s policies were inconsistently applied and the Board’s opinion was inconsistently given when doing so would further the conspiracy: the Board reversed prior decisions and refused to authenticate works the Foundation had previously tried to purchase. Finally, the Plaintiff alleged “that, unlike other authentication boards, which are composed of well-qualified and well-known independent experts, the Board is populated by individuals who lack expertise in the authentication of Warhol works and who are not independent of the Foundation.”<sup>98</sup>

In *Bilinski v. Keith Haring Found., Inc.*, a more recent antitrust case against an artist foundation where there was no such evidence of bad faith, the court granted the motion to dismiss the claims.<sup>99</sup> In that case, the plaintiff submitted several works to the Keith Haring Foundation (the “Foundation”) to be authenticated by the associated Authentication Committee. The Foundation declared that works were not authentic and Bilinski sued, claiming antitrust violations of Sections One and Two. The fact that the case was so easily dismissed could indicate that *Simon-Whelan* was not as dark a harbinger of antitrust liability for authenticators as some believed.

However, the *Bilinski* case has some key differences from the *Simon-Whelan* case,

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393, 400 (2012).

94. *Simon-Whelan*, 2009 WL 1457177 at \*6.

95. *Bilinski*, 96 F. Supp. 3d at 46.

96. Reiss, *supra* note 93, at 400-01.

97. *Simon-Whelan*, 2009 WL 1457177 at \*3.

98. *Id.* at \*5.

99. *Bilinski*, 96 F. Supp. at 35.

and may not indicate a safe legal environment in which authentication boards can operate in good faith. In *Bilinski*, the plaintiff alleged that there was a conspiracy between the Foundation and various art dealers, not between the Foundation and an independent authentication board as in *Simon-Whelan*. Also, the Keith Haring Foundation did not publish a catalogue raisonné, and it only authenticated pieces submitted to it. There was no evidence that the Keith Haring Foundation had a monopoly or conspired to restrain trade.<sup>100</sup> On the other hand, the defendants in *Simon-Whelan* controlled both the catalogue raisonné and the Board, and were alleged “to exercise complete control over the authentication of Warhol’s work, which they used to create scarcity in the market for Warhol’s work.”<sup>101</sup> Even if *Bilinski* does not change the precedent set by *Simon-Whelan*, it does at least establish that the mere existence of an artist foundation with an authentication board and a general interest in the value of the relevant artist’s works does not constitute an antitrust violation. But *Bilinski* probably does not provide enough protection for foundations that publish catalogues raisonnés to dispose of an antitrust claim on a motion to dismiss.

## II. BILL S1229A

The New York Legislature’s solution to the authenticator liability issues discussed above is Bill S1229A. This Bill changes the Arts and Cultural Affairs Law in three main ways: (1) it precisely defines “authenticator” to delineate who is protected under the Bill, (2) it requires that plaintiffs in actions against authenticators plead with particularity in their complaints, and (3) it allows judges to award costs and fees to authenticators for “good and just cause.”<sup>102</sup> Each of these changes and their effect on the existing statutory and common law framework is detailed and assessed below.

### A. DEFINING AN AUTHENTICATOR

In § 1 of the Bill, an “authenticator” is defined as:

a person or entity recognized in the visual arts community as having expertise regarding the artist, work of fine art, or visual art multiple with respect to whom such person or entity renders an opinion as to the authenticity, attribution or authorship of a work of fine art or visual multiple . . . . “Authenticator” shall include, but not be limited to, authors of catalogues raisonné [sic] or other scholarly texts in which an opinion as to the authenticity, attribution or authorship of the work of fine art or visual art multiple is expressed or implied. “Authenticator” shall not include a person or entity that has a financial interest in the work of fine art or visual art multiple for which such opinion is rendered or in any transaction concerning such work of fine art or visual art multiple for which the opinion is rendered, other than to be compensated for services such person or entity engaged in to provide an opinion as to the authenticity, attribution, or

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100. *Id.* at 46-47.

101. *Id.* at 45-46.

102. S.1229A, 238th Sess., Reg. Sess. (N.Y. 2016).



authorship of such work of fine art or visual art multiple . . . .<sup>103</sup>

In short, an authenticator is someone with expertise in the subject on which he or she opines, whose expertise is recognized by the art community.<sup>104</sup> The provision about financial interest limits the authenticator label to those whose opinions are not conflicted.<sup>105</sup> Authentication boards and artist foundations as catalogue authors meet the former part of this definition. However, they may not meet the provision about financial interest, because most artist foundations own a considerable number of works by the namesake artist, which they steward and sell as needed to fund the foundation's activities. Thus, most foundations have a financial interest in the general market for their artist's works. If supply increases when works are authenticated, the value of extant works, including those in the foundation's possession, may decrease. Also, if the foundation authenticates works that are later revealed to be copies or forgeries, the value of previously authenticated works—again, including those the foundation possesses—may decrease, since there will be a greater risk associated with the long-term investment. Members of authentication boards may be conflicted in the same way, since board members often personally own works by the artist they knew or studied.

If the Bill is passed and a plaintiff makes this financial interest argument, the courts could simply rule that owning a work by the relevant artist does not count as a financial interest for the authenticator under the statute. However, there is no certainty that this would happen, and the courts could take the opposite approach. If the courts take the position that those who own artworks by the same artist are financially interested, the proposed law would provide no protection for artist foundations from frivolous lawsuits, nor would it provide protection for authentication boards, so long as a single member owned an artwork by the relevant

103. S.1229A, 238th Sess., Reg. Sess., § 1 (N.Y. 2016).

104. Attorneys could probably split hairs on what constitutes specific expertise and whether the “visual arts community” recognizes this expertise. However, in the relevant case law for authenticators, courts have not had trouble determining who qualifies as a credible expert. In *Lariviere*, the court easily determined that the plaintiff's witness was not qualified to give an opinion on art authenticity, whereas in *Greenberg Gallery, Inc. v. Bauman*, the court found both the defendant's and the plaintiff's witnesses to be art experts, though it found one to be more credible than the other. 817 F. Supp. 167 (D.D.C. 1993).

105. The Bill excludes dealers, auctioneers, and others with a financial interest in the work. This is a reasonable distinction to make given the purpose of the legislation, which is to decrease frivolous claims without undermining meritorious ones. There are many cases against dealers, auctioneers, etc. that are frivolous, possibly more than there are against third party experts, but people with a financial interest in the transaction who give authenticity opinions are always conflicted and it will be less clear that there is no triable issue of fact with respect to the scienter element of a given tort claim. Thus, it is more likely that potentially meritorious claims would be dismissed if the definition of authenticator were expanded to include those with a financial interest. Even with the distinction the law would still benefit dealers and the market more generally, because authenticity issues could be more easily put to rest by hiring an independent expert. From another perspective, the Bill's definition of authenticator can be seen as codifying the professional standards set out by authenticator associations such as the Appraisers Association of America. The Association does not condone “contract(ing) to perform services for a fixed percentage of the value of the item appraised.” Appraisers Association, *Code of Ethics*, (2013), <https://perma.cc/RZ4J-P526>. A dealer's authentication service could be characterized as violating this rule since the dealer would get a percentage of the sale. Lastly, the distinction is reasonable, because the Bill is more likely to be passed this way. A bill that protected dealers would be viewed less favorably by the public, given preconceptions of art market insiders and the plaintiff attorney lobbies.

artist. There is evidence that the New York courts could take this position since the plaintiff in *Simon-Whelan* made a very similar financial interest argument when he alleged “that Defendants use their control over the authentication methods to create a scarcity in the market for Warhol artwork and inflate the value of the Warhol works in the Foundation's possession,” and that court ruled that this argument was sufficient to survive a motion to dismiss.<sup>106</sup>

### B. PLEADING WITH PARTICULARITY

Section 3 of the Bill states that “in any civil action brought against an authenticator . . . that arises from or relates to the authenticator’s opinion . . . , the claimant shall specify with particularity in the complaint facts sufficient to support each element of the claim or claims asserted.”<sup>107</sup> It is unclear whether this provision would be interpreted to impose a heightened pleading standard as opposed to a basic notice pleading standard. If it does impose such a heightened standard, it is also unclear what effect this would have in deterring frivolous suits. In all likelihood, the provision would not have any effect on authentication cases, given the current statutory and common law framework.

New York State law already requires basic notice pleading under § 3013 of the New York Civil Practice Law and Rules, which says that, “statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.”<sup>108</sup> In certain circumstances, which are detailed in CPLR § 3016, New York imposes a heightened pleading standard. For example, “where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.”<sup>109</sup> Similarly, Bill S1229A § 3 also appears to be trying to impose a heightened pleading standard like that of § 3016(b). However, many commentators disagree as to whether § 3016(b) does in practice impose a heightened pleading standard. But in *Pleading Fraud in New York*, attorneys James Cavoli and Matthew Laroche argue that New York precedent “holds that 3016(b) does in fact impose requirements above and beyond those of 3013,” and that the “rule protects would-be defendants from being forced to defend, often at great cost, speculative allegations of fraud.”<sup>110</sup>

When one looks to the recent case law regarding artist foundations and authentication boards, the utility of the pleading provision in dispatching frivolous claims is even less clear. The plaintiff in *Simon-Whelan* was able to meet the “heightened” specificity requirement for his fraud claim, and he was able to meet the

106. *Simon-Whelan*, 2009 WL 1457177, at \*2 (S.D.N.Y. May 26, 2009).

107. S.1229A, 238th Sess., Reg. Sess., § 3 (N.Y. 2016).

108. N.Y. C.P.L.R. § 3013 (McKinney 2016).

109. N.Y. C.P.L.R. § 3016(b) (McKinney 2016).

110. James G. Cavoli and Matthew J. Laroche, *Pleading Fraud in New York: CPLR 3016(b)'s Heightened Pleading Standard and Why It's Important*, ALB. L. REV. 685, 686 (2010).

specific pleading standard of a federal antitrust claim, so it does not appear that the Bill S1229A § 3 requirement would have made any difference in that case.<sup>111</sup> Had the claims in *Thome* not been time-barred, the specific pleading requirement would probably not have made a difference either, because the court indicated that the product disparagement claim was well pleaded.<sup>112</sup> In *Lariviere*, an example of a frivolous lawsuit against an authentication board and foundation, the pleadings were found to be insufficient such that the motion to dismiss succeeded under the basic notice standard of CPLR § 3013. Bill S1229A is not needed to deter frivolous cases of that sort.<sup>113</sup>

### C. ATTORNEY FEES

Finally, in § Four, the Bill states that:

In any civil action brought against an authenticator . . . that arises from or relates to the authenticator's opinion or information concerning a visual art multiple or work of fine art, the court may allow the prevailing authenticator the costs of the action together with reasonable attorneys' and expert witnesses' fees, provided that no such costs or fees shall be made pursuant to this section except upon a written finding of good or just cause, which shall specify the grounds thereof.<sup>114</sup>

In sum, the court may award cost and fees to the prevailing authenticator, if the court specifically finds good and just cause for doing so.

The provision would probably make it easier for authenticators to recover legal costs when compared to the existing common law and statutory framework. According to § 130-1.1 of New York's Administrative Rules of the Unified Court System & Uniform Rules of the Trial Court, the court, in its discretion, may award costs and fees resulting from frivolous "conduct to any party, and it may impose sanctions on any party that engages in frivolous conduct."<sup>115</sup> The provision in S1229A is easier to use than the administrative rule detailed in § 130-1.1, because the court need only point to good and just cause for awarding costs and fees and does

111. Gareth S. Lacy, Note, *Standardizing Warhol: Antitrust Liability for Denying the Authenticity of Artwork*, 6 WASH. J.L. TECH. & ARTS 185, 192 (2011).

112. In the opinion, the court went on at length about how the elements of a product disparagement claim were pleaded. There were detailed facts that indicated that the works at issue were authentic, which would support the falsity element, and that indicated that the foundation negligently or recklessly made the statement. The court specifically opined that the foundation's non-inclusion of the piece in the catalogue constituted publication, the third element. Finally, there was ample evidence of the special damages element, since the owner arranged several sales that fell through because the foundation did not include the pieces in the catalogue. See generally *Lariviere v. Thaw*, 2000 WL 33965732 (N.Y. Sup. Ct. June 26, 2000).

113. *Lariviere v. Thaw*, 2000 WL 33965732 (N.Y. Sup. Ct. June 26, 2000).

114. S. 1229A, 238th Leg., Reg. Sess. § 4(b) (N.Y. 2016).

115. (c) For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1 (2009).

not need to establish frivolous conduct. *Lariviere* is the hallmark precedent for awarding costs and fees to an authentication board, but it is not as robust as the cost and fees provision in S1229A. Because *Lariviere* only applies to clearly frivolous suits, it would probably not be enough of a justification to impose costs and fees in a suit that is meritless, but falls short of the frivolous conduct standard.<sup>116</sup>

### III. RAISING THE BAR FOR CLAIMS AGAINST AUTHENTICATORS IN NEW YORK

#### A. BILL S1229 VERSUS BILL S1229A

If New York legislators want to create a more favorable legal environment for authenticators, and to make it more difficult for meritless or simply weak claims to proceed against them, they should pass S1229, the unamended (original) version of the Bill. S1229 is the same as S1229A, but with two important differences. In the provision on attorneys' fees in S1229, the prevailing authenticator is entitled to the costs and fees of a suit, unlike § 4(b) of S1229A, which only allows costs and fees to be awarded at the judge's discretion, and only if the judge justifies the award with good and just cause. This would compensate authenticators for defending legal claims, and it would deter many plaintiffs from pursuing weak claims in the first place.

As it stands right now, there is an incentive for an owner of an artwork that has been denied by the authentication board or not included in the foundation catalogue to bring a suit, even if it is unlikely that he will win. The potential financial gains to be made by forcing a settlement generally outweigh the costs of litigation. Making it a certainty that plaintiffs with meritless or weak claims will have to pay for their conduct changes the cost-benefit analysis and decreases the incentive for strike suits.

Bill S1229 also has a provision that is entirely absent from S1229A; S1229 provides that in any action brought against an authenticator for giving his opinion with respect to an artwork, "the claimant shall prove the elements of such a claim or claims by clear and convincing evidence."<sup>117</sup> This is a higher burden of proof than the normal preponderance of evidence standard that has been used in past lawsuits against authenticators. The standard of clear and convincing evidence "has been described as evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is highly probable."<sup>118</sup> Highly probable is quite different than "more likely than not."

This higher burden of proof would likely disincentivize some plaintiffs from the outset, and thus, would help authenticators avoid suits altogether. However, many plaintiffs already bring their suits with the knowledge that they will be unable to prevail under the basic preponderance of evidence standard.<sup>119</sup> So, one could argue that the higher clear and convincing evidence standard will not deter meritless suits

116. *Lariviere*, 2000 WL 33965732, at \*7.

117. S. 1229, 238th Leg., Reg. Sess. § 1 (N.Y. 2015).

118. *Harrah's Entm't, Inc. v. Station Casinos, Inc.*, 321 F. Supp. 2d 1173, 1176 (D. Nev. 2004).

119. An authenticator has not been found liable for giving his opinion in good faith in New York.

any more than the current preponderance of evidence standard. Even if this is the case, though, the clear and convincing standard will make it easier for defendants to dispatch a claim on a motion to dismiss.

The clear and convincing evidence standard in conjunction with the provision for reimbursement of authenticators for costs and fees would create an effective bar against plaintiffs with weak suits. If it were clear from the outset that the plaintiff does not have and cannot obtain evidence to meet the clear and convincing standard, the judge would dismiss the suit. If not, the judge would still award costs and fees if the authenticator ultimately prevailed, and the authenticator would be more likely to prevail under the clear and convincing evidence standard. This new framework would change the cost-benefit analysis of authenticity claims by disincentivizing plaintiffs from pursuing meritless cases in hopes of a settlement and by incentivizing authenticators to fight meritless claims instead of settling.

### **B. THE PROGRESSION OF BILL S1229 TO S1229A**

Bill S1229 was introduced in its original format at the beginning of the 2015 legislative session (January 9, 2015), and was referred to the Committee on Cultural Affairs, Tourism, Parks and Recreation. The same Bill had been proposed the previous year as S6794 in the Senate and A9016 in the Assembly. Various actors in the art community submitted letters of support for Bill S6794.<sup>120</sup> These letters drew attention to the chilling effect in the art market, and the need for expert opinions to “maintain the integrity of the art market for fine art, but also for the advancement of art historical knowledge and public education in the arts.”<sup>121</sup> They also highlighted the proposed Bill’s potential to discourage frivolous lawsuits and to encourage reluctant authenticators. As discussed above, the changes to Bill S1229 (converting it to S1229A) diluted much of the effect the Bill would have in discouraging meritless suits, and in making authenticators less wary of potential litigation costs. It is uncertain if the above-mentioned art groups would full-heartedly support the Bill as written now.

The changes were prompted due to opposition from the New York State Trial Lawyers Association (“NYSTLA”). Once the Bill was amended to its present form, the NYSTLA withdrew its opposition. This Bill was originally meant to protect authenticators from litigants. Inherent in this goal is that some litigants with potentially meritorious claims lose the ability to make a claim without a fear of losing. It would seem that in trying to please everyone (including potential litigants and their lawyers, in addition to art authenticators), Bill S1229A as written does not greatly impact the existing legal framework in New York State.

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120. Those who sent letters include the Winston Art Group, the Metropolitan Museum of Art, the Guggenheim, and the Museum of Modern Art.

121. Letter from the Guggenheim in Support of S. 6794, 2013 Leg., Reg. Sess. (N.Y. 2014) and A. 9016, 2013 Leg., Reg. Sess. (N.Y. 2014) respectively.

### C. LIMITS TO SOLUTIONS FROM THE NEW YORK LEGISLATURE

Even if the Senate had passed the original version of the Bill S1229, the New York Legislature's power to mitigate the chilling effect of liability would be limited, because some of the claims that plaintiffs could bring (and have brought) against authenticators are governed by federal law. For example, *Simon-Whelan* opened the door for both state and federal antitrust litigation against artist foundations and authentication boards. New York legislators could make it more difficult for plaintiffs to proceed on a claim under the Donnelly Act or some other state law, but they can do nothing to deter claims under the Sherman Act, since federal law is not bound by state statutes.

By closing their authentication boards, artist foundations insulated themselves from those Sherman Act Section One claims that would be premised on alleged collusion between the foundation and the board to restrain the market.<sup>122</sup> This Bill is unlikely to bring back authentication boards because of the continuing fear of Section One market restraint claims under the Sherman Act. However, the boards may come back on their own if the federal courts continue to dismiss antitrust claims like they did in *Bilinski*, though *Bilinski* is a limited precedent, as discussed above.<sup>123</sup>

Artist foundations are still susceptible to Sherman Act Section Two claims of monopolization, even without their authentication boards, though the allegation of monopolization may be weaker against a stand-alone foundation. The Bill could lessen the fear of suits based on the Donnelly Act parallel, but not those based on federal claims. The Bill, however, does lessen somewhat the fear of product disparagement and other tort claims such as those in *Thome*.

### CONCLUSION

Liability for authenticators is now silencing some of the greatest authorities in the art community. Authentication boards were once seen as a solution to this chilling effect, because they allowed experts to pool their risk and to come to a consensus. Now, the boards are dissolving, as they have become the focus of too many jilted collectors. The closure of authentication boards has made a hole in the art market; many owners are unable to secure the assurance of authenticity they need to sell their works at "appropriate" prices. Foundations as authors of catalogues raisonnés are also exposed to more liability now, though they are still functioning. If foundations stop publishing complete catalogues, the art market would become even less stable.

Bill S1229A may provide some protection for authenticators, but it is not likely to provide enough protection to incentivize the authentication boards to return to the market. It also does not close the door that *Thome v. Calder* opened for product disparagement claims based on exclusion from a catalogue raisonné. If the New York Legislature wants to change the perverse incentives that authenticators face, it needs to take more drastic measures to compensate authenticators for defending

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122. Steven Reiss, *The Rights and Responsibilities of Authenticating Art*, 35 COLUM. J.L. & ARTS 393, 400 (2012).

123. See *Bilinski v. Keith Haring Found., Inc.*, 96 F. Supp. 3d 35 (S.D.N.Y. 2015).

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themselves in court, to cut short the time spent in court, and to disincentivize frivolous plaintiffs in the first place. This can be better achieved by implementing the unamended version, S1229. However, even that legislation provides limited deterrence to lawsuits, given the continued potential liability in federal court.