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STRINGS ATTACHED — VIOLIN FRAUD AND OTHER DECEPTIONS

*Carla J. Shapreau**

VIOLIN FRAUD: DECEPTION, FORGERY, THEFT, AND THE LAW. By *Brian W. Harvey.* New York: Oxford University Press. 1992. Pp. viii, 126. $35.

The lure of the violin has stirred passion in the hearts and minds of musicians and collectors of the violin family,[1] many of whom have fallen victim to fraud and other misdeeds throughout history. The subject of such misdeeds, from a legal standpoint, is the focus of a provocative new book, *Violin Fraud: Deception, Forgery, Theft, and the Law,* by Brian W. Harvey.[2] Harvey's book examines the microcosm of the violin world and incorporates a general overview of civil and criminal English law as applied to, among other things, violin theft and the intentional and negligent misattribution and description of violins.

This book review includes three Parts: a general discussion of the issues Harvey raises; an examination of the possible legal implications of secret commissions paid to violin teachers by violin dealers or makers, which Harvey touches on briefly; and an analysis of how the discovery of allegedly false "opinions" as to the authenticity or description of a violin may affect a consumer's remedies when discovery is not made within the applicable statute of limitations.

I. THE PLAYERS AND THE PRACTICES

Harvey sets the backdrop for his analysis by describing the gamut of players involved in the violin trade, including the "suppliers" on the one hand (violin dealers, violin makers, and auction houses) and those creating demand for instruments (musicians, students, and collectors) on the other. As Harvey observes, the violin involves both visual and musical aesthetics (p. 2), which together make it a unique hybrid of the worlds of art and music.

Woven throughout *Violin Fraud* are entertaining historical anec-

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1. The term *violin* as used in this review encompasses all members of the violin family, including the violin, viola, cello, and double bass.

2. Professor of Law, University of Birmingham.

dotes. For example, in 1685 in Italy, a man petitioned the Duke of Modena for assistance in a matter involving the false labeling of a violin:

> Your most Serene Highness,
>
> Tomasso Antonio Vitali, your most humble petitioner, now at the service of Your Most Serene Highness, bought of Francesco Capilupi, through the medium of the Rev. Ignazio Paltrinieri, a violin for the price of twelve pistoles because this violin bore the label of Nicolò Amati, a maker of great repute in his profession. Your petitioner has, however, discovered that the said violin was falsely labelled, he having found underneath the label one of Francesco Ruggieri, called "Il Pero," a maker of much less repute, whose violins at the utmost do not realize more than three pistoles. Your petitioner has consequently been deceived by the false label, and he appeals to Your Most Serene Highness for the appointment of a legal representative, who, without many formalities and judicial proceedings, and after ascertaining the petitioner's proofs of his assertions, should quickly provide [relief].
>
> That God may long preserve Your Most Serene Highness's precious life . . . .
>
> (Signed) TOMASSO A. VITALI. [pp. 10-11]

Harvey also provides a fairly detailed description of violin forgers' practices, including artificial distressing of varnish, simulated wear patterns, neck grafts for purported proof of conversion from baroque to the more modern neck length, creation of strategic "repaired cracks" with interior studs, and forged labels (pp. 68-73).

As with fine art, the value of a violin is greatly enhanced if the instrument is attributed to a famous maker from a particular geographic location and time period. Although musicians and collectors have traditionally sought out Italian violins from the seventeenth and eighteenth centuries, with the inflation of the prices of such violins, consumers are now discovering the merits of English, French, and German violins from the classic and postclassic periods as well as the virtues of modern violins made worldwide.

Although the practice of deception in the violin trade has continued unabated for centuries, there is a surprising dearth of reported opinions in the United States and England relating to such misdeeds (p. 15). With a virtual absence of caselaw involving the violin family from which to draw, "art law" provides the most fertile analogy for substantive law with respect to claims for misrepresentation, breach of contract, breach of warranty, replevin, and conversion, as well as related claims, because of the near identity of factual and legal issues that occur in transactions involving artwork and violins.

Harvey's book, although based on English law, discusses the same basic substantive civil claims that are likely to arise under U.S. law in cases of misattribution and misdescription, such as fraud, negligent misrepresentation, breach of contract, and breach of express and implied warranties (pp. 20-39, 46-85). In both England and the United

States, a court will generally not find negligence claims meritorious if the seller uses the care, skill, and due diligence ordinarily used by reputable violin makers or dealers practicing in the same or a similar locality under similar circumstances.[3] For breach of contract and warranty claims, the seller may successfully assert various defenses, including mistake,[4] fraud, failure of consideration, an appropriately worded and conspicuous disclaimer,[5] a limitation of remedies provision in a sales agreement involving a certification of authenticity or value, and the statute of limitations.[6]

English law diverges from U.S. law with respect to stolen goods and acquisition of title. English law employs the rule of "market overt" (pp. 95-98), which Harvey describes as a "quaint, awkward, and far from creditable part of English law" (p. 99). The doctrine of market overt allows a buyer to acquire good title to stolen goods if they are purchased in good faith, without notice of any defect or want of title on the part of the seller, and sold in a "market" that is "open, public, and legally constituted by grant, prescription, or statute" (p. 96). In contrast, in the United States, a good-faith purchaser cannot generally acquire title to, or right to possession of, stolen property.[7]

However, the statute of limitations may bar an owner's right to recover a stolen violin. Again, the law in England and the United States differs. Harvey states that an owner's right to title in England is extinguished and his right to claim damages is barred if discovery of the theft and the whereabouts of the violin occurs more than six years from the date a good-faith purchaser buys a violin (pp. 98-99).

In sharp contrast, in the United States two rules have evolved that may toll the statute of limitations on an owner's cause of action against a good-faith purchaser arising from the theft of artwork.[8] The minority rule, known as the "demand rule," tolls the statute of limita-

3. *See, e.g.,* CALIFORNIA JURY INSTRUCTIONS CIVIL [BAJI] 6.37 (7th ed. Supp. 1994) (regarding professional negligence).

4. *See, e.g.,* Smith v. Zimbalist, 38 P.2d 170, 174 (Cal. Ct. App. 1934) (holding a sale to be unenforceable when there was a mutual mistake on the part of plaintiff collector and defendant violinist as to the authenticity of purported Stradivarius and Guarnerius violins).

5. *See* U.C.C. § 2-316 (1990).

6. U.C.C. § 2-725 (1990), which provides a four-year statute of limitations, likely applies to contract or breach of warranty claims involving the sale of a violin.

7. *See* U.C.C. § 2-403 (1990) (providing that "[a] purchaser of goods acquires all title which his transferor had or had power to transfer") Clearly, a thief cannot transfer good title to anyone; nor can a person receiving stolen goods from a thief, or a person in line of possession of a thief, obtain title to stolen goods. *See, e.g.,* Inmi-Etti v. Aluisi, 492 A.2d 917, 922-23 (Md. Ct. Spec. App. 1985) (holding that "a possessor of stolen goods, no matter how innocently acquired, can never convey good title") (quoting Schrier v. Home Indem. Co., 273 A.2d 248, 250 (D.C. 1971)); *see also* Suburban Motors, Inc. v. State Farm Mutual Auto. Ins. Co., 268 Cal. Rptr. 16, 19 (Ct. App. 1990).

8. The caselaw relating to stolen artwork provides the best analogy for cases of stolen violins because of the similar nature of the article at issue. *See* Andrea E. Hayworth, Note, *Stolen Artwork: Deciding Ownership Is No Pretty Picture,* 43 DUKE L.J. 337 (1993) (discussing both the "demand rule" and the "discovery rule" as applied to stolen artwork); *see also* RALPH E. LER-

tions until an aggrieved owner discovers the stolen item's whereabouts[9] and makes a timely demand for return of the item and the wrongful possessor refuses to return it.[10] The demand rule shifts the primary burden of investigation to the good-faith purchaser and requires that she attempt to verify the provenance of artwork or a violin prior to purchase. In contrast, the majority rule, known as the "discovery rule," tolls accrual of the owner's cause of action until the owner knows, or reasonably should know, the identity of the possessor.[11] Unlike the demand rule, the discovery rule shifts the primary burden to the owner by requiring that the owner notify relevant authorities and conduct a diligent search for the stolen item.

Harvey provides the retailer, auctioneer, collector, or teacher with practical guidelines for avoiding liability. For example, he suggests:

- Remove offending labels when appropriate;
- Use a prominent disclaimer in sales transactions in which a buyer may be misled as to attribution or description of the violin;
- Use due diligence when preparing certifications of authenticity, appraisals, or other documents that describe the instrument and identify in detail the instrument at issue;
- When advertising the sale of an instrument make it clear that you are in the trade and not selling as a private person;
- Do not attempt to exclude implied warranties of fitness and merchantability when defects are latent;
- Keep copies of all documents provided to customers that contain descriptions or attributions and keep records that will enable the violin dealer or maker to reidentify the instrument in the future; and

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NER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS 82-90 (Practising Law Institute No. G1-1010, 1989).

9. In most cases, it will be difficult for a true owner to acquire actual or constructive notice of the identity of the possessor of a stolen violin or piece of art because the item is usually kept in a private collection or home. *See, e.g.*, O'Keeffe v. Snyder, 416 A.2d 862, 871 (N.J. 1980) (finding the private residential display of stolen art insufficient to afford notice to the true owner). *But see* United States v. One Stradivarius Violin, 188 F. 542, 543-44 (S.D.N.Y. 1911) (finding the statute of limitations not tolled on a customs claim under a fraudulent concealment theory because the well-known Stradivarius violin was "habitually played on by different artists at [defendant's] Sunday afternoon musical parties" and on one occasion was played at a public concert), *affd.*, 197 F. 157 (2d Cir. 1912).

10. *See, e.g.*, Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991); DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987) (developing modified demand rule to include requirement of due diligence on the part of the owner in searching for a stolen painting), *cert. denied*, 486 U.S. 1056 (1988); Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829 (E.D.N.Y. 1981), *affd.*, 678 F.2d 1150 (2d Cir. 1982); Menzel v. List, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (App. Div. 1967), *modification revd.*, 246 N.E.2d 742 (N.Y. 1969).

11. *See, e.g.*, *O'Keeffe*, 416 A.2d at 874; Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989), *affd.*, 917 F.2d 278 (7th Cir. 1990), *cert. denied*, 112 S.Ct. 377 (1991); *see also* CAL. CIV. PROC. CODE § 338(c) (West Supp. 1994) (providing that a "cause of action in the case of theft . . . of any article of . . . artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency which originally investigated the theft").

- If you are a teacher or a dealer, do not accept or pay secret commissions arising from sales to students.[12]

Harvey's practical guidelines should be helpful to those involved in the violin trade.

II. The Hazards of Secret Commissions and the Duty To Disclose

It is common practice in the United States, and apparently in England, for teachers to receive secret commissions "from particular dealers in whose direction the pupil has been deliberately pointed" (p. 118). Harvey suggests that this practice is an abuse of the teacher's position of trust, may be a breach of the teacher's contract of employment, and may even be a crime in England (pp. 47, 118). In his practical guidelines section, he further states:

> Secret profits like these are held by the fiduciary (i.e. the teacher) in trust for the beneficiary (the pupil) and if the practice is discovered the teacher will be required to account for the money. Traders, too, should eliminate the payment of this type of commission in the terms of any Code of Practice. [p. 118]

The harm of secret commissions is felt not just by the student, who may be paying for his teacher's commission through an inflated sales price. In addition, violin makers and dealers who refuse to engage in this industry custom may suffer competitive injury when teachers choose to send their students elsewhere.

Generally, students place special confidence and trust in their violin teachers, and teachers have great power to influence decisions made by their students, who typically rely on their teachers' expertise, superior knowledge, and training. In certain circumstances, there may be a special relationship of trust and confidence between teacher and student that may arguably give rise to an elevated duty of care by the teacher or even a fiduciary duty.[13] The special relationship that exists between a student and her violin teacher may expose the teacher to liability for accepting secret commissions when a conflict of interest exists between the teacher's self-interest in obtaining commissions and her duty to the student.

Although no reported case in the United States has addressed the legality of secret commissions in this context, the practice of paying and receiving secret commissions may run afoul of state statutes. For example, California's Unfair Practices Act arguably prohibits secret commissions under the appropriate factual scenario:

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12. Harvey includes these and other suggestions in an appendix. Pp. 114-18.

13. *See* 36A C.J.S. *Fiduciary* 385 (1961) ("A fiduciary relationship may exist or come into being whenever trust and confidence are reposed by one person in the integrity and fidelity of another . . . or when there is a reposing of faith, confidence, and trust, and the placing of reliance by one person on the judgment and advice of another."). Whether or not a fiduciary relationship exists is a question of fact. *Id.* at 387.

> *The secret payment* or allowance *of* rebates, refunds, *commissions,* or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, *to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful.*[14]

In addition, concealing a commission may constitute actionable fraudulent concealment under the common law if the teacher's special or fiduciary relationship with the student gives rise to a duty to disclose.[15] In the absence of a fiduciary relationship, a teacher may commit actionable fraudulent concealment when she makes some representations relating to the sales transaction but suppresses the arguably material fact that she is receiving a commission from the seller.[16]

The payment of secret commissions by a violin dealer or maker to a teacher also may be an antitrust violation under the Robinson-Patman Act, which provides that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.[17]

In *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.,*[18] a photographer paid commissions to schools in exchange for the schools' endorsement as the "official photographer." Both the photographer and the schools disclosed to the students that an unspecified portion of the

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14. CAL. BUS. & PROF. CODE § 17045 (West 1987) (emphasis added); *see also* United States v. Di Girolamo, 808 F. Supp. 1445, 1450-52 (N.D. Cal. 1992) (finding that kickbacks paid to obtain a competitive edge violated California's Unfair Practices Act).

15. *See, e.g.,* Heliotis v. Schuman, 226 Cal. Rptr. 509, 512 (Ct. App. 1986) ("[N]ondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts." (citing 4 BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW §§ 459-464 (8th ed. 1974))).

16. *See, e.g.,* Zinn v. Ex-Cello-O Corp., 306 P.2d 1017, 1025 (Cal. Dist. Ct. App. 1957) ("[W]here the defendant, who has no duty to speak, nevertheless does so . . . he is bound to speak truthfully and to speak the whole truth."); *see also* Rogers v. Warden, 125 P.2d 7, 9 (Cal. 1942); RESTATEMENT (SECOND) OF TORTS § 551 cmt. g (1977).

17. 15 U.S.C. § 13(c) (1988). *See, e.g.,* Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851 (9th Cir. 1965) (holding that a corporate defendant's commercial bribes to a state employee to obtain competitive advantage violated § 13(c)), *cert. denied,* 383 U.S. 936 (1966).

18. 713 F. Supp. 937 (E.D. Va. 1989), *affd.,* 903 F.2d 988 (4th Cir. 1990).

photograph price would be given to each school to support various school activities.

When a competitor challenged this practice, the district court found that section 13(c) had not been violated. "Because secrecy is an essential element of Section 13(c) commercial bribery, the contractual arrangement at issue here is not illegal."[19] The Fourth Circuit affirmed the district court's ruling without addressing the secrecy issue. Instead, the Fourth Circuit concluded that the schools did not act as agents, representatives, or intermediaries on behalf of the students, as those terms are used in section 13(c).[20]

Similarly, in *Harris v. Duty Free Shoppers,*[21] the court found no antitrust violation when the operator of a duty-free store made secret payments to tour companies and tour guides to promote its shop. The court concluded that the tour operators and guides were not in an agency or fiduciary relationship with their passengers and did not serve as intermediaries subject to the passengers' direct or indirect control as to the purchase of the store's goods.[22]

The Ninth Circuit distinguished the facts in *Harris* from the agency relationship in *McCollum v. Friendly Hills Travel Center.*[23] In *McCollum,* the court held that a fiduciary relationship existed between a tourist and his travel agent because the travel agent "had arranged his trip and had vouched for the excellent condition of certain sporting equipment," the defects of which later caused the plaintiff's injuries.[24]

In contrast to the facts in *Harris* and *Stephen Jay Photography,* a violin teacher, much like the agent in *McCollum,* may act as a special agent for the student or as an intermediary for purposes of the purchase transaction. The teacher may arrange for the specific transaction and vouch for the condition and attributes of the violin, thereby arguably creating a relationship between the student and the teacher worthy of protection by the antitrust laws.

Although section 13(c) does make an exception for services rendered in connection with the sale or purchase of goods, the exception will not apply when the teacher receives a commission for services rendered to the seller but against the best interest of the buyer.[25]

19. 713 F. Supp. at 941.

20. Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988, 993 (4th Cir. 1990).

21. 940 F.2d 1272 (9th Cir. 1991).

22. 940 F.2d at 1275.

23. 217 Cal. Rptr. 919 (Ct. App. 1985).

24. *Harris,* 940 F.2d at 1274-75 (citing *McCollum,* 217 Cal. Rptr. at 923).

25. *See, e.g.,* Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851, 859 (9th Cir. 1965) (refusing to construe the "services rendered" exception to include services performed by a buyer's agent for the seller but against the interest of the buyer, because such an interpretation would undermine the fiduciary relationship between buyers and their agents), *cert. denied,* 383 U.S. 936 (1966); Modern Mktg. Serv., Inc. v. Federal Trade Commn., 149 F.2d 970 (7th Cir. 1945) (finding that brokerage commissions could not be paid by sellers to the buyers' agent for services that were incidental to the agent's main activities on behalf of the buyers, even though

One way to avoid potential liability for violation of state unfair trade practices statutes, for fraud, or for violation of the Robinson-Patman Act in connection with commissions is for teachers to be compensated openly for the valuable expert service that they can provide to their students in the instrument-selection process by candidly accepting payment for such expert services. In the absence of such a disclosure, violin teachers, dealers, and makers expose themselves to possible liability if the requisite degree of trust and confidence is reposed in the teacher by the student with respect to circumstances surrounding the student's purchase of a violin.

III. Discovery of Fraud and Deception: Fiddling Away the Time and the Statute of Limitations

Harvey states in his summary of practical guidelines that to avoid or minimize potential liability "[c]ertificates etc. of authenticity should normally do no more then express an *opinion*" (p. 115). Under American law, however, the courts will likely treat a representation cloaked in "opinion" language to avoid liability for fraud, negligence, or breach of warranty as an actionable misrepresentation of fact when made by a violin dealer or maker who holds himself out to the public as an expert and when the buyer reasonably relies on such superior knowledge to her detriment.[26]

Although Harvey does not discuss the details of litigating civil claims for false certification or misdescription on a breach of contract or warranty theory, one major issue may be whether or not the statute of limitations bars such a claim. For example, if a violin dealer or maker knowingly or negligently misrepresents the authenticity of a violin in connection with a sale by incorrectly stating that the violin was made by Stradivarius, a buyer's claim may not reasonably be discovered until the owner decides to sell the violin, which may be twenty years or more after the purchase.[27]

The applicable statute of limitations and the buyer's duty to dis-

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the services were genuine and of benefit to the sellers). In *Modern Marketing*, the Seventh Circuit noted that "[t]he agent cannot serve two masters simultaneously rendering services in an arm's length transaction to both." 149 F.2d at 978 (quoting Great Atl. & Pac. Tea Co. v. Federal Trade Commn., 106 F.2d 667 (3d Cir.), *cert. denied*, 308 U.S. 625 (1939)).

Even when a seller renders a service for the benefit of the student-buyer, when the actual services rendered are de minimis, the exception to § 13(c) will probably provide no refuge. *Cf.* Hennegan v. Pacifico Creative Serv., Inc., 674 F. Supp. 303, 306 (D. Guam 1987) (holding that § 13(c) does not prohibit payments by store owners to tour bus drivers for services rendered in bringing tourists to their stores because such services are not de minimis).

26. *See, e.g.*, Grinnell v. Charles Pfizer & Co., 79 Cal. Rptr. 369, 378 (Cal. Ct. App. 1969) ("Where the party making the representations has superior knowledge regarding the subject matter of his representations, and the other party is so situated that he may reasonably rely on such supposed superior knowledge or special information, the representations may be considered as fact and not opinion." (citations omitted)); *see also* Balog v. Center Art Gallery-Hawaii, Inc., 745 F. Supp. 1556, 1565 (D. Haw. 1990).

27. *See, e.g.*, Rosen v. Spanierman, 894 F.2d 28, 32 (2d Cir. 1990) (holding that a breach of

cover the seller's misrepresentation have been the subject of litigation in the art world with interesting and disparate results. In cases involving works of art, the First,[28] Second,[29] and Third Circuits[30] have foreclosed buyers from obtaining a remedy for breach of warranty claims when they failed to discover the breach until after the running of the applicable statute of limitations, which is generally four years from tender of delivery under the Uniform Commercial Code.[31] These circuits have held that the statute of limitations bars claims for breach of warranty when the warranty does not *explicitly* extend to future performance *and* when discovery of an alleged defect in a work of art does not *necessarily* await future performance.[32] This result may appear harsh when a buyer has no obvious reason to obtain a second opinion regarding attribution or description of a violin until he decides to sell the violin — in many instances more than four years after purchase and after the statute of limitations has arguably barred his breach of contract and warranty claims.

In sharp contrast to the First, Second, and Third Circuits, the trial court in *Balog v. Center Art Gallery-Hawaii, Inc.*[33] found that the buyer was effectively precluded by the price of the artwork — purported works by Salvador Dali that were purchased for a total of $36,200 — as well as by the defendant's repeated assurances and fraudulent concealment of the truth, from undertaking an extensive investigation into the veracity of the seller's claims of authenticity until ten years after the purchase, when the buyer became aware of newspaper articles and television reports that indicated that the defendant's representations might be false.[34]

The *Balog* court held:

> [I]n the case of art work which is certified authentic by an expert in the

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warranty claim for the sale of a fake painting brought 20 years after purchase was barred by the statute of limitations).

28. Wilson v. Hammer Holdings, Inc., 850 F.2d 3, 4-7 (1st Cir. 1988).

29. *Rosen*, 894 F.2d at 31.

30. Firestone & Parson, Inc. v. Union League, 833 F.2d. 304 (3d. Cir.), *affg. without opinion* 672 F. Supp. 819 (E.D. Pa. 1987).

31. U.C.C. § 2-725(1) (1990). However, § 2-725(2) provides an exception to the four-year statute of limitations. If "a warranty *explicitly* extends to future performance of the goods *and* discovery of the breach *must* await the time of such performance the cause of action accrues when the breach is or should have been discovered." U.C.C. § 2-725(2) (1990) (emphasis added). A sales agreement may also shorten the four-year statute of limitations to "not less than one year." U.C.C. § 2-725(1) (1990).

32. *See Wilson*, 850 F.2d at 4-7; *Rosen* 894 F.2d at 31-32; *Firestone*, 672 F. Supp. at 822; *see also* Lawson v. London Arts Group, 708 F.2d 226, 228 (6th Cir. 1983) (noting in dicta that, although the plaintiff did not reasonably suspect a breach of warranty claim until well after the four-year statute of limitations set forth in U.C.C. § 2-725(2), "it would not have been impossible for her to have discovered the breach earlier. Consequently, this discovery did not necessarily have to await the [artwork's] future 'performance.' ").

33. 745 F. Supp. 1556 (D. Haw. 1990).

34. 745 F. Supp. at 1558-59, 1566.

> field or a merchant dealing in goods of that type, such *a certification of authenticity constitutes an explicit warranty of future performance sufficient to toll the U.C.C.'s statute of limitations.*[35]

Applying the discovery rule, the *Balog* court further held that "the limitations period of a claim of a party seeking damages for breach of such warranty accrues at the time when the breach is discovered or reasonably should have been discovered."[36]

The type of claim pled by a purchaser of a violin or artwork may be critical because the measure of damages recoverable for a fraud or negligence claim — restoration to pretransaction status — may, depending on the jurisdiction,[37] preclude the buyer from obtaining lost profits or appreciation damages,[38] whereas a breach of contract or warranty claim may provide the buyer with compensation for the benefit of the agreement had it been fully performed.[39]

The discovery rule will only apply to claims for breach of warranty under U.C.C. § 2-725(2) if a warranty explicitly extends to the future performance of the goods *and* if discovery of the breach must await the time of such performance.[40] As previously discussed, there is a split in authority as to how section 2-725(2) should be applied to claims involving artwork. The better view on the warranty-of-future performance prong of section 2-725(2) is set forth in *Balog* because the authenticity of a violin or artwork is not expected to change over time. Therefore, if a seller warrants that a violin is an authentic Stradivarius,

35. 745 F. Supp. at 1570 (emphasis added). The court went on to note that artwork, as well as antiques, are "the type of thing about which questions as to authenticity normally arise only at some future time, usually the time of resale." 745 F. Supp. at 1570 n.22, 1571. "Since artwork does not 'perform' in the traditional sense of goods covered by the U.C.C., and since the authenticity of a work of art, i.e. its 'performance', would not change over time, [defendant's] warranty necessarily guaranteed the present and future existence of the art as authentic works of Salvador Dali." 745 F. Supp. at 1571.

36. *Balog,* 745 F. Supp. at 1572.

37. If a buyer sues under a tort theory, he may not be able to recover lost profits or appreciation damages. The result will depend on whether the jurisdiction follows the "benefit-of-the-bargain" rule, the "out-of-pocket-loss" rule, or some modification thereof. If the out-of-pocket-loss rule is followed, the defrauded plaintiff generally recovers only the consideration paid. If the benefit-of-the-bargain rule is followed, the plaintiff may be able to recover lost profits or appreciation damages. California has established a highly modified out-of-pocket-loss rule under Civil Code § 3343 that authorizes recovery of lost profits as consequential damages. CAL. CIV. CODE § 3343 (West Supp. 1993). *See, e.g.,* Hartman v. Shell Oil Co., 137 Cal. Rptr. 244, 248-49 (Ct. App. 1977); *see also* Koerner v. Davis & Stein Galleries, Inc., No. 85 Civ. 0742 (S.D.N.Y. May 21, 1987) (awarding the plaintiff a benefit-of-the-bargain measure of damages, which included appreciation damages, for claims of conversion for failure to return a stolen painting after demand).

38. Lost profits or appreciation damages may be an important component of a claim when a buyer purchases a violin made by a purported famous maker, which, if genuine, would have appreciated in value after purchase.

39. *See, e.g.,* Menzel v. List, 246 N.E.2d 742, 745 (N.Y. 1969) (permitting a buyer to obtain appreciation damages for a breach of warranty of title claim under the Uniform Sales Act in connection with the sale of artwork).

40. U.C.C. § 2-725(2) (1990).

this warranty should be deemed a warranty that extends to future performance of the goods under U.C.C. § 2-725(2). However, a purchaser of a violin remains at risk of failing to meet the second prong of U.C.C. § 2-725(2) if the purchaser does not obtain a second opinion as to the authenticity of the violin within four years of tender of delivery.

CONCLUSION

Violin Fraud is an interesting and enjoyable examination of the culpability that may arise out of the false attribution and description of violins, with a message targeted not only at consumers but also at violin dealers, makers, auctioneers, and other sellers of the violin. Harvey provides a valuable contribution in an area in which there is a dearth of legal discussion, although some of the issues raised closely mirror issues addressed in the field of art law. *Violin Fraud* provides an excellent foundation for further legal inquiry into, and analysis of, the gray areas implicated by the specialized area of violin commerce.