

Demystifying the Bankruptcy Process – Part Four

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As previously highlighted, the COVID-19 pandemic created a lot of turmoil in every industry and every company and hundreds of in the energy, transportation, entertainment, health & personal care, retail, travel, lodging, and leisure industries have sought bankruptcy protection.

In 2020, the Art Dealers Association of America (ADAA) released a report on how art galleries across the U.S. have been affected by the pandemic. The report demonstrated that galleries had faced devastating revenue losses, reduction in business activity, and closures of their physical spaces, not only financially impacting their employees and vendors but artists and creative professionals around the world. Therefore, it is important to be familiar with your rights as an artist.

WHAT IF YOU ARE AN ARTIST DEALING WITH A GALLERY'S BANKRUPTCY

State law dictates the scope and nature of the legal rights and interest that a debtor-gallery has in artwork in its possession, even when the gallery is a bankruptcy proceeding in federal court. Applicable state law in New York expressly provides that artwork delivered by an artist to a gallery for sale is trust property and that any proceeds from the sale of such work are trust funds in the hands of the gallery for the benefit of the artist. Such artwork and sale proceeds may not be subject to any claims, liens or security interest.

When a bankruptcy proceeding is commenced, property in the possession of the debtor-gallery becomes property of the estate and subject to distribution to all or certain creditors to the extent of the debtor-gallery's property interest. Such interest is determined by state law. Since under Section 12.01(1)(a)(ii) of the NYACAL, artwork is trust property in the hands of the debtor-gallery for the benefit of the artist, artwork protected by the statute never becomes part of the debtor-gallery estate and should be beyond the reach of the gallery's creditors.

By its terms, the New York statute applies "[n]otwithstanding any custom, practice or usage of the trade, any provision of the uniform commercial code or any other law, statute, requirement or rule, or any agreement, note, memorandum or writing to the contrary." Section 12.01 unequivocally provides that no liens or security interest may attach to artwork delivered by an artist to a gallery for sale. Moreover, the statute also expressly provides that an artist cannot waive this provision of the statute, making it impossible for a lien or security interest to attach.

To be protected by the statute, the artwork should fall under the definitions of the statute. Section 11.01 of the NYACAL sets forth the applicable definitions:

- An “artist” is defined as “the creator of a work of fine art or, in the case of multiples, the person who conceived or created the image which is contained in or which constitutes the master from which the individual print was made.”
- “Fine art” is defined as “a painting, sculpture, drawing, or work of graphic art, and print, but not multiples.”

Section 12.01(1)(b) expressly prohibits the waiver of the “no lien” provision contained in Section 12.01(1)(a)(v), and no artist whose works are subject to Section 12.01 is able to consent to the granting of a lien or security interest, even if they were inclined to do so. Section 12.01(1)(b) contains one exception to its prohibition on waivers. Subject to certain conditions, Section 12.01(1)(a)(iii), which provides that any proceeds from the sale of work that is trust property are trust funds in the hands of the gallery for the benefit of the artist, may be waived if “such waiver is clear, conspicuous, in writing and subscribed by the consignor. Therefore, when dealing with a gallery, an artist has to carefully review any language proposed by the gallery that may suggest relinquishing statutory rights.

In case you missed it, read [part one](#), [two](#), [three](#), and [five](#) here.

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