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Caveat Vendor: A Call to Reform the Scope of Rights of Withdrawal for Off-Premises Contracts Under U.S. Consumer Protection Laws with Respect to the Auction of Art

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Caveat Vendor:
A Call to Reform the Scope of Rights of Withdrawal for Off-Premises Contracts Under U.S. Consumer Protection Laws with Respect to the Auction of Art

Sarah Fabian Maramarosy*

As sales of art at auction become increasingly popular and accessible, an overlooked consumer right may cause sellers of art to get "burned." At its core, the auction process is intended to establish the price of a difficult-to-value object of art, therefore, the underlying philosophy of an auction is that sales are final. However, cooling-off rules in U.S. off-premises contracts are broad enough that auction house contracts can potentially fall within the ambit of these rules, giving rise to the consumer's right to cancel the contract.

Arguably, permitting consumers to cancel in remorse undermines the premise of an auction and may be detrimental to the market value of the artwork, the auctioneer's business, and by extension the consumer. Cooling-off rules are ineffective in the context of art auctions because these rules were not drafted with an understanding of the mechanics of the auction process or the characteristics of the art market, including the subjective value of art. In fact, applying these rules to art transactions would be

* Symposium Editor, Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXX; J.D. Candidate, Fordham University School of Law, 2020; B.A., Political Science, University of Connecticut, 2012. I wish to acknowledge the invaluable contributions, insightful comments, and steadfast encouragement of Professors Aditi Bagchi and Leila Amineddoleh. I would like to thank the IPLJ Editorial Board and Staff, particularly Senior Writing & Research Editor Elliot Fink, for their feedback. I would like to also extend a special thank you to my friends and family for their love and support during the writing process.

consumer protection overreach. These rules were designed to redress high pressure sales techniques used by door-to-door salesmen who cornered vulnerable consumers at home. By contrast, the relationship between an auction house and a consignor or winning bidder is very different: the balance of bargaining power favors the consumer. Further, for the auction process to be effective, the consumer cannot be permitted to walk away from the sale out of remorse.

Despite some ambiguity in the U.S. legal framework, it is important to not assume that these cooling-off rules do not apply to auction house contracts. Such a mistake could extend the prescribed cooling-off period indefinitely, thus aggravating the costs of administering returns. Ultimately, the art world will be handicapped by the uncertainty of the application of these rules, therefore, the time for reform is now. It is upon stakeholders in the artworld, who have industry expertise that regulators and legislators are unlikely to have, to proactively petition the Federal Trade Commission to develop new approaches to the right to withdraw as it relates to art transactions.

INTRODUCTION

If you were to buy a work of art at an auction in New York, you probably would not be able to return it; but in London, you could return it during a "cooling-off" period. A cooling-off period, or withdrawal right, is a state-mandated contract term that provides consumers the power to cancel a contract without cause during a set timeframe.[1] While this consumer right provides buyers leeway to reconsider the bargain, sellers of art may get "burned."[2]

Under European law, consumers have a generic right to withdraw from contracts formed outside of the seller's business premises.[3] Recent changes to the European Commission's Consumer Rights Directive ("CRD") explicitly include auctions within the scope of this regulation.[4] These changes have prompted auction houses in Europe to amend their contracts to include notice of the right to withdraw,[5] and have led to apprehension about the

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1 Patricia Sánchez Abril, et al., *The Right of Withdrawal in Consumer Contracts: A Comparative Analysis of American and European Law*, INDRET, March 2018, at 31; *see also* Pamaria Rekaiti & Roger Van den Bergh, *Cooling-Off Periods in the Consumer Laws of the EC Member States: A Comparative Law and Economics Approach*, 23 J. CONSUMER POL'Y 371, 371, 373 (2000) (stating that a cooling-off period is also "referred to as a right to cancellation, as a right to rescind, disaffirm, or revoke a contract, or more generally as a withdrawal right.").

2 A work of art is "burned" when it fails to sell at auction. *See Is an Artwork "BURNT" by Failing to Sell at a Public Auction?*, ARTEMUNDI GLOBAL FUND (Jan. 13, 2014), http://artemundiglobalfund.com/wp-content/uploads/2014/01/Myth-Busters-BI-Analysis.pdf [https://perma.cc/DX4U-E2FF] [hereinafter *BI Report*].

3 *See* Council Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011 O.J. (L 304) 64 (EC).

4 *See generally* Kinfemicheal Yilma Desta, *The Scope of Rights of Withdrawal in Consumer Contracts Under EU Law: The Case of Auctions*, UIO (2012), https://www.duo.uio.no/handle/10852/34428 [https://perma.cc/FHN6-HF8].

5 *Compare Conditions of Online-Only Sale*, PHILLIPS (Oct. 19, 2018), https://www.phillips.com/buysell/online-only/conditions [https://perma.cc/4KV7-835P] (including a notice provision for the European right of withdrawal at paragraph 11), *with Conditions of Sale*, PHILLIPS (Oct. 19, 2018), https://www.phillips.com/buysell/newyork/conditions [https://perma.cc/MC6B-DRW6] (lacking notice of the U.S. right of withdrawal). These disclosure amendments are significant because in instances where the right to withdraw applies and the seller fails to inform the consumer of this right, the cancellation ("cooling-off") period may be automatically extended until actual notice is

fate of the European art market.[6] Pierre Valentin, Sotheby's former in-house counsel, has warned that this new consumer protection law may undermine the auctioning of art because "[t]he right to cancel is fundamentally incompatible with the sale at auction of art, antiques and collectible items."[7]

Withdrawal rights are incompatible with art auctions because returning a work of art poses potentially devastating consequences to a one-of-a-kind item's value.[8] The price of art is volatile and reputationally sensitive to such a degree that the art community considers art that fails to sell "burnt," which significantly decreases its value.[9] Burning could make it difficult to sell the piece of art for many years to come.[10] It could even negatively impact the price of the artist's other works as well as those within the same art movement.[11] Thus, if either a consignor or winning bidder were to withdraw after a widely publicized auction, the auction house (and by extension the consumer) would be stuck with the tremendous cost

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provided. *See infra* Appendix A. Therefore, the cooling-off period could extend indefinitely, and permit buyers to return years later to rescind the sale. *See infra* Part I.B.2.

6 *See* Anny Shaw, *New Rules Threaten Online Art Market in the UK*, ART NEWSPAPER, (Jan. 9, 2014), https://www.artatlaw.com/wp-content/uploads/2016/04/New-rules-threaten-online-art-market-in-the-UK-The-Art-Newspaper-Jan-2014.pdf [https://perma.cc/3YSH-AULE]; Georgina Adam, *Los Angeles Art Market Hots Up*, FIN. TIMES (Sept. 12, 2014), https://www.artatlaw.com/wp-content/uploads/2016/04/Los-Angeles-art-market-hots-up-FT-Sept-2014.pdf [https://perma.cc/5C3X-Q54D]; *New Consumer Remedies: Be Prepared*, ANTIQUES TRADE GAZETTE (Oct. 10, 2015), https://www.artatlaw.com/wp-content/uploads/2016/04/New-consumer-remedies-be-prepared-Antiques-Trade-Gazette-October-2015.pdf [https://perma.cc/99JS-YAFT]; Ashitha Nagesh, *UK Law Change to Jeopardize Online Art Market,* BLOUIN ARTINFO (Apr. 12, 2016), https://constantinecannon.com/wp-content/uploads/2017/09/UK-Law-Change-to-Jeopardise-Online-Art-Market-BLOUIN-ARTINFO-Jan-2014.pdf [https://perma.cc/UL5H-3LFD].

7 Pierre Valentin, *Danger Ahead – Auctions Undermined by New Consumer Protection*, ART AT L. (Nov. 23, 2013), https://www.artatlaw.com/archives/archives-2013-july-dec/danger-ahead-auctions-undermined-by-new-consumer-protection [https://perma.cc/8SWU-7SUV].

8 *Id*.

9 *See generally BI Report*, *supra* note 2.

10 *See id*.

11 *See* CHARLES W. SMITH, AUCTIONS: THE SOCIAL CONSTRUCTION OF VALUE 3 (1989); *see also* DOUG WOODHAM, ART COLLECTING TODAY: MARKET INSIGHTS FOR EVERYONE PASSIONATE ABOUT ART 74–75 (2017).

of both preparing the sale and a work of art that is no longer commercially viable.[12]

For almost fifty years, federal and state regulatory regimes in the United States have provided consumers rights of withdrawal similar to those now available in the European Union ("E.U.").[13] Americans do not seem to be generally aware of this device in the consumer protection toolbox,[14] or at least do not seem to frequently exercise their right to withdraw.[15] Indeed, the history of this right as intended to remedy coercive, door-to-door sales practices has cast a shadow over the American right of withdrawal and caused them to be overlooked as being narrow in scope.[16] In fact, major U.S. auction house contracts do not contain notice of the right to withdraw like their European counterparts.[17] This omission may mean that auction houses have not contemplated the application of the U.S. rights of withdrawal. Alternatively, they may believe that the rights do not apply to the auction of art in light of these rights' intended purpose.

It is important not to assume that rights of withdrawal do not apply to auction house contracts. An agreement between the consumer and the auction house can meet the definition of an off-premises contract[18] depending on the circumstances of the sale.[19] If that happens and the consumer has not been given notice of their right to withdraw, the cooling-off period may extend indefinitely and the costs of administering a return will increase.[20]

This Note first surveys U.S. cooling-off rules in order to clarify whether the right to withdraw in fact applies to art auctions such that

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12 *See* Valentin, *supra* note 7.

13 *See* Jeff Sovern, *Written Notice of Cooling-off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, 75 U. PITT. L. REV. 333, 333 (2014).

14 Sánchez Abril, *supra* note 1, at 18.

15 Sovern, *supra* note 13, at 333.

16 *See* Omri Ben-Shahar & Eric A. Posner, *The Right to Withdraw in Contract Law*, 40 J. LEGAL STUD. 115, 115 (2011).

17 *Compare Conditions of Online-Only Sale*, *supra* note 5, *with Conditions of Sale*, *supra* note 5.

18 The term "off-premises contracts" as used in this Note, refers to contracts signed at any location other than the seller's business premises, e.g., the buyer's or seller's home.

19 *See infra* Part II.B.2.

20 *See infra* Appendix A.

consignors may withdraw from an auction or that winning bidders may rescind a purchase. After examining the broad language and common law application of these rules as well as the similarity of auction house transactions to door-to-door sales, this Note determines that under a literal reading, art auctions are plausibly subject to withdrawal rights.[21]

However, withdrawal rights cannot be justified at art auctions under the consumer advocate perspective because their application would materially harm the value of the artwork on the auction block, pose a significant challenge to the auction business, and fail to meet the redistributive objectives of consumer protection policy.[22] Thus, while buyers have not yet prevailed in invoking the right to withdraw against an art auction house,[23] and the extent of this problem is not entirely clear, the potential certainly is.

In order to prevent these inequitable and undesired outcomes, this Note will seek to establish that U.S. withdrawal rights should not apply to art auctions and recommends an explicit carve-out under the federal regulation with the hope that the states will follow suit.[24] This result would fit with the general principles of behavioral economic scholarship and the intended purpose of the cooling-off rules. Alternatively, if such an amendment to the federal cooling-off rule is rejected, this Note recommends that auction houses mitigate associated risks by amending their contracts to include notice of the right to withdraw and take steps to minimize the risk of cancellation rights arising inadvertently.[25]

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21 *See infra* Part II.

22 *See infra* Parts I; Part III.

23 *See generally* Morris v. Steffes Grp., Inc., 924 N.W.2d 491, 496–97 (Iowa 2019), *reh'g denied*, (Mar. 28, 2019); Vaks v. Ryan, 2012 Mass. App. Div. 17 (Mass. Dist. Ct. 2012), *award vacated*, 2014 Mass. App. Div. 37 (Mass. Dist. Ct. 2014); Holm v. Berner, No. 06-CA-140, 2007 Ohio App. LEXIS 3148 (Ohio Ct. App. June 29, 2007). Notably, rights of withdrawal have been applied to transactions with art galleries, where courts have allowed art collectors to cancel deals. *See generally* Pritzker v. Krishna Gallery of Asian Arts, 1996 U.S. Dist. LEXIS 14398 (N.D. Ill. Sept. 30, 1996); Vom Lehn v. Astor Art Galleries, Ltd., 380 N.Y.S.2d 532 (N.Y. Sup. Ct. 1976).

24 *See infra* Part IV.

25 An example of such steps includes signing agreements only at the auction house business premises.

Part I of this Note recounts the origin and basis of withdrawal rights for off-premises contracts in the United States. It then examines the laws that define rights of withdrawal in all fifty states, including a federal regulation, in terms of their substantive prohibitions, their scope, and the remedies that they provide consumers. Part II discusses how art is distinguishable from common consumer goods; additionally, this Part outlines the respective contracts between auction houses, consignors, and winning bidders. Eventually, Part II evaluates whether U.S. withdrawal rights plausibly cover the sale of art at auction. Part III analyzes the consequences of applying the right to withdraw to art auctions, and the various incentives of consignors and bidders to take advantage of this right to avoid a contract. Ultimately, Part IV proposes three possible amendments to the federal withdrawal right that would minimize the substantial costs this right may create at art auctions: (1) an exception for art auctions or the sale of art; (2) imposition of a cancellation fee; and, alternatively, (3) an exclusion for transactions over a maximum purchase price.

I. OVERVIEW OF RIGHTS OF WITHDRAWAL

A. Rationale Behind Rights of Withdrawal

1. Regulatory and State Legislative Purposes

The regulatory and legislative rationale underpinning withdrawal rights is to protect consumers from sales techniques that usurp their rational decision-making process and exploit their lack of expertise.[26] A

[26] *See, e.g.*, N.Y. Pers. Prop. Law § 425 ("The purpose of this act is to afford consumers a "cooling-off" period to cancel contracts which are entered into as a result of high pressure door-to-door sales tactics."); *see also* Fred S. McChesney, *Behavioral Economics: Old Wine in Irrelevant New Bottles?*, 21 SUP. CT. ECON. REV. 43, 68 (2013) (discussing that cooling-off rules are founded on principles of bounded rationality, "justified by claims of ignorance and other failures of consumer choice"); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1162, 1188 (2003) (discussing that cooling-off rules make the most sense in circumstances where consumers are particularly likely to make decisions they will regret, i.e., "when two conditions are met: (1) people are making decisions that they make infrequently and for which they therefore lack a great deal of experience, and (2) emotions are likely to be running high").

cooling-off period can protect consumers from their own "heat-of-the-moment" impulses by allowing them to reevaluate contracts without the salesman present and without resorting to breach of contract remedies.[27] Thus, withdrawal rights can improve the bargaining position of consumers, and as such are powerful tools for consumer protection.[28]

In the context of door-to-door sales, withdrawal rights were created to balance fairness in a shopping environment that renders consumers more vulnerable to entering into contracts that go against their best interests.[29] Consumers in the comfort of their homes already occupy a less deliberative state of mind and therefore become more susceptible to overestimating the value of a purchase or underestimating the risks of poor contract terms.[30] What's more, when a door-to-door salesman intrudes into the privacy of one's home, the surprise element catches the consumer off-guard.[31] The consumer may also feel obliged to listen to an overzealous salesman's pitch and agree to the proposed contract in order to get the seller to leave their home.[32]

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[27] *See* Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 239 (2012) (noting that "contract law provides remedies, but enforcement is costly and largely impractical."); *see also* Colin Camerer, et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism*," 151 U. PA. L. REV. 1211, 1239 (2003); Sunstein & Thaler, *supra* note 26, at 1191.

[28] *See* Rekaiti & Van den Bergh, *supra* note 1, at 371; Oren Bar-Gill & Omri Ben-Shahar, *Exit From Contract*, 6 J. LEGAL ANALYSIS 151, 151 (2014) ("Exit from contract is one of the most powerful consumer protection devices, freeing consumers from bad deals and keeping businesses honest.").

[29] *See* Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV 749, 749 (2008); *see also* Camerer et al., *supra* note 27, at 1215, 1238.

[30] Michael R. Mattioli, *Cooling-Off & Secondary Markets: Consumer Choice in the Digital Domain*, 15 VA. J.L. & TECH. 227, 236–37 (2010); *see also* Ben-Shahar & Posner, *supra* note 16, at 120; Harry M. Brittenham, et al., *The Direct Selling Industry: An Empirical Study*, 16 UCLA L. REV. 890, 895–922 (1969).

[31] FTC Cooling-Off Period for Door-To-Door Sales, 37 Fed. Reg. 22933, 22937–39 (Oct. 26, 1972) (to be codified at 16 C.F.R. § 429) [hereinafter *FTC Cooling-Off Rule Statement of Basis and Purpose*] ("The door to door selling technique strips from the consumer one of the fundamentals in his role as an informed purchaser, the decision as to when, where, and how he will present himself to the marketplace.").

[32] One consumer explained why they listened to the sales pitch and ultimately signed the contract this way: "I was frightened of the man. I didn't know how to get rid of him."

Additionally, studies show that door-to-door salesmen were trained to utilize coercive sales tactics to "make the kill."[33] Problematic sales practices included badgering, harassment, and intimidation. For example, consumers complained that they were pressured into deals by aggressive salesmen who spent hours "with them late at night making numerous oral promises, wearing down their resistance and even intimidating them."[34] Another concern included sales pitches that convinced the consumer that they must purchase "now or never" because the seller offers unusual goods or a special deal that cannot be obtained elsewhere.[35] The consumer, who may already feel overwhelmed by the circumstances of an unexpected house call, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the salesman's presence in the home and insistence upon an immediate response.[36] This situation is fraught with the possibility of undue influence, intimidation, and over-reaching.[37]

A cooling-off period alleviates the immediacy of the salesman's influence and lessens the element of surprise by providing the consumer additional time after signing the contract to reconsider the commitment.[38] During this extra time, consumers can rationally weigh the purchase decision against their needs and resources, consult with others, and even engage in comparative shopping before the contract becomes irrevocable.[39] In this way, cooling-off

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FTC Cooling-Off Rule Statement of Basis and Purpose, *supra* note 31, at 22938 n.39; *see also* Camerer et al., *supra* note 27, at 1215, 1238.

33 *See, e.g.*, *FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31, at 22938 n.42; *see also* Brittenham, et al., *supra* note 30, at 890.

34 *FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31, at 22937 n.32.

35 *See* Rekaiti & Van den Bergh, *supra* note 1, at 378.

36 *See generally FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31.

37 *See generally id*.

38 *See* Byron D. Sher, *The Cooling-Off Period in Door-to-Door Sales*, 15 UCLA L. REV. 717, 717 (1968) ("The interval immediately following the point at which a salesman secures the buyer's signature has been called the 'decompression' period, a graphic description of the decline in the intensity of a consumer's desire to possess the goods or services often experienced after the salesman has departed. And the interval within which the consumer is permitted by statute to cancel his contract or offer is commonly referred to as the 'cooling-off' period.").

39 *FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31, at 22942.

period rules are able to "redistribute" the transaction costs between the contracting parties and balance the bargaining power between consumers and sellers.[40]

2. Contract Theory

From a contract law perspective, the temporary impaired judgment caused by a doorstep sale also justifies paternalistic laws such as withdrawal rights.[41] These rights formally recognize that the consumer's perceived freedom to enter the contract may have been compromised.[42] A cooling-off period can encourage sound judgement and diminish the influence of unfair persuasion on contract formation.[43]

However, restricting an individual's freedom to commit to a legally enforceable promise is no small matter.[44] Most scholars

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[40] *See* Rekaiti & Van den Bergh, *supra* note 1, at 373. To be clear, the cooling-off rule is intended to redistribute to the consumer what is taken away from the seller. *Id*. at 374. If the consumer were asked to pay for the withdrawal right through depreciation costs, cancellation fees, or even higher prices, the consumer would be in the same, or worse, position than prior to the implementation of the rule. *See id*. Any such result would undermine the redistributive goals of consumer protection law. *Id*.

[41] *See* Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 786–87 (1983). Any legal rule that proscribes action to prevent people from acting against their own interests is paternalistic. *Id.* at 763, 797.

[42] Sánchez Abril, *supra* note 1, at 33 ("[F]rom a dogmatic point of view, the right of withdrawal is linked to a defective formation of the consumer's will, which is offset with the power . . . to terminate the contract.").

[43] Kronman, *supra* note 41, at 788. Yet, Professor Kronman cautions that "[t]his argument . . . is overbroad: The ways in which a person's judgment may be impaired are protean, but we quite properly refuse to recognize lack of judgment as a general defense against the claim that one has failed to meet his contractual obligations. What explains the law's selectivity in this regard and the particular pattern of restrictions it enforces?" *Id.* at 794.

[44] *Id.* at 795 ("[T]he requirement of a cooling-off period has *antidemocratic* implications, which explains why we demand a special justification for these restrictions and would never think of imposing a cooling-off period in every contractual relationship."); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277, 1364 (1984) ("[A withdrawal right] enhances people's freedom by giving them a chance to decide what they actually want without excessive pressure, and it limits their freedom by prohibiting them from contracting as early as they might want to. Both the existence and the nonexistence of such a rule can be praised—and also condemned—for its contribution to the formation of voluntary contracts.").

agree that such legal intervention should not apply in every contractual relationship.[45] As one scholar explains:

> The right of withdrawal implies above all the acknowledgment of a very relevant exception to the fundamental dogma of contract law: the duty to fulfill what is promised (*pacta sunt servanda*). For that reason, *no legal system can grant the contracting parties the power to withdraw in a generalized and indiscriminate fashion*, but rather on an extraordinary basis and only in cases that are sufficiently justified. Otherwise, the complete private contract system would be contingent upon the whim of the buyer of goods and services, which, in turn, would imperil the very functioning of the market.[46]

In fact, Oren Bar-Gill argues that withdrawal rights should be based on strong market-specific evidence of consumer mistakes that create substantial welfare costs.[47] He recommends empirical research to determine if the mistakes are systemic to an industry: "regulation should only be considered where such specific evidence proves the existence, in the specific market, of a behavioral market failure that generates significant welfare costs."[48] Cass Sunstein and Richard Thaler also emphasize the need for welfare analysis that balances the costs and benefits of such programs.[49]

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[45] *See, e.g.*, OREN BAR-GILL, SEDUCTION BY CONTRACT 42–43 (2012) ("There are many consumer markets and many more consumer contracts. Each market is embedded in a unique historical, institutional, political, and legal context. Most importantly, the underlying currents of consumer psychology and market forces, while following common patterns, manifest in unique ways in different markets. When it comes to considering regulatory intervention, a detailed market analysis is imperative."); Yilma Desta, *supra* note 4, at 4 ("A far reaching instrument like withdrawal right has to be crafted with care and having taken due account of all potential effects of extending the right to a wide range of consumer contracts."); *see also* Camerer et al., *supra* note 27, at 1239; Sunstein & Thaler, *supra* note 26, at 1166.

[46] Sánchez Abril, *supra* note 1, at 43 (emphasis added).

[47] *See* Bar-Gill, *supra* note 29, at 790.

[48] *Id*. at 801–02.

[49] Sunstein & Thaler, *supra* note 26, at 1166 ("[Paternalistic] programs should be designed using a type of welfare analysis, one in which a serious attempt is made to measure the costs and benefits of outcomes.").

Yet, there is doubt about whether enough evidence even supports utilizing withdrawal rights.[50] For example, a review of the federal right of withdrawal's "Statement of Basis and Purpose" shows a lack of quantitative analysis.[51] The Federal Trade Commission ("Commission" or "FTC") actually dismissed testimony of state officials who concluded similar state rules did not benefit consumers on the basis of statistical evidence.[52] In fact, the FTC primarily relied on anecdotal evidence and a survey that contained a disclaimer of its validity.[53] While such anecdotal evidence is more illustrative and poignant, it is often unreliable.[54]

Further, at least from examining the administrative history of the federal rule, there is no evidence to indicate that empirical research on the art market was used to support enactment of the right of withdrawal.[55] Those favoring the extension of the withdrawal right to the art market must be sensitive to the potential economic ramifications because this right defies a one-size-fits-all framework.[56] Failing to take account of the unique dynamics of the art market and indiscriminately using withdrawal rights could harm the industry as well as consumers.[57]

B. Rights of Withdrawal in U.S. Off-Premises Contracts

The "radical" concept of providing consumers with the right to withdraw from door-to-door sales contracts originated with the

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50 JOSEPH P. MULHOLLAND, SUMMARY REPORT ON THE FTC BEHAVIORAL ECONOMICS CONFERENCE 22 (Apr. 20, 2007) ("Notwithstanding the apparent widespread acceptance of cooling-off rules, they do not appear to have been subjected to the kind of asymmetric paternalism or unfairness analysis discussed at the conference. For example, *the FTC rule appears to have been created without the benefit of any systematic research to document its value*.") (emphasis added). *But see* FTC Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 60 Fed. Reg. 54180 (Oct. 20, 1995) [hereinafter *1995 FTC Cooling-Off Rule Non-Substantive Amendments*] (noting the FTC conducted a regulatory review of the FTC Cooling-Off Rule in the mid-1990s and concluded that the rule provides benefits to consumers).

51 *See* McChesney, *supra* note 26, at 69.

52 *See id*.

53 *See id*.

54 *See* STEFAN H. KRIEGER & RICHARD K. NUEMAN, Jr. ESSENTIAL LAWYERING SKILLS 41 (2015).

55 *See generally FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31.

56 *See* Sánchez Abril, *supra* note 1, at 43.

57 *See id*.

English Committee on Consumer Protection in 1962, which recommended providing buyers a three-day period to cancel installment contracts.[58] The idea was transplanted to the United States within the year when New York and Pennsylvania enacted the earliest right-to-withdraw statutes.[59] In 1970, the FTC published a notice of proposed rulemaking that provided for a withdrawal right in door-to-door sales and other off-premises contracts.[60] As concern for consumer welfare gained momentum, other states introduced right-of-withdrawal statutes such that today all fifty states have their own law in effect.[61]

1. Federal Regulation

In 1972, the FTC promulgated the "Cooling-off Period For Sales Made At Homes Or At Certain Other Locations" ("Cooling-Off Rule" or "Rule") to provide consumers the unilateral right to cancel transactions without justification or cost.[62] The Rule grants buyers a cooling-off period of three business days to exercise their right to withdraw.[63]

A fairly broad range of contracts are subject to cancellation under the Rule. The Rule defines door-to-door sales as transactions where the seller of consumer goods or services[64] personally solicits

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58 *See* Sher, *supra* note 38, at 717–18.

59 Wade R. Thompson, *A New Remedy for California Consumers: The Right to Cancel a Home Solicitation Contract*, 3 PAC. L.J. 633, 633 n.7 (1972) (noting enactment of 73 PA. STAT. ANN. § 500-202(c)(4) and N.Y. PERS. PROP. §§ 425–430 in 1962). *But see* Byron D. Sher, *supra* note 38, at 719 (noting enactment of 73 PA. STAT. ANN. § 500-202(c)(4) in 1966 and MICH. STAT. ANN. § 19.417(202)(c)(4) in 1965 as the earliest right of withdrawal statutes in the United States).

60 *FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31, at 22933.

61 *See infra* Appendix A.

62 FTC Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. § 429 (2018). To clarify that the rule is intended to cover more than the paradigm door-to-door sale, the Rule was amended in 1995 to change the name from "Cooling-Off Period for Door-to-Door Sales" to "Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations." *See 1995 FTC Cooling-Off Rule Non-Substantive Amendments*, *supra* note 50, at 54180.

63 16 C.F.R. § 429.1 ("You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction."); 16 C.F.R. § 429.0(f) (defining business day as any day except Sunday or a federal holiday).

64 16 C.F.R. § 429.0(b) (defining consumer goods or services as those primarily used for personal, family or household purposes).

the sale and the buyer makes the offer or agreement to purchase at some location other than the seller's place of business, even where the buyer initiated contact.[65] If the sale was finalized at the buyer's home, the consumer may cancel a contract valued at $25 or above; if consummated at another location, the minimum threshold is $130.[66]

The Rule was primarily addressed to direct sellers,[67] i.e., salesmen who capitalize on person-to-person contact to sell at locations where consumers have not yet made the conscious decision to enter a store to make a purchase.[68] For instance, drafters of the Rule contemplated door-to-door sales of, *inter alia*, home appliances, encyclopedia subscriptions, and home improvement services.[69]

The limited purpose of the Rule was to remedy the problem of sales obtained through deceptive and high-pressure sales tactics used on consumers who are vulnerable to having their judgement swayed by an unexpected sales pitch.[70] In particular, the FTC justified the Rule on five problems characteristic of personal solicitation sales:

- Deception by the seller in getting inside the door;
- High-pressure sales tactics;
- Misrepresentation of the quality, price or characteristics of the product;
- High price for low-quality product; and

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65 16 C.F.R. § 429.0(a) (defining a door-to-door sale as "[a] sale, lease, or rental of consumer goods or services in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller (e.g., sales at the buyer's residence or at facilities rented on a temporary or short-term basis, such as hotel or motel rooms, convention centers, fairgrounds and restaurants, or sales at the buyer's workplace or in dormitory lounges) . . . .").

66 16 C.F.R. § 429.0(a).

67 *FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31, at 22936, 22913.

68 *Business Guidance Concerning Multi-Level Marketing*, FEDERAL TRADE COMMISSION (Jan. 2018), https://www.ftc.gov/tips-advice/business-center/guidance/business-guidance-concerning-multi-level-marketing. [https://perma.cc/C9P6-VLDE]. For background information on the direct selling industry *see generally* Brittenham, et al., *supra* note 30.

69 *FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31, at 22936.

70 *1995 FTC Cooling-Off Rule Non-Substantive Amendments*, *supra* note 50, at 54184.

- Nuisance created by the unexpected salesman's house call.[71]

To limit application of the Rule to transactions where such abuses were found, certain sales have been excluded. The definition of "door-to-door sales" excludes: (1) transactions made pursuant to prior negotiations at the seller's trade premises, [72] and (2) transactions conducted and executed entirely by mail or telephone.[73] These exclusions recognize that the pressure to buy is less intense when the buyer can easily escape an aggressive sales pitch by leaving the business establishment or hanging up the phone.[74]

Other exemptions have been added for sellers of arts and crafts at fairs[75] and sellers of motor vehicles sold at auction.[76] Clearly, consumers purposely attending an auction or fair cannot be subject to an unexpected sales pitch.[77] Additionally, the consumer at an auction or fair has the opportunity to shop around between different vendors; therefore, misrepresentations that characterize doorstep sales are less likely.[78] Notably, in adopting these amendments, the Commission stressed that the Rule continues to apply to sales made "at a place other than the place of business of the seller . . . . [h]ence, the Rule applies to *public auctions*, tent sales, and sales at fairs."[79] Arguably, this explicit inclusion of public auctions encompasses art auctions.[80]

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71 *FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31, at 22937.

72 16 C.F.R. § 429.0(a)(1).

73 16 C.F.R. § 429.0(a)(4).

74 *See 1995 FTC Cooling-Off Rule Non-Substantive Amendments*, *supra* note 50, at 54184.

75 16 C.F.R. § 429.3(b).

76 16 C.F.R. § 429.3(a). These exemptions were prompted by a letter petition from Public Auto Auction. *See* FTC Rule on Cooling-Off Period for Door-to-Door Sales, 52 Fed. Reg. 29539, 29540–41 (Aug. 10, 1987) [hereinafter *1987 FTC Cooling-Off Rule Proposed Exemptions*]. In adopting the amendments, the Commission explained that an auctioneer is not necessarily a "seller" under the Rule, and that the Rule would not apply to the auctioneer unless they are involved in directly selling goods or services to buyers. *See* FTC Rule on Cooling-Off Period for Door-to-Door Sales, 53 Fed. Reg. 45455, 45458 n.23 (Nov. 10, 1988) [hereinafter *1988 FTC Cooling-Off Rule Final Exemptions*].

77 *See 1987 FTC Cooling-Off Rule Proposed Exemptions*, *supra* note 76, at 29541.

78 *Id*.

79 *1988 FTC Cooling-Off Rule Final Exemptions*, *supra* note 76, at 45457 n.10 (emphasis added).

80 *See infra* Part II.C.

Additionally, the Rule makes it an unfair or deceptive practice for the seller to fail to give the buyer both a verbal notice and a clear and conspicuous written notice about the buyer's right to cancel at the time of purchase.[81] The Rule requires that the contract include duplicate copies of the notice of the buyer's right to withdraw and a specifically worded cancellation form, all of which must be in boldface type with a particular minimum size font and substantially comply with the language set forth in the regulation.[82] These draconian notice requirements recognize that the right to withdraw would be useless if consumers were not fully informed of their rights before the cooling-off period expires.[83]

The Commission considered whether failure to meet these notice requirements should extend the cooling-off period.[84] However, the Rule was not intended to be a "buyer's remorse program."[85] As such, these remedial proposals were repeatedly rejected as too punitive to adopt.[86]

Within ten days after cancellation, the Rule requires the seller to give the buyer a full refund of any payment or return any goods bartered in exchange.[87] Because these provisions were designed to minimize the burden on the consumer, the seller bears the risk if they perform services prior to the expiration of the cooling-off period.[88] Thus, consumers are assured free withdrawal.[89]

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81 *See, e.g.*, 16 C.F.R. § 429.1.

82 *See id*.

83 *See id*.

84 *See 1995 FTC Cooling-Off Rule Non-Substantive Amendments*, *supra* note 50, at 54185 (discussing that tolling the cooling-off period with notice would penalize the seller and is too remedial an amendment to adopt); *FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31, at 22957 (same).

85 *1995 FTC Cooling-Off Rule Non-Substantive Amendments*, *supra* note 50, at 54184 ("The Cooling-Off Rule was not intended to be a federal 'satisfaction guarantee' requirement or 'buyers' remorse' insurance program . . . . The Rule instead has the *limited purpose* of correcting the specific problem of sales being obtained through high pressure and deceptive sales tactics used on consumers at times and places in which consumers typically may not expect to be solicited for sales and find it difficult to extricate themselves from the situation.") (emphasis added).

86 *See* 16 C.F.R. § 429.2.

87 *See* 16 C.F.R. § 429.1(g).

88 *See FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31, at 22947.

89 *See id*.

Importantly, the Federal Trade Commission Act does not create a private cause of action.[90] Therefore, only the FTC has the power to initiate an enforcement action for violations of the Cooling-Off Rule.[91] However, the Rule is not intended to preempt state law where greater protection is given to consumers; thus, consumers may take advantage of state statutes that provide private rights of action.[92]

Finally, because the right of withdrawal is a consumer protection right, parties cannot expressly waive or contract away this right.[93] The federal regulation and some states explicitly void any waiver of the right to withdraw.[94]

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[90] The court in *Rojas v. Ygrene Energy Fund, Inc.* specifically addressed the cancellation rights under the Rule, as well as the FTCA in general, finding that a claim brought by an individual seeking to cancel a contract will be dismissed for lack of subject matter jurisdiction. Rojas v. Ygrene Energy Fund, Inc., No. 18-cv-579, 2018 U.S. Dist. LEXIS 60945, at *1 (S.D. Cal. Apr. 10, 2018).

[91] *See id*. at *2.

[92] *See FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31, at 22958 ("If the State cooling-off laws give the consumer greater benefit and protection in regard to notice, time for election of the cancellation remedy, or in transactions exempted from this rule, there seems to be no reason to deprive the affected consumer of these additional benefits."). Where a claim does proceed to trial, the Rule does not provide for remedies in addition to those otherwise applicable to unfair and deceptive acts or practices under the FTCA. Crystal v. W. & Callahan, Inc., 328 Md. 318, 328 (Ct. App. Md. 1992). In *United States v. Union Circulation Co.,* the court held that penalties that take into account the injury to the public, prior history of violations, defendant's knowledge of the Rule and their financial resources could be imposed for violation of the Cooling-Off Rule. United States. v. Union Circulation Co., No. C81-997A, 1983 U.S. Dist. LEXIS 18794, at *11–12 (N.D. Ga. Mar. 4, 1983) (ordering defendant sellers of magazine subscriptions to pay a civil penalty of $15,000 and attorney's fees for violation of the Cooling-Off Rule).

[93] *See, e.g.*, 16 C.F.R. § 429.1(d) ("[I]t constitutes an unfair and deceptive act or practice for any seller to . . . [i]nclude in any door-to-door contract or receipt any . . . any waiver of any of the rights to which the buyer is entitled under this section including specifically the buyer's right to cancel the sale.").

[94] *See, e.g.*, ARIZ. REV. STAT. ANN. § 44-5002(D) (2018) ("Any provision of a contract, offer or agreement that waives a buyer's right of cancellation under this section is void and has no effect."); CAL. CIV. CODE § 1689.12 (Deering 2018); DEL. CODE ANN. tit. 6, § 4404(4) (2018); GA. CODE ANN. § 10-1-13 (2018); HAW. REV. STAT. ANN. § 481C-2(4) (LexisNexis 2018); IOWA CODE ANN. § 555A.4(2) (2018); KAN. STAT. ANN. § 50-640(b)(4) (2018); KY. REV. STAT. ANN. § 367.460 (LexisNexis 2018); MD. CODE ANN., COM. LAW § 14-302(1)(ii)(4) (LexisNexis 2018); MASS. ANN. LAWS ch. 93, § 48(G) (LexisNexis 2018); N.M. STAT. ANN. § 57-12-21(A)(4) (LexisNexis 2018); N.D. CENT. CODE § 51-18-08.1 (2018); S.D. CODIFIED LAWS § 37-24-5.5 (2018).

2. State Statutes

Every state has a consumer protection law that recognizes a buyer's right to withdraw from contracts consummated outside of the seller's business premises.[95] While most state rights are substantially similar to the federal rule,[96] the state laws differ in at least two key ways.

First, the state right-to-withdraw statutes tend to be more protective of consumers. For example, most states go beyond the federal rule by providing consumers a private right of action, and some even impose a monetary penalty against sellers for violation of the statute.[97] Critically, state statutes are not preempted unless they provide less protection to consumers.[98] Thus, provisions that provide a private enforcement mechanism will not be preempted; however, cancellation fee clauses or exemptions with no counterpart in the federal rule will be preempted.[99] For instance, certain states

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95 *See infra* Appendix A.

96 Like the federal rule, most states allow consumers a cooling-off period of three days after signing a contract to reconsider purchases of goods or services above twenty-five dollars. Alaska is the only state in the nation that permits the buyer to exercise their right to cancel for as long as five days, and lowers the threshold of contracts subject to cancellation to a minimum of $10. *See* ALASKA STAT. § 45.02.350(a) (2018). A few states like New York, incorporate exceptions established in the federal Rule for transactions made pursuant to prior negotiations at the seller's trade premises and those conducted entirely over the telephone or mail. *See, e.g.*, N.Y. PERS. PROP. LAW § 426(1)(a) (Consol. 2018) (defining the term door-to-door sale does not include a transaction made pursuant to prior negotiations at seller's trade premises); N.Y. PERS. PROP. LAW § 426(1)(c) (defining the term door-to-door sale does not include a transaction conducted and consummated entirely by mail or telephone, and without any other contact between the buyer and the seller or its representative prior to performance of the services).

97 *See, e.g.*, N.Y. PERS. PROP. LAW § 429(3) ("If the seller refuses within the period prescribed by subdivision one to return all payments made by the buyer, he shall be liable to the buyer for the said payments and if the buyer is successful in his action therefor or appeal thereon, the court shall award him one hundred dollars plus reasonable attorney's fees and costs, in addition to such payments.").

98 *See* 16 C.F.R. § 429.2.

99 *See id.*

include exceptions for "fairs,"[100] "catalogue sales,"[101] and "auctions."[102] Minnesota, Ohio, and Wisconsin are the only states that expressly exempt auctions.[103] However, these general exceptions for auctions have no counterpart in the federal rule.[104] Therefore, consumers would continue to have a right to withdraw from contracts with auctioneers under the federal regulation.[105]

Second, in contrast to the federal rule, the state approach to the notice requirement is much more remedial. Of the states that require notice of the right to withdraw,[106] seven expressly provide that the contract is void and unenforceable for lack of notice.[107] Additionally, while the FTC has repeatedly decided not to penalize the seller for noncompliance with the notice requirement, thirty-eight states provide that the cooling-off period does not begin to run

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[100] *See, e.g.*, FLA. STAT. ANN. § 501.021(1)(b) (LexisNexis 2018) (A door-to-door sale "does not include a sale, lease, or rental made at any fair."); KAN. STAT. ANN. § 50-640(c)(1)(G) (2018) (statute does not apply to a sale "that occurs on the state fairgrounds"); OR. REV. STAT. ANN. § 83.710(2)(g) (LexisNexis 2018) (statute does not apply to "a sale of arts and crafts at a fair"); 6 R.I. GEN. LAWS § 28-2(3)(vi) (2018) (statute does not apply to a sale "that involves arts and crafts sold at fairs").

[101] *See, e.g.*, LA. REV. STAT. ANN. § 9:2711.1(A)(1) (2018) (statute does not apply to "a catalogue sale"); N.J. STAT. ANN. § 17:16C-61.5 (LexisNexis 2018) ("This section does not apply to . . . catalog sales where an order is placed by mail or telephone."); WIS. STAT. ANN. § 423.201(2) (LexisNexis 2018) ("'Consumer approval transaction' does not include a catalog sale that is not accompanied by any other solicitation or a consumer loan conducted and consummated entirely by mail.").

[102] *See infra* note 103.

[103] MINN. STAT. ANN. § 325G.06 Subd. 2(5) (2018) (home solicitation does not include "a sale by public auction"); OHIO REV. CODE ANN. § 1345.21(F)(6) (LexisNexis 2018) ("'Consumer goods or services' does not include . . . [t]he sale of property at an auction by an auctioneer licensed by the department of agriculture under Chapter 4707 of the Revised Code."); WIS. STAT. ANN. § 423.201(1) ("'Consumer approval transaction' means a consumer transaction other than a sale or lease or listing for sale of real property or a sale of goods at auction.").

[104] *See* 16 C.F.R. § 429.

[105] *See, e.g.*, Miriam H. Sheline, *Home Solicitation Sales Act*, *in* Ohio Consumer Law § 3:5 (Thomson Reuters ed., 2018–2019). *But see* 16 C.F.R. § 429.3(a) (providing an exception for auction of motor vehicles under the Rule).

[106] Forty-eight states require mandatory language that explains the buyer's right to cancel in addition to oral notice. Alaska and Georgia are the only exceptions. *See* ALASKA STAT. § 45.02.350 (2018); GA. CODE ANN. § 10-1-6 (2018).

[107] *See* ALASKA STAT. § 45.02.35; ARIZ. REV. STAT. ANN. § 44-5004(B) (2018); CONN. GEN. STAT. § 42-135a (2018); IOWA CODE ANN. §§ 555A.1–555A.6 (2018); N.D. CENT. CODE § 51-18-04 (2018); 6 R.I. GEN. LAWS § 28-4(a) (2018); TEX. BUS. & COM. CODE ANN. § 601.201 (LexisNexis 2018).

until actual notice is given to the buyer.[108] In these states the cooling-off period becomes indefinite without notice.[109] As a result, consumers in these states may cancel long after services have been performed and sellers will still have to bear the burdens of these costs.[110]

These robust state-level protections take into account that sellers can include notice of the withdrawal right in all contracts signed off premises in order to limit the timeframe of the cooling-off period.[111] The California Court of Appeals noted: "If this result appears to deal harshly with merchants who have fully performed under their contracts, it seems clear to this court that the message which the Legislature has attempted to convey . . . is '*Caveat Vendor*.'"[112]

II. INTERSECTION OF ART AUCTIONS WITH U.S. RIGHTS OF WITHDRAWAL

A. Art Is Not a Commodity and Exists in an "Economic Microcosm"

While U.S. rights of withdrawal are context-specific to door-to-door sales, these rules are not market-specific.[113] As a result, these rights are over-inclusive and pose a threat to the stability of the art

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[108] *See e.g.,* CAL. CIV. CODE § 1689.7(g) (Deering 2018) ("Until the seller has complied with this section the buyer may cancel the home solicitation contract or offer."). For a comprehensive list see infra Appendix A.

[109] *See, e.g.*, Weatherall Aluminum Prods. Co. v. Scott, 71 Cal. App. 3d 245, 247 (1977) (holding defendant homeowner retained their right to withdraw because notice of the buyer's cancellation right was not given, thus defendant was permitted to cancel a home improvement contract over a year after services were performed). Alabama is the only state that statutorily caps the buyer's extended right to withdraw to one year. ALA. CODE § 5-19-12 (LexisNexis 2018). Colorado also caps the buyer's extended right to withdraw to three years when notice requirements have not been met. COLO. REV. STAT. § 5-3-403(3) (2018).

[110] *See Weatherall Aluminum Prods. Co.*, 71 Cal. App. 3d at 247. In one extreme case, an Ohio court permitted cancellation nearly six years after the contract was signed. *See* Knight v. Colazzo, No. 24110, 2008 Ohio App. LEXIS 5521, at **12 (Ohio Ct. App. 2008).

[111] *Weatherall Aluminum Prods. Co*., 71 Cal. App. 3d at 249.

[112] *Id.* (emphasis added). "Caveat vendor" is a play on the phrase "caveat emptor," or "buyer beware." Essentially, this term inverts the principle that the buyer should be responsible for due diligence prior to a sale and assigns that responsibility to the seller.

[113] *See supra* Part I.A.

market.[114] Application of these rights to the auction of art is particularly problematic because art is a unique non-commodity and "exist[s] in an economic microcosm seemingly unbound by many traditional free market principles."[115]

Art is not a commodity in the sense that coffee and computers are commodities. It is not mass-produced or fungible.[116] Importantly, the price of art is highly subjective, unlike commodities that are valued in terms of material, labor, and production.[117] Art is distinguishable from common consumer goods by the intangible factors that determine an artwork's price.[118] Valuation primarily depends on authenticity, provenance,[119] and uniqueness,[120] in addition to historical context and condition.[121] Secondary factors that impact price include the social dynamics of both collecting and auctions—for instance, current market trends and personal motivations, such as taste, competition, and desire for prestige or publicity.[122] Importantly, the value of art is also largely dependent on prior sales.[123] For example, art that fails to sell is considered "burnt," and as a result loses significant market value.[124]

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114 *See supra* Part I.A.

115 *See* Sebastian Harter-Bachmann, *Truth in Art and Law: Allocating the Risks Associated With Attribution in the Art Auction House*, DURHAM E-THESES, DURHAM U. 9 (2007), *available at* http://etheses.dur.ac.uk/2411/ [https://perma.cc/H3W7-Y3X5]; *see also* Hunter S. Higgins, *A Tale of Tulips: A Counterpoint to Courts Codifying Collectibles*, 10 J. BUS. ENTREPRENEURSHIP & L. 223, 227–28 (2017).

116 *See generally* SMITH, *supra* note 11, at 28; Higgins, *supra* note 115, at 228.

117 *See* Harter-Bachmann, *supra* note 115, at 9.

118 *See* Henri Neuendorf, *Art Demystified: What Determines an Artwork's Value?*, ARTNET (June 29, 2016), https://news.artnet.com/market/art-demystified-artworks-value-533990 [https://perma.cc/DRE6-YWND].

119 Provenance refers to the origins and history of ownership of a work of art, which can ideally be traced back to the artist. *See* PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 385 (3d ed. 2012). Provenance research in addition to connoisseurship and scientific testing can help confirm the authenticity of a work of art. *See id*.

120 Much like in the real estate market, art "[m]arket participants notably resist notions of substitution, often refusing to qualify any one-of-a-kind item as 'reasonably interchangeable' with another." Higgins, *supra* note 115, at 228.

121 *See* Harter-Bachmann, *supra* note 115, at 6–9.

122 *See* SMITH, *supra* note 11, at 39.

123 *See id.* at 3.

124 *See generally BI Report*, *supra* note 2.

These subjective and idiosyncratic factors make an artwork's valuation extremely sensitive to reputation.[125] For instance, if a consignor or winning bidder "cools off" after the auction and exercises their right to withdraw, the cancelled sale can cause the artwork's value to depreciate by as much as 55%.[126]

Further, art's rarity and intangible aspects create dramatic shifts in supply and demand, which render prices even more volatile.[127] The opportunity to sell a piece of art arises relatively rarely because there is such a small supply of art on the market and a small group with sufficient resources to purchase these often expensive works.[128] Due to this limited exchange market for art, perhaps the most important function auction houses serve is to carefully arrange for the supply of and demand for art to meet.[129] Therefore, inflated demand by bidders or inflated supply by consignors at auction through bad-faith contracts will cause dramatic fluctuations in price.[130] This economic analysis must be a part of the court's, regulator's, and legislature's decisions to apply rights of withdrawal to art auctions.[131]

B. Overview of Auction House Transactions

This Note focuses on the impact of withdrawal rights on the art market within the context of the auction house because auctions are a significant and transparent forum for setting the value of art in an otherwise ambiguous market.[132] This Section will clarify the disadvantages of extending withdrawal rights to the auction of art by outlining the contractual framework at auction, auction house transactions at issue, and the services which auction houses provide.

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125 *See* Harter-Bachmann, *supra* note 115, at 7.

126 *See* Alan Beggs & Kathryn Graddy, *Failure to Meet the Reserve Price: The Impact on Returns to Art*, CTR. ECON. POL'Y RES., July 2006, at 28, https://ssrn.com/abstract=936971 [https://perma.cc/SR6C-2KG7].

127 *See* SMITH, *supra* note 11, at 28.

128 *See* Harter-Bachmann, *supra* note 115, at 7.

129 *See id*.

130 Valentin, *supra* note 7; *see also* Sánchez Abril, *supra* note 1 (cooling-off period "legislation would invite bad-faith contracts, that is to say, orders signed by a purchaser with the full intention of canceling the order the next day".).

131 *See supra* Part I.A.2.

132 *See* Harter-Bachmann, *supra* note 115, at 9.

1. Contractual Framework at Auction

Auction houses are trading platforms where sellers and buyers exchange art.[133] However, in establishing this arrangement, both sellers and buyers of art enter a contractual relationship as buyers from the auction house.[134] The seller, or consignor, consigns their goods as part of a contract to purchase the auctioneer's services called a consignment agreement and thereby also subscribes to the conditions of sale published in the auction catalogue.[135] The buyer, or winning bidder, contracts with the auction house for the purchase of the auction lot.[136] The bidder's contract is formed once their offer to purchase has been accepted "by the fall of the hammer" on the auction block.[137] The winning bidder is subject to the buyer's invoice and is also bound by the conditions of sale.[138] Because both consignors and winning bidders qualify as buyers, they may have rights of withdrawal against the seller, the auction house.[139]

2. Auction House Transactions at Issue

Most transactions with an auction house could qualify as personal solicitations at locations other than the seller's trade premises because art transactions—at auction houses in particular—are built on relationships.[140] Auction house art specialists[141] are often invited to visit clients at home to offer free appraisals or advice on conservation, and may take advantage of these encounters to discuss new consignments and to gauge interest in potential

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133 WOODHAM, *supra* note 11, at 31.

134 BRIAN W. HARVEY & FRANKLIN MEISEL, AUCTION LAW AND PRACTICE 189 (3d ed. 2006).

135 *Id*. Consignment agreements outline the terms of sale for each consignment and provides that the auction house is an agent of the seller. *See* WOODHAM, *supra* note 11, at 34.

136 *See* HARVEY & MEISEL, *supra* note 134, at 189–90.

137 *Id.* at 190.

138 *See id.* at 189–90.

139 Granted that the sale was personally solicited, agreed to away from the seller's business premises, and intended for personal use. *See supra* Part I.

140 *See* Anna Rohleder, *Which Auction House Is Right for You?*, FORBES (Nov. 14, 2001, 12:01 AM), https://www.forbes.com/2001/11/14/1114connguide.html#123103b83f3b [https://perma.cc/W5ZR-M4S3].

141 Specialists are professionals with advanced degrees in a particular field, such as post-modern and contemporary art. WOODHAM, *supra* note 11, at 12.

purchases.[142] The personal interaction during these home visits may be perceived as solicitations and result in contracts signed away from the business premises that inadvertently give rise to cancellation rights.[143]

In addition, auctions are formally open to the public, but consignors and winning bidders will necessarily be limited to the very small pool of people that have the resources to trade in art, antiques, and unique collectibles.[144] This pool includes art dealers, arts institutions, and private art collectors.[145] Notably, purchases by art dealers for resale and museums for exhibition qualify as purchases for "business purposes."[146] As such, those transactions will not be covered by withdrawal rights.[147] The right of withdrawal only applies to consumer goods or services used "primarily for personal, family or household purposes."[148] However, it may be difficult to determine if the purchase was for business or personal purposes where prolific collectors are concerned, especially if their primary motivation for the purchase is profit or investment.[149]

Auction-house sales occur through either public auction or private sales.[150] A public auction is open to anyone with resources to purchase and may be held live in the auction salesroom or online.[151] A private sale is targeted to a select group and may be negotiated one-on-one or auctioned.[152] Because private sales are generally conducted at the auction firm, these transactions are not

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142 *See* Judith H. Dobrzynski, *How Auction Houses Orchestrate Sales for Maximum Drama*, N.Y. TIMES (Oct. 28, 2015), https://www.nytimes.com/2015/11/01/arts/design/how-auction-houses-orchestrate-sales-for-maximum-drama.html [https://perma.cc/D7MZ-VBP6].

143 *See generally, e.g.*, Vom Lehn v. Astor Art Galleries, Ltd., 380 N.Y.S.2d 532 (N.Y. Sup. Ct. 1976).

144 SMITH, *supra* note 11, at 69.

145 *Id.*

146 *See, e.g.*, Holm v. Berner, No. 06-CA-140, 2007 Ohio App. LEXIS 3148, ¶¶ 13–14 (Ohio Ct. App. June 29, 2007) (finding that a purchase by Berner's Auction Gallery for purposes of resale is not within the scope of the Ohio Home Solicitation Sales Act as it was not for purposes that were primarily personal, family, or household use).

147 *See id*.

148 *See, e.g.*, 16 C.F.R. § 429.0(b).

149 MARTIN WILSON, ART LAW AND THE BUSINESS OF ART 116 (2019).

150 *See id*. at 178; *see also* RALPH CASSADY, AUCTIONS AND AUCTIONEERING 8 (1967).

151 *See* WILSON, *supra* note 149, at 59–60.

152 *See* SMITH, *supra* note 11, at 15–16.

within the scope of withdrawal rights in off-premises contracts.[153] However, public auctions may be subject to withdrawal rights if the sale was personally solicited by the auctioneer, the contract was signed off-premises, and the purchase was intended for personal use.[154]

There are several ways to bid at an auction, and the manner in which the bidder opts to place their bid may influence whether the contract between the auction house and the winning bidder will be subject to withdrawal rights in off-premises contracts.[155] A bid may be offered (1) live in the auction room, (2) over the phone, (3) online, (4) through an absentee bid,[156] or (5) via an agent.[157]

Bidding in the auction room, via agent or directly, will not fall under the right of withdrawal because the contract is concluded when the hammer comes down and at that moment the buyer is on the premises of the salesroom floor.[158] Clearly, signing a contract at the seller's business location is not within the scope of the off-premises withdrawal right.[159] Moreover, while on its face the atmosphere of an auction salesroom may apply pressure on consumers to buy,[160] legal intervention to protect consumers from this type of psychological pressure would not be legitimate market correction.[161] This buyer is merely carried away by excitement—

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153 Maggie Hoag, Christie's Inc., Address at the Cardozo Art Law Society & FAME Center Annual Symposium: From Consignment to the Auction Block (Mar. 25, 2019).

154 *See supra* Part I.

155 WOODHAM, *supra* note 11, at 98–99.

156 Bidding by absentee bid gives permission to the auction house to bid on behalf of a client up to a specific price limit. *Id*. at 98–99.

157 *Id.* Bidding via agent can be completed over the phone, online, or live bidding in the auction room. *See id*.

158 HARVEY & MEISEL, *supra* note 134, at 190.

159 *See supra* Part I.

160 HARVEY & MEISEL, *supra* note 134, at 11; *see also* CHARLES HAMILTON, AUCTION MADNESS: AN UNCENSORED LOOK BEHIND THE VELVET DRAPES OF THE GREAT AUCTION HOUSES 13–15 (1981) (describing "bidder's fever" as a wave of competition that overcomes bidders at auction and results in a purchase simply for the sake of self-aggrandizement rather than out of an earnest desire for the particular auction lot or economically rational thought process).

161 Gerald Spindler, *Internet-Auctions Versus Consumer Protection: The Case of the Distance Selling Directive*, 6 GERMAN L.J. 725, 730 (2005) ("[T] here is no room for protecting consumers due to the psychological pressures during an auction.").

not contracting by mistake or under the pressure of coercive sales tactics.[162]

For bidders (or agents of bidders) on the phone or online, the contract will likely qualify as executed off-premises.[163] While states vary on whether phone or mail sales are subject to withdrawal rights, the majority include telephone sales in their statutes.[164]

Absentee bidding is ambiguous as to whether it qualifies as on or off-premises. This Note assumes that these sales take place at the seller's business premises, since the auction house places the bid on behalf of their client.[165] Therefore, this Note accepts that they are not subject to rights of withdrawal.[166]

In sum, there are two types of off-premises contracts with auction houses that could come under rights of withdrawal:

- A contract between the auction house and a consignor who is purchasing for personal use, where the auctioneer personally solicited the sale and executed the contract at a location other than the auctioneer's business premises; and
- A contract between the auction house and a winning bidder who is purchasing for personal use, where the bid was personally solicited by the auctioneer and placed by the bidder during a public auction over the phone, by mail, or online in a jurisdiction which does not provide an exception for phone or mail sales.[167]

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162 *See id*.

163 Arguably, online purchases, like door-to-door sales, are concluded in the home. *See* Mattioli, *supra* note 30, at 233. In addition, courts have found that agreements made over the phone were concluded at the consumer's home, rather than the seller's place of business. *See* Pritzker v. Krishna Gallery of Asian Arts, 1996 U.S. Dist. LEXIS 14398, at *1 (N.D. Ill. Sept. 30, 1996); People v. Toomey, 157 Cal. App. 3d 1, 13–14 (Cal. Ct. App. 1984); Brown v. Martinelli, 419 N.E.2d 1081, 1082 (Ohio 1981).

164 *See infra* Appendix A.

165 WOODHAM, *supra* note 11, at 98–99.

166 *See supra* Part I.

167 Provided that no prior negotiations took place at the business premises. *See, e.g.*, 16 C.F.R. § 429.0(a)(1) (2020).

3. From Consignment to Auction Block

Auction houses invest substantial time and money in preparing a sale. Generally, it takes an auction house three to six months after consignment to sell a work of art.[168] Yet, if the consignor or winning bidder were to "cool off," the auctioneer would lose the benefit of the time and resources invested into preparing the sale because rights of withdrawal require the seller to bear the expense of services that have already been performed.[169]

The cost of auctioning an artwork accrues as soon as auction houses specialists source and vet the work for inclusion in the auction.[170] Specialists travel around the world to scout property, perform scholarly research on authenticity and ownership, prepare sales estimates, and pitch sales and marketing plans to clients in their effort to secure a consignment.[171] In signing a consignment agreement, the auction house commits to provide expert attribution, restoration, and extensive marketing.[172] After consignment, but prior to the auction, the auction house will design detailed catalogues with original photography and significant art historical research to promote the sale.[173] Advertising campaigns may also include videos highlighting the work and pop-up exhibitions in different countries.[174] Thus, marketing costs can include

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168 *See* NOAH HOROWITZ, ART OF THE DEAL: CONTEMPORARY ART IN A GLOBAL FINANCIAL MARKET 170 (2011).

169 *See supra* Part I.B.

170 WOODHAM, *supra* note 11, at 156.

171 *See id*. at 41, 89; *see also* Harter-Bachmann, *supra* note 115, at 10–11, 19, 23–24 (pre-sale estimates rely on scholarly research regarding attribution and authenticity that may include historical evidence, connoisseurship, scientific examination).

172 *See* HARVEY & MEISEL, *supra* note 134, at 9.

173 *See* WOODHAM, *supra* note 11, at 42.

174 *See id*. at 42. Importantly, during the preview period, at the pop-up exhibitions or the auction salesroom, potential bidders have the opportunity to conduct due diligence and become informed about the nature of the property and the consequences of the contract. *Id*. at 11. For an extraordinary example of the work involved in preparing a work for sale consider how Christie's went above and beyond their typical marketing plan to generate global interest for the sale of Leonardo Da Vinci's painting, *Salvator Mundi*. Among other prep work, Christie's hired an outside marketing firm, toured the painting around the world for exhibitions in major cities, and created a video on the painting that went viral. *See, e.g.*, Eric Rhoads, *The Ultimate Power of Branding: Why a Da Vinci Sold for $450.3 Million*, ART MARKETING (Nov. 27, 2017), https://artmarketing.com/2017/11/27/ultimate-power-branding-leonardo-da-vinci-sold-450-3-million/ [https://perma.cc/Y2HV-474A].

transportation, insurance, and photography.[175] Finally, auction houses are also responsible for preparing and curating salesrooms and exhibition spaces.[176]

If the right of withdrawal were applied to art auctions, auctioneers would be forced to absorb all of these costs in the event of a cancelled sale.[177] However, auction houses are, after all, a conduit between consignors and bidders, and it would therefore be reasonable for auctioneers to spread these sunk costs to consumers.[178] For example, auction houses could recoup the costs of administering returns by increasing their commission fees to consignors and increasing the buyer's premium.[179] Thus, consumers may ultimately bear the cost of their own protection.[180]

C. U.S. Rights of Withdrawal Could Apply to the Sale of Art at Auction

Clearly, extension of the withdrawal right to art auctions would profoundly affect the manner in which art is transferred.[181] Thus, this Section will examine whether there is a plausible reading of the regulatory and statutory texts or common law that would, in fact, apply rights of withdrawal to art auctions.

1. Read Literally, Withdrawal Rights Could Plausibly Encompass Art Auctions

When construed literally the text of U.S. cooling-off rules indicates auctions are within the scope of the rules. The fact that several states created specific exceptions for auctions indicates that these legislatures understood the rights of withdrawal to apply to auctions.[182] Moreover, if the drafters in other states omit this exception—particularly, when they are readily found in other, similar laws or regulations—the strongest conclusion is that these

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175 *See* WOODHAM, *supra* note 11, at 42.
176 *See id*. at 157.
177 *See supra* Part I.B.
178 *See* Rekaiti & Van den Bergh, *supra* note 1, at 374.
179 *See id*.
180 *See id*.
181 *See supra* Parts II.A., II.B.
182 *See* MINN. STAT. § 325G.06 Subd. 2(5) (2018); OHIO REV. CODE ANN. § 1345.21(F)(6) (LexisNexis 2018); WIS. STAT. ANN. § 423.201(1) (LexisNexis 2018).

drafters intended the omission.[183] Therefore, other state statutes' failure to exclude auctions with other enumerated exceptions[184] suggests that these legislatures intended the scope of the consumer protection statute to cover auctions.[185]

The administrative history of the federal regulation also explicitly includes auctions within the scope of the rules. In adopting the 1995 amendments to the federal regulation, the FTC stated that the Rule applies to public auctions, provided that the auctioneer is directly selling goods or services to buyers.[186] Arguably, art auction houses meet this definition because they function as a conduit between consignors and bidders such that they are direct sellers of auctioneer services to consignors and they are direct sellers of artwork to bidders.[187]

However, statutory interpretation requires that courts read rules in a manner consistent with their intended purpose.[188] Here, despite the literal reading of withdrawal rights, the purpose of these rules suggest they were not intended to cover art auctions. Importantly, the primary target for door-to-door sellers are senior citizens, new immigrants, and low-income families who are largely isolated by economic, physical, and cultural immobility.[189] This consumer lacks access to alternative markets for goods and services and is particularly susceptible to pressure by door-to-door sellers.[190] Whereas, the consumer advocate at auction would at most be concerned about

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183 The *expressio unius* canon of statutory interpretation provides that the enumeration of specific items in a statute purposely exclude items not listed. WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 668 (5th ed. 2014).

184 *See infra* Appendix A.

185 *See* ESKRIDGE, JR. ET AL., *supra* note 183, at 668.

186 *See 1988 FTC Cooling-Off Rule Final Exemptions*, *supra* note 76, at 45457–58 n.10, n.23.

187 *See supra* Part II.B.1.

188 "[T]he reason and spirit of the law and the cause which induced the legislature to enact it may be considered to discover its true meaning." Gray v. Admin. Dir. of the Court, 931 P.2d 580, 590 n.15 (Haw. 1997).

189 Concurring Statement of Commissioner Julie Brill, Fed. Trade Comm'n, Federal Trade Commission Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations (the "Cooling-Off Rule") (Jan. 6, 2015), https://www.ftc.gov/system/files/documents/public_statements/617121/150106coolingoffstatement.pdf [https://perma.cc/L94F-GUCM].

190 *See id*.

the bidder who is a novice art collector and is confused by the valuation of art or the consignor who is an art-world outsider trying to access the monetary value of a deceased relative's estate.[191] Clearly, there are fundamental differences in both the relative sophistication of contracting parties and in the procedures by which art is sold and how other door-to-door sales are conducted, which suggest that the consumer is not as vulnerable in art transactions.

To begin with, although both bidders and consignors may feel reliant on the auction house for expertise regarding the deal, they are sophisticated parties with bargaining power against the auction house.[192] In addition, any pressure on the consignor to sign the contract in time for their work to be listed in an upcoming auction is internal and not created by the demand for an immediate response to the seller.[193] The decision to consign is not made on the doorstep.[194] Customarily, consignors have time to conduct due diligence, comparison shop, and negotiate these high-value transactions.[195] Further, while auction-goers can exhibit an irrational behavior known as "bidder's fever" that may compel a person to bid more than they would have in a more deliberative state of mind,[196] these transactions take place on the business premises thus are not within the scope of withdrawal rights.[197] Finally, home visits by an auction house are made at the invitation of the client, thus there is no surprise element.[198] Therefore, application of withdrawal rights to art auctions would be contrary to the intended purpose of these rules to protect vulnerable consumers from coercive sales tactics.

Moreover, a common-sense reading of the text would suggest that these cooling-off rules were not intended to cover such disparate markets as art transactions and typical door-to-door sales. For example, the FTC's "Statement of Basis and Purpose" shows that

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191 *See* Neuendorf, *supra* note 118.

192 JOHN HENRY MERRYMAN ET AL., LAW, ETHICS, AND THE VISUAL ARTS 1020 (2007).

193 *See* WOODHAM, *supra* note 11, at 114, 117 (discussing how consignors comparison shop between different auction houses).

194 *See id*.

195 *See id*.

196 HAMILTON, *supra* note 160, at 13–15.

197 *See infra* Part II.B.2.

198 *See* Dobrzynski, *supra* note 142.

the regulation was contemplated for relatively minor purchases from unscrupulous traveling salesmen selling encyclopedia subscriptions and vacuum cleaners in low-income areas.[199] Clearly, these transactions differ vastly from the $45 billion global art market where auction houses hold roughly 40% of the market share and even "low-end" goods have significant price tags.[200] Withdrawal rights as a remedy also presuppose that the amount in controversy does not justify the legal expense.[201] While it is true that litigation might be impractical for minor purchases, that cannot be said for high-value, unique transactions like art. Indeed, the value of contracts in the art market often justify litigation.[202] Thus, consumer advocates cannot claim the same plausible application of withdrawal rights to art auctions in comparison to typical door-to-door sales.

2. Caselaw Plausibly Suggests that Withdrawal Rights Could Apply in Art Auctions

There are a limited number of withdrawal right cases dealing with art and auctions from which to draw guidance.[203] Perhaps this is because withdrawal rights have not been contemplated as applying to this market, which may change as its use becomes more well known in Europe.[204] Another reason could be that these matters are settled outside of court, or maybe consumers are simply not motivated to purchase based on increased consumer confidence on the back of withdrawal rights.[205]

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[199] *FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31, at 22936.

[200] *See* RACHEL A.J. POWNALL, TEFAF ART MARKET REPORT 2017 11 (The European Fine Art Foundation 2017).

[201] Proponents of withdrawal rights argue that it is an appropriate remedy because it provides rescission without resort to costly litigation. *See* Ben-Shahar & Logue, *supra* note 27, at 239; *see also* Brittenham, et al., *supra* note 30, at 1031.

[202] Even a perceived loss in market value after a failed auction has acted as part of the basis for legal proceedings. *See, e.g.*, Cristallina S.A. v. Christie, Manson & Woods Int'l, Inc., 502 N.Y.S.2d 165, 171 (N.Y. App. Div. 1986).

[203] Notably, the majority of cases invoking the right to withdraw involve corrupt sales practices in the home improvement industry. *See infra* Appendix B.

[204] A 1968 U.C.L.A. empirical study of cooling-off rules suggests that consumers do not even know about this consumer protection device, which could explain why consumers do not invoke this right. Sánchez Abril et al., *supra* note 1, at 18.

[205] In a 2014 study of the efficacy of cooling-off rules, 58% of sellers surveyed believed that cooling-off periods most likely do not incentivize sales to occur that would not have

The relevant cases show that courts have applied the right to withdraw to contracts with art galleries.[206] However, buyers have yet to succeed in invoking the right against an auction house.[207] Nevertheless, looking at consumer transactions with auction houses objectively in terms of the legal requirements for withdrawal rights[208] a court could plausibly find these contracts subject to cancellation as a result of the overly broad language of the cooling-off rules, as well as the fact that courts tend to disregard the unique nature of art.[209]

To start with, looking at the indiscriminate terms of the withdrawal rights, auction houses may qualify as "sellers."[210] A "seller" is typically defined as "any person, partnership, corporation, or association engaged in the door-to-door sale of consumer goods or services."[211] Thus, the scope of the term "seller" depends upon the meaning of "door-to-door sales" and "consumer goods and services."[212]

The auction house specialist's home visits to clients may qualify as "door-to-door sales" because they involve personal solicitation

otherwise happened. *See* Sovern, *supra* note 13, at 367. *But see* MULHOLLAND, *supra* note 50, at 22 (noting that impulse buys are encouraged by the right to withdraw).

206 *See* Pritzker v. Krishna Gallery of Asian Arts, 1996 U.S. Dist. LEXIS 14398, at *1 (N.D. Ill. Sept. 30, 1996); Vom Lehn v. Astor Art Galleries, Ltd., 380 N.Y.S.2d 532, 532 (N.Y. Sup. Ct. 1976).

207 *See* Morris v. Steffes Grp., Inc., 924 N.W.2d 491, 496–97 (Iowa 2019), *reh'g denied*, (Mar. 28, 2019); *see generally* Vaks v. Ryan, 2012 Mass. App. Div. 17 (Mass. Dist. Ct. 2012), *award vacated*, 2014 Mass. App. Div. 37 (Mass. Dist. Ct. 2014); Holm v. Berner, No. 06-CA-140, 2007 Ohio App. LEXIS 3148 (Ohio Ct. App. June 29, 2007).

208 Statutory requirements include particular definitions for the seller, goods and services, in addition to the requirements of minimum purchase price and personal solicitation by the seller at a location other than the seller's business premises. *See supra* Part I.B.

209 *See generally Pritzker*, 1996 U.S. Dist. LEXIS 14398; *Vom Lehn*, 380 N.Y.S.2d 532.

210 As noted earlier, auction houses are direct sellers of auctioneer services to consignors and they are direct sellers of artwork to bidders. *See supra* Part II.B.1. Auctioneering services are within the scope of withdrawal rights in most jurisdictions. *See infra* Appendix A. At present, aside from Minnesota, Ohio and Wisconsin, there is no general carve-out for the auction industry. *See* MINN. STAT. ANN. § 325G.06 Subd. 2(5) (2018); OHIO REV. CODE ANN. § 1345.21(F)(6) (LexisNexis 2018); WIS. STAT. ANN. § 423.201(1) (LexisNexis 2018).

211 *See, e.g.*, 16 C.F.R. § 429.0(c).

212 *Morris*, 924 N.W.2d at 496–97.

away from the seller's business premises.[213] For example, in *Pritzker v. Krishna Gallery of Asian Arts*, Krishna Nathan personally solicited the sale of the "Kubera," an antique Indian sandstone sculpture, during a visit to the buyer's home.[214] Likewise, in *Vom Lehn v. Astor Art Galleries*, the buyers first discussed the Ming Dynasty jade carvings with the seller over dinner and drinks, and later returned to the buyer's home where the sellers personally solicited the sale.[215]

Finally, by treating art like a mere commodity courts have overlooked its unique nature, and consequently, easily found that artworks meet the definition of "consumer goods" under cooling-off period rules.[216] In *Krishna Gallery of Asian Arts*, buyers of the Kubera contended that the sculpture was inauthentic and sought to cancel the sale agreement with an art gallery based on the New York State right-of-withdrawal statute.[217] Without any discussion, the court concluded that the Kubera was a consumer good within the meaning of the statute.[218] Similarly, in *Astor Art Galleries*, a buyer invoked the same statute to cancel the sale of inauthentic Ming Dynasty jade carvings bought from a gallery.[219] The court found that the jade carvings satisfied the definition of consumer goods as items "primarily for personal, family or household purposes"; thus, they were within the scope of the law.[220]

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213 *FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31, at 22936 ("Personal contact between the salesman and the customer in the home of the buyer is the dominant characteristic of the door-to-door sale.").

214 *See Pritzker*, 1996 U.S. Dist. LEXIS 14398, at *6.

215 *See Vom Lehn*, 380 N.Y.S.2d at 536.

216 *See generally, e.g.*, *Pritzker*, 1996 U.S. Dist. LEXIS 14398; *Vom Lehn*, 380 N.Y.S.2d 532.

217 *Pritzker*, 1996 U.S. Dist. LEXIS 14398, at *1 (holding summary judgement was inappropriate due to a genuine issue of material fact regarding where the contract was formed; plaintiff buyer argued the offer to purchase was made over the phone at their Illinois home, defendant seller argued the offer to purchase was made at the gallery warehouse, i.e. the seller's business premises).

218 *Id.* at *6.

219 *Vom Lehn*, 380 N.Y.S.2d at 542 (holding plaintiff buyer could cancel the contract at any time because the transaction met the statutory definition of door-to-door sales and notice requirements were not adhered to by the sellers).

220 *Id*.

Morris v. Steffes Group, Inc. provides more in-depth authority on the scope of a local consumer protection statute's definition of "consumer goods or services" in the context of an auction, albeit not an art auction.[221] There, the Supreme Court of Iowa found that there is no objective limitation on the terms "goods or services" other than the buyer's primary purpose for the purchase: "nothing in the statute categorically declares any goods or services outside the scope of the statute based on their inherent quality."[222] Thus, the dispositive question is whether the goods or services are "consumer" in nature.[223] Accordingly, as long as a consignor or winning bidder's purpose in buying auction services or an auction lot is "primarily for personal, family or household purposes," the right to withdraw will apply.[224] Taken together, these cases suggest that withdrawal rights could apply to goods such as art and services such as auctioneering.[225]

However, there are strong arguments for treating art differently than a mere consumer good or commodity. Art law professor Patty Gerstenblith argues that art is distinguishable from ordinary commodities in two important ways.[226] First, the value of art fluctuates rapidly because it is governed by the particularities of the art trade.[227] For example, there are practical consequences to an artwork's value that flow from a cancelled sale: its devaluation.[228] Second, art is unique, much like real estate,[229] and real estate is generally exempt from withdrawal rights.[230]

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221 Morris v. Steffes Grp., Inc., 924 N.W.2d 491, 496–97 (Iowa 2019) (holding that the state consumer protection statute may cover the auction of a tractor if the buyer's purpose was "primarily for personal, family, or household purposes.").

222 *Id.* at 499. Moreover, this broad definition of "consumer goods and services" shows an intent to exclude only those transactions motivated by business purposes based on the assumption that those transactions involve less vulnerable parties, who do not need the safeguards of consumer protection law. *Id*. at 500.

223 *See id*.

224 *See id. at* 501.

225 *See id*.

226 *See* GERSTENBLITH, *supra* note 119, at 339.

227 *See id*.

228 *See generally BI Report*, *supra* note 2.

229 *See* GERSTENBLITH, *supra* note 119, at 339.

230 *See, e.g.*, *FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31, at 22948 (real estate sales "would not fall within the scope of the definition of consumer goods or services."). However, the federal rule and seventeen states also explicitly exclude

In addition, the case law further supports the argument that art should be exempt from withdrawal rights. In particular, both *Krishna Gallery of Asian Arts* and *Astor Art Galleries* illustrate that there already appear to be protections in place for consumers in the art market that address the underlying purposes of withdrawal rights.[231] Notably, in both of these cases the determining factor was the seller's misrepresentation of the authenticity of the goods.[232] Therefore, both matters could have simply been resolved with the application of New York's specific art market legislation,[233] or under claims such as breach of warranty or fraudulent misrepresentation.[234]

Furthermore, the art market involves repeat transactions with sophisticated parties, which contrasts sharply with the more vulnerable consumers whom withdrawal rights were intended to protect.[235] In *Krishna Gallery of Asian Arts*, the buyer was the leading collector of Asian art, as well as one of the wealthiest Americans at the time.[236] He was able to hire the senior curator of Asian Art at the Los Angeles County Museum of Art as a consultant.[237] The court in *Vaks v. Ryan* suggested that withdrawal rights are not intended to protect such sophisticated buyers operating in the top

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transactions related to real property. *See infra* Appendix A. There may have been an intention to exclude real estate sales from the FTC Rule and other state withdrawal rights because the consumer is already protected by the customary process of these transactions which involve a closing period that operates very similarly to a cooling-off period. Similarly, in art transactions, art market specific legislation already fills the gap that withdrawal rights are intended to remedy. *See infra* Part IV.A. Like the right of withdrawal, art market specific legislation only applies when the seller is an art merchant and the buyer is not as sophisticated, as the purpose for these laws is "to protect unknowing buyers from knowing sellers who may try to use the unequal balance of information power to their own advantage." Christie's Inc. v. SWCA, Inc., 867 N.Y.S.2d 650, 656 (N.Y. Sup. Ct. 2008).

231 *See, e.g.*, Pritzker v. Krishna Gallery of Asian Arts, 1996 U.S. Dist. LEXIS 14398, at *1 (holding that both New York's Door-to-Door Sales Act and New York's specific art market legislation could be applied).

232 *See generally Pritzker*, 1996 U.S. Dist. LEXIS at *1; Vom Lehn v. Astor Art Galleries, Ltd., 380 N.Y.S.2d 532, 532 (N.Y. Sup. Ct. 1976).

233 GERSTENBLITH, *supra* note 119, at 405.

234 *See, e.g.*, Rogath v. Siebenmann, 129 F.3d 261, 262 (2d Cir. 1997) (plaintiff-buyer of allegedly inauthentic Francis Bacon painting brings claims of breach of warranty and fraud against seller).

235 *See supra* Part II.C.1.

236 GERSTENBLITH, *supra* note 119, at 404.

237 *Id*.

price brackets of the art trade.[238] There, a sophisticated buyer controlled the lengthy negotiation process, which provided the buyer ample time for reflection upon the transaction.[239] The court held that the consignor was not entitled to protection under the Massachusetts right of withdrawal because the statute was intended to protect "unwary consumers from unwelcome solicitors."[240] This holding implies that providing sophisticated parties free withdrawal is an ineffective use of consumer protection law.[241]

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238 *See* Vaks v. Ryan, 2012 Mass. App. Div. 17, 17 (Mass. Dist. Ct. 2012). In *Vaks*, the consignors contacted about five auction houses over the course of a month to discuss conditions of sale for home furnishings. *Id*. at 17. Ultimately, Rimma Vaks consigned to Ryan Auction Company over 150 lots, including furniture, paintings, and rugs. *Id*. As the consignments were sold during the ensuing months, a dispute as to the commission percentage arose. *Id*. at 18. The dispute culminated in a complaint by Vaks about the manner in which the auction was conducted, which relied in part on a claim under the Massachusetts State right of withdrawal. *Id*. While, the court in Vaks expressed sympathy towards evaluating claims against the legislative purpose of protecting more vulnerable consumers, this argument discriminates between the relative sophistication of buyers in a way that may not hold up in another court. In *Burke v. Yingling*, for example, the Pennsylvania Superior Court explicitly overturned a previous ruling which reasoned that a sophisticated buyer who initiated contact with the seller and conducted lengthy negotiations over the purchase of an expensive product was not the type of consumer that the state's Unfair Trade Practices and Consumer Protection Law was meant to protect. *See* Burke v. Yingling, 666 A.2d 288, 290–91 (Pa. Super. Ct. 1995) (reversing a grant of summary judgement in favor of appellee seller, as the appellant buyer of an audio-visual system was entitled to protection under the Pennsylvania Unfair Trade Practices and Consumer Protection Law). In doing so the court emphasized that the statutory language provides a "right to cancel to *all* buyers even if the buyer is sophisticated, in no way deceived or pressured by the Seller, and takes adequate time to reflect before agreeing to the transaction." *Id*. at 22 (emphasis added). Thus, the court declined to differentiate between buyers "deserving" of protection, and those not. *Id*. at 22. However, in a more recent decision specific to the art market, the court held as a matter of law that buyers in the top price brackets cannot rely on "information asymmetry" in claims against art merchants hard-selling work: "these sophisticated plaintiffs cannot demonstrate reasonable reliance because they conducted no due diligence." MAFG Art Fund, LLC v. Gagosian, 123 A.D.3d 458, 459 (N.Y. App. Div. 2014) (dismissing claims against the Gagosian Gallery for withholding information and selling artwork at an inflated price). Accordingly, although there is some uncertainty, a policy argument might prevail in court today. *See id*.

239 *See Vaks*, 2012 Mass. App. Div. at 22.

240 *Id.* The court also noted that the fact that the buyer had initiated contact with the seller factored into the decision. *Id*. Whereas some states provide that buyer-initiated sales are exempt from withdrawal rights; the Massachusetts statute does not do so. *See* MASS. GEN. LAWS ANN. ch. 93, § 48 (2018); MASS. GEN. LAWS ANN. ch. 255D, § 9 (2018).

241 *See, e.g.*, *Vaks,* 2012 Mass. App. Div. at 17.

Lastly, the remedies attached to withdrawal rights permit dissatisfied consumers to receive services in full at no cost or return goods without covering depreciation costs.[242] While these rights were not intended to be a "satisfaction guarantee,"[243] consumers will attempt to use the right of withdrawal as such.[244] For example, in *Holm v. Berner* the dispute arose specifically because the plaintiff was not satisfied with his compensation for property sold through an auction gallery.[245] Duane Holm sold collectibles, furniture, and other personal property to Berner's Auction Gallery but when he learned that the gallery had resold the items for considerably higher value, he brought suit.[246] The Court of Appeals of Ohio found that the withdrawal right did not apply because Holm sold his property outright to Berner's Auction Gallery; thus Holm was the seller and Berner was the buyer.[247] Baring this technicality, the outcome could have permitted rescission of the contract and would have transformed the right of withdrawal into a satisfaction-guarantee right.

III. RIGHTS OF WITHDRAWAL UNDERMINE THE SALE OF ART AT AUCTION

In his critique on the E.U. right of withdrawal, Pierre Valentin argued that the right to cancel is irreconcilable with the auction of art for three reasons.[248] First, a cancelled sale reduces the market value of art.[249] Second, consumers who can easily avoid a contract become more risk-friendly and bid speculatively, which drives

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242 *See supra* Part I.B.

243 *See, e.g.*, *1995 FTC Cooling-Off Rule Non-Substantive Amendments*, *supra* note 50, at 54184 ("The Cooling-Off Rule was not intended to be a federal "satisfaction guarantee" requirement or "buyers' remorse" insurance program.").

244 *See generally* Holm v. Berner, No. 06-CA-140, 2007 Ohio App. LEXIS 3148 (Ohio Ct. App. June 29, 2007).

245 *Id.* at ¶¶ 1–3.

246 *Id.*

247 *Id.* at ¶¶ 23–24. Withdrawal rights are intended to protect the buyer, not the seller, thus sellers cannot invoke this right. *Id*. at ¶ 24. Moreover, the court found that even if Berner was the buyer, the goods were purchased for resale, which does not qualify as personal use, thus the transaction would still be excluded from the scope of the statute. *Id*.

248 *See* Valentin, *supra* note 7.

249 *Id*.

prices up and distorts published market prices.[250] Third, if a buyer were to exercise the right to cancel, costs of the artwork's depreciation and the sale preparation would revert to the seller and, by extension, back to consumers.[251] Valentin's critique of the E.U. right of withdrawal is equally applicable in the United States, as consumers and auctioneers face the same challenges under the federal and state rights of withdrawal in off-premises contracts.

This Part will expand on these arguments in more depth as applied to the U.S. rights of withdrawal by arguing that the indiscriminate application of these rights to art auction sales would be inefficient and harmful. Consumer protection law should respond to the challenges of the specific market affected and strive to find a balance between consumer and market interests.[252] Therefore, courts, regulators, and legislatures should consider the peculiarities of the art market before applying the right to cancel to art auctions.

A. Repercussions of a Cancelled Sale on the Value of the Artwork

The right to cancel is too costly to implement in this market because a cancelled sale will reduce an artwork's market value significantly.[253] While free withdrawal might work well for the minor purchases of mass-produced goods contemplated by the drafters,[254] it fails when it comes to art, which exists in its own "economic microcosm."[255] "[I]n the arcane world of high-priced art, market value is affected by market perceptions,"[256] and the art world considers artwork devalued—"burnt"—as a result of its failure to sell.[257] In fact, the general assumption is that a burnt work of art has failed to sell because it is of "poor quality, bad condition or dubious

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250 *Id*.

251 *Id*.

252 *See* Bar-Gill, *supra* note 29, at 801–02.

253 Cooling-off periods may be "too costly to implement—for example, when using a purchased good during the cooling-off period causes significant depreciation in the value of the good." Camerer et al., *supra* note 27, at 1240.

254 *See FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31, at 22936.

255 *See* Higgins, *supra* note 115, at 227–28.

256 Firestone & Parson, Inc. v. Union League of Phila., 672 F. Supp. 819, 823 (E.D. Pa. 1987).

257 *See generally BI Report*, *supra* note 2.

provenance."[258] Those works that may be pulled prior to auction are also assumed to have uncertain ownership or authenticity.[259] As a result, the unsold work has lost its initial appeal to buyers.[260]

At auction, a cancelled sale will cause long-term material harm to a one-of-a-kind item's value.[261] Studies show that the average price of art decreases by 27–33% when it appears at auction for a second time.[262] Statistics also show that it takes about six years for the market value of the burnt artwork to return to *status quo ante* the failed sale.[263] In addition, consignors generally must withdraw the burnt work from the market for at least a year to create demand for it,[264] but the average holding period is closer to eight years.[265] Given that auctions regularly set record prices these depreciation costs are significant—losses could be in the range of hundreds of thousands, if not millions, of dollars.[266]

By extension, a cancelled sale may also negatively impact the market for the artist's entire category of work, as well as work by others in the same style.[267] As an example of how the sales history for one of an artist's pieces can impact the market for the rest

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[258] *Id.* at 1.

[259] *See* Isaac Kaplan, *Why Are Artworks Pulled from Auction?,* ARTSY (July 13, 2017), https://www.artsy.net/article/artsy-editorial-artworks-pulled-auction [https://perma.cc/H2L4-UDUC].

[260] *See* SMITH, *supra* note 11, at 39.

[261] *See generally BI Report*, *supra* note 2 (noting an average decrease in value of 27%); *see also* Beggs & Graddy, *supra* note 126, at 28 (noting that devaluation varies enormously from an average decrease of 33% to as much as 55% seen in certain cases).

[262] *See BI Report*, *supra* note 2, at 2. In addition to the reduced market value of the auction lot, the auctioneer must also lower its commission to encourage bids. *Id.*

[263] *See id.*

[264] MERRYMAN, *supra* note 192, at 965.

[265] Beggs & Graddy, *supra* note 126, at 13 (noting that the average holding period for failed sale is 7.65 years).

[266] For example, if the sale of the *Salvator Mundi* had been cancelled, on reoffer the painting's final sale price might have decreased by as much as $121.5 million, 27% of the over $450 million sale price. *See, e.g.*, *Leonardo's Salvator Mundi Makes Auction History*, CHRISTIE'S (Nov. 15, 2017), https://www.christies.com/features/Leonardo-and-Post-War-results-New-York-8729-3.aspx [https://perma.cc/G6NB-XPTU] (describing the historic sale of a recently discovered Leonardo Da Vinci painting, the *Salvator Mundi*, for $450,312,500).

[267] SMITH, *supra* note 11, at 3 (noting that the auction of Van Gogh's *Irises* for over $50 million not only set the price for that particular work, but also affected the price of all of Van Gogh's work and all Post-Impressionist paintings).

of their works, Christopher Wool's *And If You* (1992) sold for $13.6 million at Christie's in 2016, a 40% drop in price when compared to the artist's almost-perfect substitute *If You* (1992), which sold for $23.7 million in 2014.[268] The day after the sale of the *And If You* (1992), the artist's other word painting *Untitled* (1990) sold at Sotheby's for a very similar price, $13.9 million.[269] Given this ripple effect, depreciation costs can be significant and often difficult to calculate.[270]

Even advocates for the right of withdrawal as a default rule admit that transactions involving goods whose value changes dramatically should not be included within the scope of the right, as withdrawal would defeat the purpose of these contracts.[271] Omri Ben-Shahar and Eric Posner proposed an optimal contract model based in economic efficiency, which supports free withdrawal as a default rule where goods depreciate slowly, but opposes it where the value of the goods rapidly depreciates, depreciation is difficult to measure, and where the value fluctuates rapidly, such as at auctions.[272] These scholars emphasized that the value of goods sold at auction are volatile; thus, auctions are a prime example of transactions that should be exempt from withdrawal rights.[273] Further, cost-benefit analysis suggests that rights of withdrawal may not be justified in markets where the contract cannot be easily reversed.[274] Because it is so difficult to unwind the contract for the winning bidder at auction, it follows that auctions are a poor fit for the application of the withdrawal right.[275]

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268 WOODHAM, *supra* note 11, at 74–75.

269 *Id*.

270 *See* SMITH, *supra* note 11, at 3.

271 *See* Ben-Shahar & Posner, *supra* note 16, at 138.

272 *See id*. at 138, 144. The authors also oppose the application of the right to business sales where the contracting parties are sophisticated. *Id.* at 145–46.

273 *See id*. at 138.

274 *See* Jeffrey L. Harrison, *Happiness, Efficiency, and the Promise of Decisional Equity: From Outcome to Process*, 36 PEPP. L. REV. 935, 987–88 (2009).

275 *See id*.

B. Moral Hazard and Artificially Distorted Auction Prices

The right to withdraw can trigger opportunistic behavior[276] and welfare-reducing purchase decisions.[277] In particular, the ability to deliberate on purchases *ex post* contracting during a cooling-off period creates an incentive for impulse buys.[278] Economists describe this phenomenon as buyer's opportunism, or "moral hazard."[279] Moral hazard is when it becomes more probable that the buyer will behave in a morally reprehensible way because the consequences of the buyer's decisions are borne by others.[280] Since such opportunism harms contracting parties, moral hazard is one of the most significant arguments against the right to withdraw.[281]

Given that consumers are facing significant high-value transactions at auctions,[282] they should have an incentive to learn about their purchases and seek expert advice *ex ante*.[283] As John Henry Merryman, a founder of the field of art law, put it: "[t]he prudent collector who loves art and wants to enjoy collecting without making unnecessary mistakes will find that much time and research may be required."[284] The concern is that, if the right to withdraw applies, consumers are protected from bearing the risks of a cancelled sale and therefore may choose to avoid due diligence costs prior to the sale. It is illogical to apply withdrawal rights in such a way. Rather than helping vulnerable consumers avoid a coercive door-to-door sale, using the withdrawal right in the art

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276 *See* Rekaiti & Van den Bergh, *supra* note 1, at 381.

277 MULHOLLAND, *supra* note 50, at 22.

278 *Id*.

279 The term "moral hazard" finds its roots in insurance literature, which first discussed information problems like the moral hazard that inevitably arises when an insurance company cannot observe whether the insured exerts effort to prevent an accident and the "adverse selection" that occurs when the insured knows more than the insurer about the individual's likelihood of an accident. ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 477 n.1 (1995). However, there are a broad range of economic relationships that fit into this general framework of principal-agent problems, including auctions.

280 *See* PATRICK BOLTON & MATHIAS DEWATRIPONT, CONTRACT THEORY 20 (2005) ("When a person gets better protection against a bad outcome, she will rationally invest fewer resources in trying to avoid it.").

281 MAS-COLELL ET AL., *supra* note 279, at 478.

282 *See* POWNALL, *supra* note 200, at 11.

283 Bar-Gill, *supra* note 29, at 758.

284 MERRYMAN, *supra* note 192, at 965.

auction context, ostensibly to allow sophisticated art collectors an unfair advantage and to rid them of the expensive and time-consuming responsibility of due diligence, only accommodates regret; namely, "buyer's remorse" and "seller's remorse."

1. Effects on Bidders: Buyer's Remorse

Trading at auction depends on the finality of the resulting contracts, which withdrawal rights undermine and leave open to the opportunity of abuse.[285] Gerald Spindler has warned that "[i]f buyers are enabled to revoke their contracts after the end of an auction there would be no risk for a buyer in making the highest possible bid, thus rendering the auction a farce."[286] This risk neutrality provides an incentive for the bidder to rescind as a dominant strategy and to bid speculatively.[287]

Without free withdrawal, the bidder must put in effort to learn about the item on which they bid.[288] Auction houses offer services to bidders to overcome this information asymmetry: bidders have the opportunity to learn about the auction lot during the preview period by visiting the auction gallery or consulting with specialists;[289] yet this costs the bidder time, energy, and money.[290] Critically the consumer is not required to justify why they seek to withdraw; therefore, winning bidders could save on their normal information costs by choosing to wait and learn about the artwork during the cooling-off period, and, if necessary, return it with buyer's remorse.[291] In this way, the right to cancel can

285 *See* Spindler, *supra* note 161, at 725.

286 *Id*.

287 *Id*.

288 *See* BOLTON & DEWATRIPONT, *supra* note 280, at 129.

289 WOODHAM, *supra* note 11, at 11–12.

290 *See* BOLTON & DEWATRIPONT, *supra* note 280, at 129.

291 "Often, parties waive the banner of freedom from contract deviously, to masquerade what is otherwise plain opportunistic regret. Something changed—prices went up, new bidders came by, the deal doesn't look so good after all—such that a retracting party may seek to recapture an opportunity he gave up previously, when making a promise. Thus, for example, a party who made a firm offer in the hope of attracting attention from the offeree may seek to revoke it when a better deal was proposed by a third party." Omri Ben-Shahar, *Freedom From Contract*, 2004 WIS. L. REV. 261, 269.

encourage irresponsible bidding and increase the number of uninformed purchases.[292]

Speculative bidding also makes it more likely that the individual who values the auctioned item most will not obtain it.[293] In auctions, allocative efficiency is achieved when the individual who values the auction lot the most wins.[294] Yet, if the winner postpones learning about the purchase *ex ante*, they will have less information about the item's worth than the seller or even other bidders, and is more likely to be disappointed by the sale.[295] By facilitating this inefficiency at auction, the right to withdraw will harm all consumers involved in art auctions.[296]

Additionally, the perceived interest of the bidders and the potential for competition at auction may create a false sense of demand for the work, which harms consumers by raising prices.[297] The art market is more vulnerable to manipulation than other markets, due to limited supply and demand.[298] An auction house's estimate of the selling price of the lot, and therefore its reserve or minimum selling price,[299] is based on, among other things, estimated market conditions.[300] House specialists who set the estimate may publish inflated prices due to the false enthusiasm of bidders who do not intend to follow through with the sale.[301] This inflated demand creates a market distortion where the sale price no longer

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292 *See* Spindler, *supra* note 161, at 725.

293 *See* BOLTON & DEWATRIPONT, *supra* note 280, at 129.

294 *See id*. at 262.

295 *See id*. at 26 (discussing "winner's curse").

296 *See id*. at 243.

297 *See* SMITH, *supra* note 11, at 30.

298 *See id.*

299 *See* Andrew M. Goldstein, *A Beginner's Guide to Art Auctions*, ARTSPACE (Nov. 8, 2012), https://www.artspace.com/magazine/art_101/art_market/art_101_a_guide_to_auction_lingo-5558 [https://perma.cc/5KRY-2FBF].

300 Michael McCullough, *Successu Ex Machina. Making Sense of Auction Estimates*, GALLERY INTELL, http://www.galleryintell.com/successu-ex-machina-making-sense-of-auction-estimates/ [https://perma.cc/AWH8-DSLB].

301 *See* WOODHAM, *supra* note 11, at 100 ("So if specialists know the interest is strong [because multiple bidders have registered] . . . they are more likely to recommend the seller set a higher reserve right for the object"); *see also* Sánchez Abril et al., *supra* note 1, at 6 n.7 (cooling-off period "legislation would invite bad-faith contracts, that is to say, orders signed by a purchaser with the full intention of canceling the order the next day . . . .") (citation omitted).

reflects the artwork's true market value.[302] Thus, even in instances where the right to withdraw is not invoked, it could cause price inflation that results in consumers overpaying.[303]

2. Effects on Consignors: Seller's Remorse

In like manner, the withdrawal right provides consignors with an improper incentive to rescind. The consignor exercising the right may receive a windfall if they get to both freely exit the contract and obtain the same payoff as though the bargain had been fully performed.[304] For example, if the consignor were to walk away from an auction house after free appraisals and restoration have been done in preparation of the sale, then the consignor could use these services as a bargaining chip to sell the property with a competitor under a more favorable contract.[305]

Further, it is feasible for consignors to exploit the right to withdraw in instances where they consider their consignment as having been sold at an undervalued purchase price. Several cases show consignors attempting to take advantage of the right when dissatisfied.[306] For example, in both *Vaks v. Ryan* and *Holm v. Berner*, the primary motivation for the plaintiffs to rescind their contracts with the auction houses appeared to be disappointment over the selling price of their property.[307] Notably, neither case included arguments that the plaintiffs felt pressured to consent to the contract.[308]

Thus, rights of withdrawal may offer consignors yet another way of asking the court to permit them to back out of unfavorable agreements. However, the withdrawal rights were not written with

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302 Valentin, *supra* note 7.

303 *Id*.

304 *See supra* Part I.B.

305 *See* Daniel Grant, *Cost of Consigning Artwork? Don't Forget, Most Fees Are Negotiable*, OBSERVER (Feb. 12, 2016), https://observer.com/2016/02/cost-of-consigning-artwork-dont-forget-most-fees-are-negotiable/ [https://perma.cc/PCX2-9B9E]. *See also supra* Part II.B.2.

306 *See, e.g.*, Vaks v. Ryan, 2012 Mass. App. Div. 17, 17–18 (Mass. Dist. Ct. 2012); Holm v. Berner, No. 06-CA-140, 2007 Ohio App. LEXIS 3148 (Ohio Ct. App. June 29, 2007).

307 *See Vaks*, 2012 Mass. App. Div. at 17–18; *Holm*, 2007 Ohio App. LEXIS 3440, ¶¶ 1–3.

308 *See generally Vaks*, 2012 Mass. App. Div. 17; *Holm*, 2007 Ohio App. LEXIS 3440.

the purpose of allowing dissatisfied customers to receive a full refund after services have been performed; this is not a satisfaction-guarantee right.[309]

Moreover, there are already protections in place that suggest withdrawal rights may not be necessary in the context of the contract with the consignor.[310] The competition between auction houses serves the interests of consignors.[311] Auction houses compete with each other to offer the most favorable contract terms in order to obtain the consignment of top artwork for sale.[312] The consignor is free to compare sales proposals, marketing plans, auction estimates, and reserve prices as they shop around for auction services.[313] Consignors often negotiate over high-value artwork with auction houses right up until the moment that the catalogues go to print.[314] Further, the consignment agreement itself includes terms intended to protect consignors, including reserve prices,[315] guarantees,[316] and implied fiduciary duties.[317]

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309 *See, e.g.*, *1995 FTC Cooling-Off Rule Non-Substantive Amendments*, *supra* note 50, at 54184.

310 *See* WOODHAM, *supra* note 11, at 114, 117

311 *See id.*; *see also* HARVEY & MEISEL, *supra* note 134, at 9 (discussing the importance of competition in this market).

312 WILSON, *supra* 149, at 47.

313 *See* WOODHAM, *supra* note 11, at 114, 117.

314 *See* Isaac Kaplan, *5 Questions to Ask an Auction House before Consigning a Work*, ARTSY (July 31, 2017 5:03 PM), https://www.artsy.net/article/artsy-editorial-5-questions-auction-house-consigning-work (discussing that the deadline to submit a work to auction is between 6 weeks to 3 months depending on the preliminary work the auction house must complete prior to the sale, including publishing an auction catalogue).

315 A reserve is the minimum price at which a consignor agrees to sell a property. SMITH, *supra* note 11, at 140 ("[T]he selling party tends to be in the more dominant position in an art auction. This position of strength is greatly augmented by the fact that the auctioneer will generally protect the seller by setting a reserve price.").

316 Guarantee deals protect consignors by "guaranteeing" their consignment will sell for a good price. WOODHAM, *supra* note 11, at 158. With a guarantee, the auction house makes a promise to pay the consignor a minimum price no matter the results at auction, including if the property fails to sell. *Id*. at 160. Guarantees are like an insurance policy from the auction house. *Id*.

317 Harter-Bachmann, *supra* note 115, at 11 ("Because the auction house is the seller's agent, they offer their expertise and act as an intermediary between the seller and the buyer, balancing the information asymmetry between [consignors] and [winning bidders].").

C. *Unreasonable Sunk Costs of Preparing an Artwork for Sale at Auction*

The economic ramifications of extending the right to withdraw to art auctions include the dramatic decrease in the market value of the artwork and the substantial sunk costs of preparing the auction.[318] Who will bear the costs of administering returns of unwanted artwork? Under the rules, the seller, i.e., auction houses, must absorb these losses.[319] However, it is likely that the costs will ultimately be transferred to the consumer, which would defeat the withdrawal rights' objective of consumer protection.[320]

If a successful bidder were able to freely withdraw at auction, both consumers and the auction house would suffer. Importantly, it is not guaranteed that the same concentration of interested purchasers would bid a second time, and the auctioneer will have lost the opportunity to maximize the sale price of the work for the consignor.[321] Additionally, the auction house will have to internalize the extensive cost of preparing the sale.[322] Furthermore, in order to mitigate costs associated with cancellation, auction houses may opt to reduce the choice of items for sale or increase the vetting process for bidders.[323] This reduction of choice introduces one more inefficiency into this market—now ostensibly less artworks will be auctioned and when auctions do occur, the pieces will be more expensive.[324]

If a consignor were able to withdraw after the auction, similar repercussions would materialize for the bidder and auctioneer. When no notice of the withdrawal right is provided, the rules permit a consignor to return a year or more after the auction took place to cancel the contract.[325] As a result, the auctioneer would be in the

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318 *See supra* Parts II.B.3; III.A.

319 *See supra* Part I.B.

320 *See* Rekaiti & Van den Bergh, *supra* note 1, at 373.

321 *See* Harter-Bachmann, *supra* note 115, at 7.

322 *See supra* Part II.B.3.

323 *See* Rekaiti & Van den Bergh, *supra* note 1, at 383–84 (discussing the harm to consumer that may result from reduced choice).

324 *See id*.

325 In fact, cooling-off periods typically extend indefinitely if the auctioneer concludes that it is not subject to the right of withdrawal and thus fails to provide the consignor both written and verbal notice of the right to cancel. *See, e.g.*, Knight v. Colazzo, No. 24110,

awkward position of either (1) unwinding the sale to return both the consignor and the winning bidder to their positions prior to the sale, (2) refunding the consignor while the winning bidder keeps the goods, or (3) buying back a lot from the winning bidder that was already sold, and which may no longer be commercially viable.[326] Thus, the auctioneer would absorb the lost opportunity costs of the auction, sunk costs of preparing the sale, and the depreciation costs of the artwork. Ultimately, an auction house may respond to these costs by raising prices, reducing their goods and services, or delaying performance, all of which will harm consumers.[327]

Even if notice requirements are met and the cooling-off period is limited to three days, the auctioneer still suffers reliance costs should the consignor "cool off" prior to the auction. By the time the consignment agreement is signed, the auction house has already invested significantly in preparing the sale by vetting the work, pitching marketing proposals, and potentially even shipping the artwork to the salesroom.[328] Yet, free withdrawal means that the seller is not compensated for services already performed.[329]

Proponents of the right to withdraw may argue that to mitigate expenses with regard to the consignor, the auction house could simply provide notice of the right and delay performance until the cooling-off period expires. However, the extended negotiations over the consignment contract often run until the moment the auction catalogue is published.[330] If the sale has already been publicized when the consignor withdraws, the auction house risks reputational harm and lost profits from the embarrassment of losing a

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2008 Ohio App. LEXIS 5521, at **12 (Ohio Ct. App. 2008) (holding a buyer may withdraw from a contract almost six years after services were performed). For a list of states that extend cooling-off periods for lack of notice see infra Appendix A.

326 Depending on when the auction took place, it may be unreasonable to ask the winning bidder, a good faith purchaser, to return the item that they purchased. Valentin, *supra* note 7.

327 *See* Rekaiti & Van den Bergh, *supra* note 1, at 383–84.

328 *See supra* Part II.B.3.

329 *See supra* Part I.

330 Even if the auction is months away, the publication deadline for the catalogue may be within the cooling-off period. *See* Kaplan, *supra* note 314 (discussing deadlines for accepting a work to auction). On the other hand, if the sale is not yet public, it may be easier and less costly for the seller when the consignors cool-off.

consignment.[331] As one art dealer put it: "The auctions' publicity power works against them . . . .[i]f pieces don't sell, everybody knows it right away and they start to worry about the market."[332] In fact, the auction house's very ability to conduct business is put in question.[333]

Further, if the work has been damaged during the cooling-off period, the law is silent on whether the auctioneer may claim restitution for this depreciation in value.[334] Buyers who can easily return products have weakened incentives to handle them carefully while they hold them.[335] However, the free withdrawal policy means that consumers are not generally obligated to pay for depreciation.[336] In light of the substantial costs of administering "returns" in the context of an art auction, the seller's reliance costs should be considered.[337]

In addition, the increased transaction costs in creating custom contracts that comply with notice requirements may result in further harm to consumers. Currently, most contracts with auction houses contain standard terms.[338] Typically, consignment agreements are the only documents negotiated.[339] Even these agreements will

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331 *See* HARVEY & MEISEL, *supra* note 134, at 9 (discussing competition amongst auction houses).

332 Russell Shor, *Spring 2019 Auctions: Premium Prices for Historic Pieces*, GIA (Jun. 14, 2019), https://www.gia.edu/gia-news-research/spring-2019-auctions-premium-prices-historic-pieces.

333 MERRYMAN, *supra* note 192, at 1012.

334 *See* Valentin, *supra* note 7.

335 *See* Ben-Shahar & Posner, *supra* note 16, at 145.

336 *See supra* Part I.

337 *See* Rekaiti & Van den Bergh, *supra* note 1, at 376 (discussing detrimental reliance); Ben-Shahar, *supra* note 291, at 269.

338 *See* Grant, *supra* note 305 (noting that few auction house clients want to negotiate—they would rather have fun and revel in their passion for art or collecting).

339 Generally, terms that are amended include (1) complex financial arrangements (reserves, guarantees, etc.), (2) withdrawal, (3) warranties, (4) termination, and (5) insurance. *See* Grant, *supra* note 305 (discussing a few terms that may be negotiated in standard consignment agreements such as insurance); for a discussion on guarantees see WOODHAM, *supra* note 11, at 41–43; for a discussion on reserves see Rita Reif, *Auctions*, N.Y. TIMES (Aug. 2, 1985) https://www.nytimes.com/1985/08/02/arts/auctions.html [https://perma.cc/VA2J-5QFL]. Typically, withdrawal, in this context is understood as removal of a lot from auction, which usually occurs as a result of misattribution, or other doubts regarding ownership or authenticity. *See* Kaplan, *supra* note 259.

generally only be amended for highly coveted consignments where the auction houses are competing for the same sale.[340] Considering the patchwork of state withdrawal rights, the different treatment of personal and business purchases, and the fact that even the major auction houses only provide for a small number of in-house attorneys, compliance with the rigorous notice requirements for withdrawal rights may be costly.[341] These costs may be reasonably assumed to trickle down to consumers or even prompt auctioneers to leave the market.[342] Because consumers would likely bear the cost of their protection through higher prices, the redistributive goals of free withdrawal may not be achieved.[343]

IV. PROPOSALS FOR REFORM OF U.S. RIGHTS OF WITHDRAWAL

From a consumer protection perspective, applying rights of withdrawal to art auctions is ineffective. Reform of the U.S. rights of withdrawal could solve this problem easily. In the past, Public Auto Auction petitioned the FTC for an exception to the Cooling-Off Rule, which prompted the Commission to categorically exempt auto auctions.[344] In like manner, auction houses could petition the FTC for an exception for art auctions or an even broader exception for the sale of art.[345]

As an alternative to such an industry-wide exception, amendments to the Cooling-Off Rule could reduce the incentives to

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340 *See, e.g.*, WOODHAM, *supra* note 11, at 41–43 (discussing that one of the largest guarantees in auction history was offered by Sotheby's to secure for consignment the sale of Alfred Taubmen's collection, which was highly coveted by their direct competitor Christie's).

341 Cardozo Law School's Art Law Society organized a symposium that included in-house counsel at the world's four major auction houses as speakers, namely Rebecca VanZandt of Phillips, Maggie Hoag of Christie's, Patricia Pernes of Bonham's, and Aimee Scilieri of Sotheby's, who shared that the New York offices of these auction houses only include one to twelve in-house attorneys respectively. Cardozo Art Law Society & FAME Center Annual Symposium: From Consignment to the Auction Block (Mar. 25, 2019).

342 Rekaiti & Van den Bergh, *supra* note 1, at 383, 395.

343 *Id*. at 374.

344 *See* 16 C.F.R. § 429.3(a).

345 Under Section 18(g)(1) of FTCA "[a]ny person to whom a rule under subsection (a)(1)(B) of this section applies may petition the Commission for an exemption from such rule." *See 1987 FTC Cooling-Off Rule Proposed Exemptions*, *supra* note 76, at 29541.

misuse the right of withdrawal.[346] The risk of buyer's opportunism could be addressed by amendments that require the buyer to cover the depreciation cost to the seller[347] or cap the maximum purchase price of transactions that would be subject to the Rule.

If granted, such amendments would hopefully prompt similar reform among the states. Minnesota, Ohio, and Wisconsin have already created an explicit carve-out for auctions.[348] On the other hand, should the Commission decline to amend the regulation, at least there would be certainty regarding the application of the Rule and auctioneers could adjust their business practices accordingly.

A. Creating an Exemption for Art Auction Houses or the Sale of Art

The ideal, most ambitious proposal for reform would provide a straightforward exception for art auctions. The FTC is likely to grant this exception because it is justified by the same reasoning the Commission used when it adopted an exception for auto auctions. In particular, the FTC found that auto auctions do not have the unfair practices which the Cooling-Off Rule was intended to remedy because consumers who intentionally attend an auction can easily escape the sales pitch.[349] Likewise, cooling-off periods do not serve their intended purpose at art auctions because these transactions do not involve the same coercive sales techniques as seen in doorstep sales.[350]

Additionally, this amendment would recognize that auction houses are regulated industries under fiduciary law.[351] Fiduciary obligations are the "highest standard of conduct" under the law.[352] Auctioneers have legal responsibilities to consignors to take care of the goods in their possession and maximize profits from sales, and, to a lesser degree, they also owe a duty to winning bidders to

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346 BOLTON & DEWATRIPONT, *supra* note 280, at 169; Spindler, *supra* note 161, at 732.

347 *See* Ben-Shahar & Posner, *supra* note 16, at 122; Bar-Gill, *supra* note 29, at 790.

348 *See* MINN. STAT. § 325G.06(5) (2018); OHIO REV. CODE ANN. § 1345.21(F)(6) (LexisNexis 2018); WIS. STAT. ANN. § 423.201(1) (LexisNexis 2018).

349 *See 1988 FTC Cooling-Off Rule Final Exemptions*, *supra* note 76, at 45458 n.23.

350 *See supra* Part II.

351 *See* Harter-Bachmann, *supra* note 115, at 11, 44.

352 GERSTENBLITH, *supra* note 119, at 299.

describe the goods accurately.[353] The California consumer protection statute bars consumers from enforcing withdrawal rights against certain types of "regulated professions," including physicians, attorneys, and real estate brokers.[354] The rationale for this exception is that extensive regulations are already in place for these professions; additionally, there are responsibilities inherent in such fiduciary relationships which make the likelihood of fraud or deception less likely.[355] Therefore, it would not be such a radical concept to grant the art auction industry an exception in the same vein. An industry-wide exemption would also simplify the work of the Commission in crafting an amendment, as well as provide a bright-line rule for courts to follow.[356]

Moreover, in the art market, consumer protection is already addressed through other remedies, such as breach of warranty claims in contract, or fraud and misrepresentations claims about authenticity in tort.[357] In addition, several states have enacted comprehensive legislation specific to the art market to deal with

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[353] *See* Cristallina S.A. v. Christie, Manson & Woods Int'l, Inc., 502 N.Y.S.2d 165, 171 (N.Y. App. Div. 1986) (holding that an auctioneer, as an agent to the consignor, has a fiduciary duty "to act in the utmost good faith" in the interest of the consignor). *But see* Brenna Adler, *The International Art Auction Industry: Has Competition Tarnished Its Finish*, 23 NW. J. INT'L L. & BUS. 433 (2003) (discussing that the auction industry has not always adhered to these high standards).

[354] CAL. CIV. CODE § 1689.5(d) (Deering 2018).

[355] *See* Williams v. Kapilow & Son, Inc., 164 Cal. Rptr. 176, 180–81 (Cal. Ct. App. 1980) (holding that the Home Solicitation Sales Act applied to the services of an insurance adjustment firm and that there was a rational basis for the exemptions for regulated professions in the statute).

[356] "A bright-line rule has the advantage of providing clear guidance . . . . Clarity as to what the law requires is generally a good thing." Welch v. Iowa Dep't of Transp., 801 N.W.2d 590, 601 (Iowa 2011).

[357] *See generally, e.g.*, Pasternack v. Essay Art Galleries, 90 F. Supp. 849 (W.D. Ark. 1950) (inducing a buyer to bid at an auction by fraud or misrepresentation will entitle the buyer to rescind the contract); Dawson v. G. Malina, Inc., 463 F. Supp. 461 (S.D.N.Y. 1978) (plaintiff-buyer of allegedly inauthentic ancient Chinese vases brought action for breach of warranty); Balog v. Ctr. Art Gallery-Hawaii, 745 F. Supp. 1556 (D. Haw. 1990) (plaintiff-buyer of allegedly inauthentic Salvator Dali works brought claims of breach of express warranty and fraudulent concealment); Rogath v. Siebenmann, 129 F.3d 261 (2d Cir. 1997) (plaintiff-buyer of allegedly inauthentic Francis Bacon painting brought claims of breach of warranty and fraud against seller); Krahmer v. Christie's, Inc., 903 A.2d 773 (Del. Ct. Ch. 2006) (plaintiff-buyer of allegedly inauthentic Frank Weston Benson painting brought claim of fraud and negligent misrepresentation against seller).

questions of authenticity and art market practices.[358] Intuitively, these remedies are more appropriate in art transactions than cooling-off period rules because, not only were they were designed with market-specific analysis in mind, but also they get to the heart of the dispute and openly address the true source of the conflict.[359] Furthermore, these remedies show that an exclusion for art auctions would not leave the consumer without protection.

In the alternative, a broad exemption for the sale of art would follow the logic of behavioral economics scholars who argue that regulation based on market-specific analysis provides for the optimal contract.[360] As mentioned above, art exists in its own "economic microcosm," such that a cancelled sale "burns" the art and causes material harm to unique items.[361] This market-specific analysis suggests that, on balance, withdrawal rights do more harm than good in art transactions.[362] Empirical research into whether a significant number of buyers are exercising the right to withdraw at art auctions and whether this outstrips otherwise successful sales may be useful in further evaluating the net harm to the industry. Further, while a definition for "art" may be difficult to craft, it is not impossible, as illustrated by existing art market specific legislation.[363]

B. Requiring Consumers to Cover the Cost of Cancellation

A more modest proposal for reform would at least reduce the costs of withdrawal rights and the potential for abuse of these rights. There are a number of cases which demonstrate that the withdrawal right is being exploited.[364] In auction-related cases, disputes arose when a consumer claimed to be dissatisfied with the services received.[365] Thus, rather than cooling-off rules serving their purpose—to provide a cooling-off period to buyers—it has been

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358 *See, e.g.*, FLA. STAT. §§ 686.504-505 (LexisNexis 2018); IOWA CODE §§ 715B1-B4 (2018); N.Y. ARTS & CULT. AFF. LAW §§ 11.01-16.01 (2018).

359 *See supra* Parts I.A.2; II.C.2.

360 *See supra* Part I.A.2.

361 *See supra* Part II.A.

362 *See supra* Part III.

363 *See, e.g.*, N.Y. ARTS & CULT. AFF. LAW §§ 11.01–16.01.

364 *See supra* Part II.C.2.

365 *See supra* Part II.C.2.

transformed into a satisfaction-guarantee right.[366] If the purpose of the rules are to give consumers protection against high pressure door-to-door sales by providing them time to cancel these contracts, then the effect of the rules does not match with this purpose.

An amendment that requires consumers to compensate sellers for the diminished value of the goods and sunk costs through depreciation loss or cancellation fees could minimize abuses of the right to withdraw, such as moral hazard, and still protect the consumer.[367] Even advocates for withdrawal rights have recognized that the optimal contract includes a balancing of the buyer's gain with the seller's loss.[368]

Depreciation costs could fully account for the diminished market value of art subject to cancellation. However, the drawback of depreciation costs is that they are often difficult to calculate,[369] which makes a general exception for art or art auctions an easier remedy to implement.[370] When an artwork fails to sell, the best way to determine its depreciation in value is through the market's response.[371] This calculation may not be available until the work is resold, if it can be resold.[372] A solution could be to use the average depreciation value put forth by studies, i.e., 27–33%.[373] Yet, this average may fluctuate largely, depending on the specific work of art and the circumstances of the cancelled sale.[374] Hence, alternatively, as Omri Ben-Shahar has suggested, time could be used as a proxy for depreciation.[375]

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366 *See supra* Part I.

367 Rekaiti & Van den Bergh, *supra* note 1, at 382 (noting that the moral hazard problem could be deterred by imposing depreciation costs on the consumer).

368 *See* Ben-Shahar & Posner, *supra* note 16, at 121; *see also* Rekaiti & Van den Bergh, *supra* note 1, at 394 ("As long as such a penalty imposed on the consumer deciding to withdraw from the . . . agreement can be justified as a counterpart to the costs incurred by the [seller] it may be considered . . . efficient.").

369 *See BI Report*, *supra* note 2.

370 *See* Ben-Shahar & Posner, *supra* note 16, at 138, 144 (discussing that withdrawal rights are ill suited to markets where depreciation is difficult to measure).

371 *See BI Report*, *supra* note 2.

372 *See id*.

373 *See id*; *see also* Beggs & Graddy, *supra* note 126, at 18, 20.

374 *See* Beggs & Graddy, *supra* note 126, at 22.

375 *See* Ben-Shahar & Posner, *supra* note 16, at 122.

Because depreciation costs are difficult to calculate, a set cancellation fee might be a more practical solution.[376] A number of states already provide for liquidated damages clauses or cancellation fees for sellers when a buyer exercises the right to withdraw.[377] Unfortunately for sellers, these provisions could currently be preempted by the federal regulation.[378] Therefore, it would make sense to harmonize the federal regulation with state statutes by amending the regulation to include a cancellation fee.

Without an explicit amendment for cancellation fees or depreciation costs, consumers may inevitably bear the cost of "free" withdrawals. In practice, the costs sellers expect to suffer as a result of regulation generally translates into higher prices.[379] Ultimately, the buyer will pay more up front as insurance against a poor purchase.[380] Thus, ironically, the buyer is made worse off by the right to free withdrawal as a result of the seller's price increase.[381] Therefore, not only do free withdrawals create inefficiency in the art market,[382] but in practice they actually undermine the redistributive objective of the withdrawal policy.[383] Clearly, it is in the consumer's best interest for the FTC to prescribe a specific percentage cancellation fee or provide for a method to calculate depreciation costs.

C. Excluding Transactions Over a Maximum Purchase Price

Alternatively, amending the Cooling-Off Rule to cap the maximum purchase price of transactions subject to the right of withdrawal would be another way to minimize buyer's opportunism. A cap would encourage consumers to develop rational purchase behavior when they are involved in complex and high-value

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376 *See id*.

377 Andrew Randol, *Ohio's Home Solicitation Sales Act: Consumer Protection Overreach*, 10 OHIO ST. BUS. L.J. 73, 86 (2015) (noting that Arizona, Georgia, Louisiana, Mississippi, Oklahoma, and Rhode Island all have statutes that provide for liquidated damages clauses or cancellation fees for sellers when a buyer exercises the right to withdraw).

378 *See supra* Part I.B.

379 *See* Ben-Shahar & Posner, *supra* note 16, at 122.

380 *Id*. at 129.

381 *Id*.

382 *Id*. at 122.

383 *Id*. at 130.

transactions. As the 2008 financial crisis shows, irrational spending harms not only consumers, but can also devastate economies.[384]

Generally, the purchase of relatively inexpensive goods is held to a lesser standard of care and consumers do not give much thought to the transaction because they often capitulate to impulse buys.[385] Yet, art auctions involve carefully curated pieces with a historic past that are expected to reach record prices.[386] Such transactions should be held to a higher standard of care. Buyers over a certain maximum threshold would merely be asked to exercise more care and precision in their purchases for these valuable items.[387] Thus, setting a limit on transactions subject to cancellation would encourage more efficiency in the market.

Indeed, transactions in the art trade demand due diligence.[388] Consumers in this market need to confirm authenticity and assess price accuracy, in addition to evaluating their personal use value and

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[384] *See* Andy Hira, *Irrational Exuberance: An Evolutionary Perspective on the Underlying Causes of the Financial Crisis*, 48 INTERECONOMICS 116, 121 (2013).

[385] Bar-Gill, *supra* note 29, at 758.

[386] Auction houses sell items in the following categories: fine art, decorative arts (e.g., furniture, ceramics), and luxury goods (e.g., jewelry, watches, wine, handbags). WOODHAM, *supra* note 11, at 11; *see also* Nate Freeman, *The 20 Most Expensive Artworks Sold at Auction in 2018*, ARTSY (Dec. 24, 2018), https://www.artsy.net/article/artsy-editorial-20-expensive-artworks-sold-2018 (last visited Feb. 17, 2020) (noting that the sale of Kerry James Marshall's *Past Times* (1997) for $21.1 million was not even within the top 50 most expensive artworks sold in 2018).

[387] *See* Bar-Gill, *supra* note 29, at 758.

[388] Purchasers have a right to inspect goods for sale at auction previews. LEONARD D. DUBOFF ET AL., THE DESKBOOK OF ART LAW M-70 (2008). In fact, because goods at auction are sold "as is," buyers are highly encouraged to do so. *Id.* Auction house conditions of sale typically contain a disclaimer, warning purchasers to personally inspect lot items. *See, e.g.*, *Conditions of Online-Only Sale*, *supra* note 5, at 2 ("Prospective buyers acknowledge this fact and accept responsibility for carrying out inspections and investigations to satisfy themselves as to the lots in which they may be interested."). In *Christie's Inc. v. Dominica Holding Corp*., the court noted that buyers have heightened duties of due diligence when an auctioneer includes a disclaimer to examine property. Christie's Inc. v. Dominica Holding Corp., 2006 WL 2012607, at *15 (S.D.N.Y. 2006). The Supreme Court of New York has also found that sophisticated buyers operating in the top price brackets should conduct due diligence. MAFG Art Fund, LLC v. Gagosian, 123 A.D.3d 458, 459 (N.Y. App. Div. 2014).

the intrinsic value of the artwork prior to a purchase.[389] Thus, capping the price of transactions subject to the right would provide an incentive for buyers in this market to act according to industry practice.[390] Buyers in the art market already tend to come from a highly discerning group.[391] Art auctions particularly attract a group of buyers who are knowledgeable about art and experienced with traditional auction principles.[392] Therefore, it would not be difficult for consumers to adjust to such an amendment of the withdrawal right.

Although a boundary may be hard to set for the Commission, it does not follow that no cap should be added to withdrawal rights. Research into the optimum cost-benefit function, similar to that used to set the minimum threshold, would help in determining the ideal cap. Incidentally, the minimum threshold requirement was primarily included in the Rule as a result of industry lobbying to protect the livelihood of route salesmen, such as milkmen, who provided essential services or products.[393] Thus, the lack of any current maximum limit could mean a few different things. Perhaps the Rule's drafters were in fact concerned about large sales, or they did not think that door-to-door sales would encompass high value transactions. Or perhaps they simply failed to consider the need for an exclusionary cap, which artworld stakeholders could now make clear to the Commission.

CONCLUSION

The extension of withdrawal rights to the sale of art at auction would be detrimental not only to the value of the artwork on the auction block, and the auction house, but most importantly, to the consumer. This result in the art market can be attributed to the fact that regulators neglected relevant market-specific insights when

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389 *See* MERRYMAN, *supra* note 192, at 965. Two different types of due diligence are usually performed: (1) legal, regarding ownership; and (2) artistic, including authenticity and provenance. *See id*.

390 The use of an art advisor or art consultant is a common practice in the art market. *See id*. at 970.

391 *See* SMITH, *supra* note 11, at 69.

392 *See id*.

393 *FTC Cooling-Off Rule Statement of Basis and Purpose*, *supra* note 31, at 22945–46.

drafting the rules, which suggests the need for new approaches to regulation.

Despite a plausible application of withdrawal rights to art auctions, the FTC should amend the Cooling-Off Rule to clearly exclude art auctions. Art auctions differ from other markets where door-to-door sales are prevalent in terms of the valuation of goods, the sales practices, as well as the relative sophistication and bargaining power of contracting parties. The effects of extending cooling-off rules to this market do not comport with the intended purpose of these rules to protect against high-pressure home solicitation sales. An industry-wide exception for art auctions is the best solution because it not only responds to the intended purpose of cooling-off rules, but also acknowledges that art is incompatible with the right to cancel. Further, there is a high likelihood that the FTC would adopt an exclusion for art auctions because it has already excluded auto auctions using the same purpose-based argument.

At minimum, the FTC should amend the Rule to discourage buyer's opportunism and the use of withdrawal as a satisfaction guarantee right. Imposing a cancellation fee or a cap will correct incentives while still protecting consumers by giving them a cooling-off period. These amendments are both relatively simple to adopt: all that would be needed is research into the optimal cost-benefit functions and the political will to accomplish the objective. However, while these solutions will prevent abuse, they fall short of addressing the fundamental incompatibility of the right to cancel with art sales.

Consumer protection law should respond to the particular behavior of people who enter bargains within the context of their promises, which includes the art market. Otherwise, consumer protection law will only end up hurting the people it is supposed to help. Given the tremendous potential costs of inaction and the ease of reform efforts, auction houses should not hesitate to make this reform a reality by petitioning for an industry-wide exception.

Traditionally, the legal system has misunderstood specialized areas of the law like art. In this respect, Justice Oliver Wendell Holmes has acknowledged the lack of expertise of the judge and jury, and the limitations of litigation in achieving the objectives of

an art dispute.[394] To solve this problem a team of creative New York-based art lawyers developed a new forum dedicated exclusively to resolving art-related disputes, the Court of Arbitration for Art.[395] As this example illustrates, it is upon stakeholders in the artworld to proactively develop new approaches to regulation of the right to withdraw as it relates to art transactions.

[394] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

[395] *See About Us*, COURT OF ARBITRATION FOR ART, https://www.cafa.world/cafa/ [https://perma.cc/Z7DB-CZP7].

APPENDIX A

Jurisdiction	Withdrawal Right	Cooling-off Period Begins	Relevant Exceptions*
Federal	16 C.F.R. § 429 (2015)	at execution of contract	• sale made pursuant to prior negotiations at seller's business premises • mail or phone sales • real estate sales • automobile sales at auction • arts and crafts sales at fairs
Alabama	ALA. CODE § 5-19-1 and 5-19-12 (LexisNexis 2018)	with notice (or up to 1 year after execution of contract)	• sale made pursuant to prior negotiations at seller's business premises
Alaska	ALASKA STAT. § 45.02.350 (2018)	at execution of contract	• sale made pursuant to prior negotiations at seller's business premises • sales by mail
Arizona	ARIZ. REV. STAT. ANN. §§ 44-5001 to 44-5008 (2018)	at execution of contract	• sale made pursuant to prior negotiations at seller's business premises
Arkansas	ARK. CODE ANN. §§ 4-89-101 to 4-89-110 (West 2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • sales by mail
California	CAL. CIV. CODE §§ 1689.5 to 1693 (Deering 2018)	with notice	• services of attorneys, real estate brokers, securities dealers, physicians, optometrists, dentists, banks, savings institutions, credit unions, industrial loan companies, personal property brokers, consumer finance lenders
Colorado	COLO. REV. STAT. §§ 5-3-401 to 5-3-405 (2018)	with notice (or up to 3 years after execution of contract)	• sale made pursuant to prior negotiations at seller's business premises • sales by mail or phone

Jurisdiction	Withdrawal Right	Cooling-off Period Begins	Relevant Exceptions*
Connecticut	CONN. GEN. STAT. §§ 42-134a to 42-143 (2018)	at execution of contract	• sale made pursuant to prior negotiations at seller's business premises • sales by mail or phone • real estate sales
Delaware	DEL. CODE ANN. tit. 6, §§ 4401 to 4407 (2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • buyer-initiated mail or phone sales • real estate sales
District of Columbia	D.C. CODE § 28-3811 (2003)	with notice	• sale made pursuant to prior negotiations at seller's business premises
Florida	FLA. STAT. ANN. §§ 501.021 to 501.055 (LexisNexis 2018)	at execution of contract	• sale made at any fair or similar commercial exhibit • sales by phone or catalog • buyer-initiated sales
Georgia	GA. CODE ANN. § 10-1-6 (2018)	at execution of contract	N/A
Hawaii	HAW. REV. STAT. ANN. §§ 481C-1 to 481C-6 (LexisNexis 2018)	at execution of contract	• sale made pursuant to prior negotiations at seller's business premises • sales by mail
Idaho	IDAHO CODE § 28-43-401 to 28-43-405 (2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • sales by mail or phone
Illinois	815 ILL. COMP. STAT. ANN. 505/2B (LexisNexis 2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • sales by mail or phone • real estate sales
Indiana	IND. CODE ANN. §§ 24-4.5-2-501 to 24-4.5-2-502 and IND. CODE ANN. §§ 24-5-10-1 to 24-5-10-18 (LexisNexis 2017)	with notice	• sale made pursuant to prior negotiations at seller's business premises • sales by mail or phone

Jurisdiction	Withdrawal Right	Cooling-off Period Begins	Relevant Exceptions*
Iowa	IOWA CODE ANN. §§ 555A.1 to 555A.6 (2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • sales by mail or phone • real estate sales
Kansas	KAN. STAT. ANN. § 50-640 (2018)	with notice	• sales by mail or phone • real estate sales
Kentucky	KY. REV. STAT. ANN. §§ 367.410 to 367.460 (LexisNexis 2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises
Louisiana	LA. STAT. ANN. §§ 9:3538 to 9:3541.1 and § 9:2711.1 (2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • catalog sales
Maine	ME. REV. STAT. tit. 9-A, §§ 3-501 to 3-507 (2018) and ME. REV. STAT. tit. 32, §§ 4661 to 4671 (2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises
Maryland	MD. CODE ANN., COM. LAW §§ 14-301 to 14-306 (LexisNexis 2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • sales by phone or mail • real estate sales
Massachusetts	MASS. ANN. LAWS ch. 93, § 48 (LexisNexis2018) and MASS. ANN. LAWS ch. 255D, § 9 (LexisNexis 2018)	with notice	N/A
Michigan	MICH. COMP. LAWS SERV. §§ 445.111 to 445.117 (LexisNexis 2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • real estate sales
Minnesota	MINN. STAT. §§ 325G.06 to 325G.11 (2018)	at execution of contract	• auctions • sale made pursuant to prior negotiations at seller's business premises • real estate sales

Jurisdiction	Withdrawal Right	Cooling-off Period Begins	Relevant Exceptions*
Mississippi	MISS. CODE ANN. §§ 75-66-1 to 75-66-11 (2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • buyer initiated sales
Missouri	MO. REV. STAT. §§ 407.700 to 407.720 (2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • real estate sales
Montana	MONT. CODE ANN. §§ 30-14-501 to 30-14-508 (2018)	with notice	• buyer initiated sales
Nebraska	NEB. REV. STAT. ANN §§ 69-1601 to 69-1607 (LexisNexis 2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • sales by mail or phone • real estate sales
Nevada	NEV. REV. STAT. ANN. §§ 598.140 to 598.2801 (LexisNexis 2018)	at execution of contract	• sale made pursuant to prior negotiations at seller's business premises • real estate sales • sales by mail
New Hampshire	N.H. REV. STAT. ANN. §§ 361-B:1 to 361-B:3 (LexisNexis 2018)	at execution of contract	N/A
New Jersey	N.J. STAT. ANN. §§ 17:16C-61.1 to 17:16C-61.9 (LexisNexis 2018)	with notice	• sales by mail or phone • catalog sales
New Mexico	N.M. STAT. ANN. § 57-12-21 (LexisNexis 2018)	with notice (telephone initiated sales)	• sale made pursuant to prior negotiations at seller's business premises • real estate sales
New York	N.Y. PERS. PROP. LAW §§ 425 to 431 (Consol. 2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • sales by mail or phone

Jurisdiction	Withdrawal Right	Cooling-off Period Begins	Relevant Exceptions*
			• real estate
North Carolina	N.C. GEN. STAT. §§ 25A-38 to 25A-45 (2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • sales where buyer has previously engaged in similar transactions with seller • if seller has begun performance
North Dakota	N.D. CENT. CODE §§ 51-18-01 to 51-18-09 (2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises
Ohio	OHIO REV. CODE ANN. §§ 1345.21 to 1345.28 (LexisNexis 2018)	with notice	• auctions • sale made pursuant to prior negotiations at seller's business premises • real estate sales • buyer initiated mail or phone sales
Oklahoma	OKLA. STAT. tit. 14A, §§ 2-501 to 2-505 (2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • real estate sales • if seller has begun performance
Oregon	OR. REV. STAT. ANN. §§ 83.710 to 83.750 (LexisNexis 2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • real estate sales • if seller has begun performance • sale of arts and crafts at a fair

Jurisdiction	Withdrawal Right	Cooling-off Period Begins	Relevant Exceptions*
Pennsylvania	73 PA. STAT. AND CONS. STAT. ANN. § 201-7 (LexisNexis 2018)	with notice	• real estate sales
Rhode Island	6 R.I. GEN. LAWS §§ 6-28-2 to 6-28-8 (2018)	with notice	• real estate sales
South Carolina	S.C. CODE ANN. §§ 37-2-501 to 37-2-506 (2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • sales by mail or phone • if seller has begun performance
South Dakota	S.D. CODIFIED LAWS §§ 37-24-5.1 to § 37-24-5.7 (2018)	at execution of contract	• sale made pursuant to prior negotiations at seller's business premises • real estate sales • sales by mail or phone
Tennessee	TENN. CODE ANN. §§ 47-18-701 to 47-18-708 (2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • real estate sales • if seller has begun performance
Texas	TEX. BUS. & COM. CODE ANN. §§ 601.051 to 601.205 (LexisNexis 2018)	at execution of contract	• sale made pursuant to prior negotiations at seller's business premises • real estate under $100
Utah	UTAH CODE ANN. §§ 70C-5-101 to 70C-5-105 (LexisNexis 2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • if seller has begun performance
Vermont	VT. STAT. ANN. tit. 9, §§ 2451(a) and 2454 (2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • sale by phone or mail

Jurisdiction	Withdrawal Right	Cooling-off Period Begins	Relevant Exceptions*
			• real estate sales
Virginia	VA. CODE ANN. §§ 59.1-21.1 to § 59.1-21.7:1 (2018)	with notice (when waiver of right induced by seller)	• sale made pursuant to prior negotiations at seller's business premises • if seller has begun performance
Washington	WASH. REV. CODE ANN. § 63.14.154 (LexisNexis 2018)	at execution of contract	NA
West Virginia	W. VA. CODE ANN. §§ 46A-2-132 to 46A-2-135 (LexisNexis 2018)	with notice	• if seller has begun performance
Wisconsin	WIS. STAT. ANN. §§ 423.201 to 423.205 (LexisNexis 2018)	with notice	• auctions • catalog sales • real estate sales
Wyoming	WYO. STAT. ANN. § 40-12-104, §§ 40-14-251 to 40-14-255 (2018)	with notice	• sale made pursuant to prior negotiations at seller's business premises • if seller has begun performance • buyer initiated sale by phone or mail

*Note that not all exclusions/exceptions under the rights of withdrawal are included in the above chart; only those that may be relevant to art auctions have been included.

APPENDIX B

Industry	**Number of Cases**
Home construction and improvement	336
Home appliance	20
Loan	62
Insurance	15
Automotive	9
Auction and/or art related	6
Legal Services	5
Unknown	4
Education, textbooks and magazine subscriptions	3
Miscellaneous*	44
Total Cases	515

* Miscellaneous category is composed of those cases for which only one to two cases fit a specific industry, such as clothing, arcade video games, baby products, and cosmetics.