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PERSPECTIVE

Protections for memorabilia collectors

By Andrew Wong, Brian Sanchez and Nathan Davis

We've all seen the scenes on television: someone walks into a pawn shop or sports memorabilia store and offers to sell a baseball signed by Babe Ruth or a photo signed by Michael Jordan. An autograph expert is called in, looks at the item, and declares dramatically to the cameras, "Sorry, this is a fake." Dramatic music plays over looks of surprise and disappointment from the would-be sellers. End of scene.

We never find out what follows on television. But one answer could be a lawsuit. In California, there is a powerful, yet little-known statute designed to help the unwitting consumer. California's Autographed Sports Memorabilia statute, codified at Civil Code Section 1739.7 and enacted in 1992, protects consumers who purchase autographed collectibles from dealers by requiring dealers to provide a certificate of authenticity for any autographed collectible sold.

Passed at the height of the sports card and memorabilia craze in the early 1990s, the purpose of the statute was to help consumers maximize their chances of receiving a genuine autograph. Requiring dealers to issue certificates of authenticity would offer greater assurances to consumers regarding an item's authenticity and deter those considering selling forged items.

The statute has been substantively amended twice since its enactment. Both times, the Legislature broadened the statute's scope and increased the severity of the penalties for statutory violations. In 1995, the Legislature extended the term "dealer" to include those who engaged in mail, telephone and cable television sales of sports memorabilia to address the shop-at-home sales of sports memorabilia, and expanded the term "collectible" to include any item signed by a celebrity, including historical and entertainment figures. The 1998 amendments lowered the qualifying sales price of an item from \$50 to \$5, dramatically increased the civil penalty recoverable by a consumer for violations of the statute to 10 times the amount of actual damages, and allowed additional damages based on the egregiousness of the dealer's conduct (in addition to the attorney fees and costs provisions already included).

Did this statute and the amendments lead to a flurry of consumer lawsuits as has been seen with other consumer protection statutes? Hardly. Since its enactment, only two published cases have discussed the Autographed Sports Memorabilia statute although neither has squarely dealt with the consumer protection issue.

In *Gentry v. eBay Inc.*, 99 Cal. App. 4th 816 (2002), the 4th District Court of Appeal clarified the scope of the term "dealer" in the statute, finding that eBay was not a dealer. In that case, purchasers of fraudulently autographed sports collectibles brought claims on behalf of a putative class against eBay for, among other things, failing to furnish certificates of authenticity as required by the statute. This case arose from the famous FBI-led investigation "Operation Bullpen," resulting in the seizure of over \$10 million in forged memorabilia.

The plaintiffs could not establish that eBay was a dealer under the statute because "section 1739.7 requires that the dealer be exclusively or nonexclusively 'in the business of selling or offering for sale collectibles in or from this state'" and eBay was "not in the business of selling" the sports collectibles, but only provided a "venue" for their sale. *Gentry* also held that the plaintiffs' claims under Section 1739.7 were preempted by Section 230 of the Communications Decency Act which "immunizes providers of interactive computer services ... and their users from causes of action asserted by persons alleging harm caused by content provided by a third party." Thus, "No cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with [Section 230]," and "no provider of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

The other case, *Upper Deck Authenticated Ltd. v. CPG Direct*, 971 F.Supp 1337 (S.D. Cal. 1997), did not deal directly with the scope of the consumer protections included in the statute or a wronged party's remedies either. It does, however, provide guidance about the requirements for compliance.

In that case, Upper Deck claimed that a competing sports memorabilia company committed numerous unfair business practices, including violating

Upper Deck's "exclusive rights" to sell signatures and memorabilia of certain athletes. Upper Deck also alleged a violation of the certificate of authenticity requirement of Section 1739.7 as the predicate for its unfair business practices claim. The court found that dealers must (1) satisfy the facial requirements of the statute, and (2) have a reasonable basis in fact for believing that an item of autographed sports memorabilia is authentic. Merely requiring facial compliance with the statute would "eviscerate the effectiveness of the statute." Given the need for heightened consumer protection under Section 1739.7, "to give Section 1739.7 some enforcement teeth, the warranty must have a substantive foundation."

The *Upper Deck* court appeared to set stringent requirements for compliance under the statute. For example, while the court noted that the language defining "express warranty" in Section 1739.7 tracks that of the UCC provisions in Commercial Code Section 2313, it suggests that the Autographed Sports Memorabilia statute imposes a stricter warranty requirement. The statute enforces express warranty provisions even when a statement about the authenticity of a collectible "is or purports to be ... merely the dealer's opinion." The court appeared to mandate that, while a dealer does not have to witness the signing nor follow a particular methodology for ensuring the authenticity of an item, "dealers cannot escape civil liability simply by affixing an express warranty to an autographed sports collectible."

Since *Upper Deck*, there have been no published cases that discuss the requirements or protections provided under the statute. However, a lawsuit filed in 2011 in New Jersey federal court is instructive in demonstrating how Section 1739.7 can potentially be a dangerous pitfall for the unwary sports memorabilia dealer in California.

In April 2011, Corey Shanus filed an action for fraud and breach of contract against Robert Lifson and his auction house, Robert Edward Auctions. *Shanus v. Robert Edward Auctions LLC*, No. 2:11-cv-2839 (D.N.J. filed April 4, 2011). Shanus claims he purchased several high-end memorabilia items from defendants between 2003 and 2007 (totaling more than \$300,000) in reliance on defendants' affirmative repre-

sentations regarding their authenticity. Shanus alleges that Lifson was privy to information that should have led him to question whether the items were genuine, including a statement by a professional authenticator that there were "serious questions" regarding the authenticity of items. Defendants denied they had knowledge of any authenticity issues, and claimed in their responsive pleadings that any claims regarding authenticity are precluded by the express warranty provisions contained in the "Terms and Conditions" provisions of the auction house rules.

The *Shanus* case is ongoing, but it highlights the potential for consumers to use California's Autographed Sports Memorabilia statute against dealers of sports and other collectible memorabilia in the state. A dedicated sports memorabilia auctioneer such as Robert Edward Auctions would likely fall within the statute's broad definition of a dealer. If so, the dealer would then have to establish a reasonable basis in fact for the authenticity of each item that it sold. It is clear, at least in California, the auction house would have to do more than simply say it is authentic without anything more. In cases where there were "questions" regarding the authenticity of an item, there would be serious issues regarding whether the auctioneer should even accept the consignment and commission fee. Ultimately, consumers who believe they may have purchased forged memorabilia in these circumstances could pursue those dealers and potentially recover treble damages and even additional discretionary damages. Memorabilia dealers in California will need to strictly monitor compliance with the statute to ensure that they are not exposed to civil liability.

So, the next time you see a television show and wonder what happened when the sports memorabilia item was declared fake, remember that it might just lead to another lawsuit in California.



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