

LEGAL RECOURSE FOR FAKES AND REPRODUCTIONS

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When people know that I am an attorney, one question that I get asked from time to time is some variation of “I think that I bought a fake. Do I have any rights of recovery?” Perhaps, not surprisingly, the answer is that it depends very much on the circumstances.

The first place for protection for relics purchased at a show is the rules for that particular show, if any. The G.I.R.S. has adopted a resolution dated March 7, 2014, which applies to G.I.R.S. shows. That resolution appears near the front of every **Prehistoric American** Journal. It states: *The Society requires any member who sells any artifact at a Society show to refund fully the amount paid by the buyer at any time for any reason whatsoever during the official hours of the Society show on the date when the transaction occurred, provided such artifact is in the same condition in which it was sold.* Any failure of a seller to comply with this rule should promptly be reported to a Society officer.

Second, any sale of a relic is a contract for the sale of a good, just like the purchase of an automobile or a refrigerator, and the buyer has certain legal rights both for express warranties and warranties implied at law. I recognize that 99+% of relics are purchased with a handshake and exchange of money. However, it is still a contract. The statements made by the seller can constitute a warranty, so that “I know this is old and if you ever don’t agree just bring it back” is enforceable. Lots of relics have been returned just on this basis. I have also heard of a seller who would state: “It’s a beautiful point” but would only answer whether he believed it was old if specifically asked. For many other sellers, their word is their bond, and items have been returned long after they were purchased. This shows the importance of knowing with whom you are dealing. Ask around, and if you are not

comfortable, document the right to return.

There are also certain warranties implied by law. The most important of these is the implied warranty of merchantability. This states that the item must be “reasonably fit for its ordinary purpose”. If an item is described as a Hardin Barb, the description of the item which you are relying on is not that “it is a pretty piece of flint in the general shape of a Hardin Barb” but rather that it is an item which meets the description contained in reference books, such as the Perino books, as having been made in the Archaic period; that is to say, it is old.

In every case, if you bring a contract claim, the issue with which you are going to have to deal is one of proof. There is the classic story of the advertiser in the old *Hobbies Weekly* magazine who advertised that the arrows that he was selling were “guaranteed Indian made” because he had them made on a reservation the week before! More likely is the situation where the seller does not recall having made that money back offer or counters it with “Well you think it’s new but it looks old to me.” or even “Well your authenticator says it’s new but mine says it’s old.” The best remedy is to deal in the open and with people that you know or have been recommended by people you trust. Also, if you want that second opinion, obtain it as quickly as you can. If the transaction is handled through the mails, rather than in person, use that opportunity to document in writing, as part of the correspondence, your rights and confirm that you have the right to return it within so many days, or that a mutually agreed person will look at it.

One case of relics being sold under written contracts that almost every collector has dealt with is an auction. Almost every auction has rules. Those rules are your written contract. I have seen variations between and among “return for any reason within (x) days”, to “return within (x) days if certain people decline to paper it”, to “AS-IS”. “As-is” is a phrase that every collector needs to know. It basically means that there are no warranties whatsoever on the item being sold. You will see this phrase often used at estate sales and the like, where

the purpose is to simply get rid of everything—no questions asked. I have also seen “as-is” signs posted at flea markets and similar venues, where the owner probably does not have any idea as to the authenticity of what he is selling and, if pressed, will say “I have no idea what it is. I bought it from someone who said that he found it.” Your chance of getting your money back in those circumstances is slim to none. So before placing any bids at an auction, read the auction rules, and if you have any questions, ask them before you place your bid!

In any case, what the law seeks to protect is the fundamental nature of what is sold. It is not going to protect you from the statement “This is the best Hardin Barb for sale in the room today”; nor do I think that they would try to sort out whether a piece was made of Fort Payne or Dover chert; or whether a triangular bird point is a Hamilton, or some other variation of triangular points.

The third possible legal basis to recover is under the law of tort. Most people think of tort as covering automobile accidents and personal injuries (the sorts of things that you see lawyers advertising about on TV). However, there are also torts of both “fraudulent and negligent misrepresentation”. The difference between the two is that fraudulent misrepresentation requires that the seller knew that a statement was false when he made it, while negligent misrepresentation only requires that he should have known it was false. Again this comes down to a matter of proof with it obviously being harder to show that someone “knew” what he sold was a reproduction versus “should have known” that it was. In either case, the evidence needs to be “clear, cogent, and convincing”. In any case, you only have a set period of time to bring a claim, which period varies state by state.

I am only aware of one significant matter which was litigated that concerned (alleged) reproductions. That matter was settled prior to trial. There may be others that have been resolved and never came to light, either because the seller wanted to preserve his reputation or the buyer was embarrassed to admit to the purchase. And, as you can imagine, the legal costs associated with any litigation can be significant. But I do think that it is something that, as larger and larger amounts of money are spent on relics, we can expect to see more of these sorts of actions in the future. As both a buyer and a seller, you need to understand the laws that apply to your transactions.

AUTHOR'S NOTE: The legal quotes in this article are from the Uniform Commercial Code and the Restatement of Torts, which form a basis of the law in 49 of the 50 states. That being said, every state's laws have some differences from these general standards—especially in regards to how long after the purchase a legal action must be brought—and anyone considering a legal action should look to the specific laws of the state where the purchase was made. Due to Louisiana's Spanish and French heritage, the laws in that state have more substantial differences. However, the legal result should basically be the same.

In any case, if you believe that you have a claim, the value of obtaining proper and timely professional advice cannot be underestimated.



Collectors: We plan on publishing more articles related to fakes, frauds, and the like in the future. You may join the Genuine Indian Relic Society, Inc. for \$30 and receive all four Journals for 2018.

Go online—
www.PrehistoricAmerican.net (PayPal only)

Or send a check to:
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Collectors: One of the primary goals of the G.I.R.S. is to combat the spread of fraudulent and altered relics in our hobby:

Statement of Purpose: The specific purpose of this non-profit national Society is to promote friendship and trust among persons interested in the collection and preservation of **legally obtained** genuine prehistoric North American Indian artifacts by providing a medium of informational and educational exchange through the regular publication of journals; taking a firm and vigorous stand in opposing the display, sale, or distribution of questionable, **illegally obtained**, or fraudulent artifacts at Society meetings or elsewhere; and conducting regular meetings to transact business and to encourage the display of, and dissemination of knowledge about, such **legally obtained** artifacts.