

2015

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Maureen Collins
John Marshall Law School

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PENSIONS OR PAINTINGS?

The Detroit Institute of Arts from Bankruptcy to Grand Bargain

Maureen B. Collins*

This article examines the issues faced by the City of Detroit and the Detroit Institute of Arts when Detroit filed for municipal bankruptcy. Creditors called for the sale of the highly esteemed DIA art collection to pay outstanding municipal pension obligations. The DIA and the Michigan Attorney General viewed the collection not as an asset, but as a charitable public trust. Simply put, the City faced the question of what mattered most – pensions or paintings? Along the way, the parties and courts struggled with valuation of the art collection, a history of judicial decisions and lawmaking regarding charitable trusts with a public purpose, and the interplay of these issues with municipal bankruptcy law.

Ultimately, the parties were able to reach a “grand bargain” that was the result of creative legal thinking and remarkable philanthropy. At the behest of a bankruptcy judge, a group of philanthropists came up with a plan to donate large sums of money to the DIA, who would in turn donate to the pension fund. As a result, the collection was preserved, its legal ownership was clarified, and the pension obligation was significantly reduced.

The article calls for cultural and other charitable institutions like the DIA to conduct an audit of the legal title of their assets,

* The author is an Associate Professor of law at The John Marshall Law School and a native Michigander. She wishes to thank Kevin Ray of Greenberg Traurig, LLP for his wise counsel and encouragement. She also wishes to thank Priyavathi Reddy for her research assistance and the law school for its support of her scholarly endeavors.

suggests that professional museum organizations articulate a policy against the use of art as a municipal asset and establish penalties for violations of that policy, and encourages others similarly situated to look outside of established norms for solutions to thorny issues with legal, social and cultural ramifications.

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Under what circumstances should art be monetized to alleviate staggering municipal debt? To put it another way, what matters most: pensions or paintings? These were the questions faced by the City of Detroit (the “City”) recently as it juggled scarce resources in an effort to

resolve its municipal bankruptcy. When the City filed for Chapter 9 bankruptcy,¹ its creditors demanded that the highly regarded collection of the Detroit Institute of Arts (the DIA), the nation's sixth largest art museum,² be sold to satisfy outstanding municipal debt. Residents, patrons, state legislators and the museum community were horrified at the possibility.³

Although the museum was founded as a private institution, over the years it had transferred legal title to the City to facilitate city and state funding for maintenance and operation costs.⁴ As a result, the DIA collection was vulnerable to the claims of the City's creditors who were owed billions.⁵ Valued at anywhere from 454 million to over 8 billion dollars⁶, the collection was an attractive target for those who saw few other options for resolving this complicated financial snarl. Ultimately, the City and the DIA solved the conundrum through a unique and creative solution known as "the Grand Bargain."⁷

I. INTRODUCTION

This article will examine the causes of Detroit's bankruptcy and the legal issues raised by that bankruptcy as they affected the Detroit Institute of Arts. In doing so, it will consider the history of the DIA and its complicated relationship with the City of Detroit, how the collection

¹ Voluntary Petition, *In re* City of Detroit, 504 B.R. 97 (Bankr. E.D. Mich. 2013) (No. 13-53846) available at <http://www.mieb.uscourts.gov/sites/default/files/notices/City%20of%20Detroit%20Chapter%209%20Petition.pdf>.

² Michael H. Hodges, *DIA's Collection Has National Luster*, DETROIT NEWS (Nov. 6, 2007, 1:00 AM), <http://www.detroitnews.com/article/20071106/ENT05/711060394>.

³ Abby Ohlheiser, *Detroit's Emergency Manager Could Sell The City's Art Collection*, THE WIRE (Aug. 5, 2013, 9:46 PM), <http://www.thewire.com/national/2013/08/detroits-emergency-manager-could-sell-citys-art-collection/68004/>; *Proposal to Sell Detroit's Art to Save the City Draws Outrage*, NPR (May 28, 2013, 3:00 PM), <http://www.npr.org/2013/05/28/186948386/proposal-to-sell-detroits-art-to-save-the-city-draws-outrage>.

⁴ See *infra* Part IV.A.

⁵ See Abby Ohlheiser, *Detroit's Emergency Manager Could Sell The City's Art Collection*, THE WIRE (Aug. 5, 2013, 9:46 PM), <http://www.thewire.com/national/2013/08/detroits-emergency-manager-could-sell-citys-art-collection/68004/>; Robert Frank, *Bankrupt Detroit Could Sell Its Billion-Dollar Art Collection*, BUSINESS INSIDER (July 22, 2013, 4:40 PM), <http://www.businessinsider.com/bankrupt-detroit-could-sell-its-billion-dollar-art-collection-2013-7>.

⁶ See *infra* Part VII.

⁷ Randy Kennedy, *'Grand Bargain' Saves the Detroit Institute of Arts*, NEW YORK TIMES (Nov. 7, 2014), http://www.nytimes.com/2014/11/08/arts/design/grand-bargain-saves-the-detroit-institute-of-arts.html?_r=0; Matthew Dolan, *In Detroit Bankruptcy, Art Was Key to the Deal*, WALL STREET JOURNAL (Nov. 7, 2014, 7:09 PM), <http://www.wsj.com/articles/in-detroit-bankruptcy-art-was-key-to-the-deal-1415384308>.

was valued, and the positions asserted by the interested parties. It will also look at how the bankruptcy, charitable trust and testacy laws were interpreted by the Michigan Attorney General and the bankruptcy court. Additionally, the article examines the structure of the Grand Bargain (which has the DIA making direct payments to municipal workers' pension funds), the agreement's funding, and structure, and its impact on the future of the DIA. Finally, the article considers how other vulnerable public institutions can protect themselves from becoming a bankruptcy asset rather than strictly an asset to the community.

II. DETROIT'S MUNICIPAL BANKRUPTCY

Once, Detroit was the beating heart of the auto industry with more than half the cars in the world being made there.⁸ In the early part of the twentieth century, Detroit was the destination for many of those who were part of the Great Migration.⁹ By the next century, most of the manufacturers were gone and the jobs along with them.¹⁰ The auto industry suffered from competition from international manufacturers, a gas crisis, and a declining economy in the rust belt of the Midwest.¹¹ These factors were aggravated by a series of questionable financial decisions made by the City's mayors in efforts to shore up the City's coffers.¹²

In 2012, the City's population had decreased over 60% from mid-twentieth century highs.¹³ The housing stock was decimated by empty schools, homes and businesses, and entire swaths of the city were

⁸ *In re City of Detroit*, 504 B.R. 97, 112 (Bankr. E.D. Mich. 2013); *Automobiles, HISTORY*, <http://www.history.com/topics/automobiles> (last visited Apr. 8, 2015).

⁹ *Detroit African-American History Project: The Great Migration*, WAYNE STATE UNIV., <http://www.daahp.wayne.edu/biographiesDisplay.php?id=57> (last visited Apr. 8, 2015).

¹⁰ Amy Padnani, *Anatomy of Detroit's Decline: Shortcomings of Leadership*, N.Y. TIMES (Dec. 8, 2013), <http://www.nytimes.com/interactive/2013/08/17/us/detroit-decline.html>.

¹¹ *See Automobiles, HISTORY*, <http://www.history.com/topics/automobiles> (last visited Apr. 8, 2015).

¹² *See* Joel Kurth, Mike Wilkinson & Louis Aguilar, *Six Decades in Detroit: How Abandonment, Racial Tensions and Financial Missteps Bankrupted the City*, DETROIT NEWS (Oct. 4, 2013, 9:20 AM), <http://www.detroitnews.com/article/20131004/METRO01/310040001>; Amy Padnani, *Anatomy of Detroit's Decline: Shortcomings of Leadership*, N.Y. TIMES (Dec. 8, 2013), <http://www.nytimes.com/interactive/2013/08/17/us/detroit-decline.html>.

¹³ *In re City of Detroit*, 504 B.R. at 119; John Reeves, *19 Shocking Facts about Detroit's Bankruptcy, Motley Fool, republished in USA TODAY* (Dec. 3, 2013, 9:20 AM), <http://www.usatoday.com/story/money/personalfinance/2013/12/02/19-facts-about-detroit-bankruptcy/3823355/>.

blighted.¹⁴ What had once been the Motor City, and the home of Motown, had become an abandoned city. In March 2013, Michigan governor Rick Snyder declared the City to be in a state of financial emergency.¹⁵ Kevin Orr was appointed as the City's Emergency Manager and granted "broad powers in receivership to rectify the financial emergency."¹⁶

Despite austerity measures, by 2013, Detroit was in debt in an amount in excess of eighteen billion dollars¹⁷ and its creditors, city services providers, and its city pension recipients¹⁸ had grown frustrated with the City's inability to meet its ever increasing financial obligations. In December of 2013, the City of Detroit was deemed eligible to file for Chapter 9 bankruptcy under § 109(c), making it the largest municipality ever to file for bankruptcy.¹⁹

Municipal bankruptcy is permitted under Chapter 9 of the federal bankruptcy statute, in accordance with the bankruptcy clause of the U.S. Constitution.²⁰ In a municipal bankruptcy case like this, the creditors have a more restricted role than in a Chapter 11 bankruptcy.²¹ Chapter 9 bankruptcy debtors can propose a settlement agreement that often includes nonconsensual modification of its contractual obligations.²² The resolution of Detroit's bankruptcy hinged on its ability to settle the

¹⁴ As part of the bankruptcy proceedings, Judge Rhodes was asked to tour the City to personally witness the extent of the blight. For a detailed, if not dispiriting description of his tour, see *In re City of Detroit*, Mich., 524 B.R. 147, 167 (Bankr. E.D. Mich. 2014).

¹⁵ *In re City of Detroit*, 504 B.R. at 125; Monica Davey, *Michigan Named Fiscal Manager to Help Detroit*, N.Y. TIMES, Mar. 2, 2013, at A1, available at <http://www.nytimes.com/2013/03/02/us/michigan-appoints-emergency-manager-for-detroit.html>.

¹⁶ *In re City of Detroit*, 504 B.R. at 125; see MICH. COMP. LAWS § 141.1549(2).

¹⁷ Monica Davey & Mary Williams Walsh, *Billions in Debt, Detroit Tumbles Into Insolvency*, N.Y. TIMES, July 19, 2013, at A1, available at http://www.nytimes.com/2013/07/19/us/detroit-files-for-bankruptcy.html?pagewanted=all&_r=0.

¹⁸ Matt Helms, Nancy Kaffer & Stephen Henderson, *Detroit Files for Bankruptcy, Setting Off Battles with Creditors, Pensions, Unions*, DETROIT FREE PRESS (July 19, 2013, 7:47 AM), <http://www.freep.com/article/20130718/NEWS01/307180107/Detroit-bankruptcy-filing-Kevyn-Orr-emergency-manager>.

¹⁹ *In re City of Detroit*, 504 B.R. at 110; Nathan Bomey, Brent Snavelly & Alisa Priddle, *Detroit Becomes Largest U.S. City to Enter Bankruptcy*, USA TODAY (Dec. 3, 2013, 7:53 PM), <http://www.usatoday.com/story/news/nation/2013/12/03/detroit-bankruptcy-eligibility/3849833/>.

²⁰ See *In re City of Detroit*, 504 B.R. at 110.

²¹ Kevin P. Ray, *The City, Its Creditors and the Art: What's Next for the Detroit Institute of Arts?*, AM. BANKR. INST. (Apr. 24, 2014) [hereinafter *The City, Its Creditors and the Art*], <http://committees.abi.org/committees/asset-sales/posts/2014/the-city-its-creditors-and-the-art-what-s-next-for-the-detroit-institute-of-arts>.

²² *Id.*

claims of the municipal pension funds.²³ To its creditors, the DIA collection seemed to be an attractive way to finance this settlement.

III. DIA HISTORY

The Detroit Institute of Arts is one of the most widely admired museums in the United States. The museum contains one of the largest collections in the United States.²⁴ It is the sixth ranked museum in the United States.²⁵

Located in the once-bustling Midtown section of Detroit, the museum attracts over a half-million visitors each year.²⁶ It puts on highly regarded exhibitions featuring artists ranging from Yoko Ono²⁷ to Edgar Degas²⁸ to renowned African-American artists.²⁹ It is also home to The Detroit Film Theatre.³⁰

The DIA collection is encyclopedic. The museum's more than 60,000³¹ works range from the ancient to contemporary.³² The museum is comprised of over 100 galleries. Diego Rivera's Detroit Industry cycle

²³ Nathan Bomey, Matt Helms & Brent Snavely, *Detroit's bankruptcy exit plan includes pension cuts, millions for blight removal, technology*, DETROIT FREE PRESS (Feb. 21, 2014, 8:41 PM), <http://archive.freep.com/article/20140221/NEWS01/302220007/Detroit-Chapter-9-bankruptcy-plan-of-adjustment-Steven-Rhodes-Kevyn-Orr>.

²⁴ *About the DIA*, DETROIT INST. OF ARTS, <http://www.dia.org/about/history.aspx> (last visited Mar. 30, 2015).

²⁵ Michael H. Hodges, *DIA's Collection Has National Luster*, DETROIT NEWS (Nov. 6, 2007, 1:00 AM), <http://www.detroitnews.com/article/20071106/ENT05/711060394;Membership-Benefits>, DETROIT INST. OF ART, <http://www.dia.org/support/membership-benefits.aspx> (last visited Mar. 30, 2015).

²⁶ Javier Pes & Emily Sharpe, *Visitor Figures 2013: Taipei Takes Top Spot with Loans from China*, Art Newspaper (Mar. 24, 2014), <http://old.theartnewspaper.com/articles/Visitor-figures--Taipei-takes-top-spot-with-loans-from-China/32105>.

²⁷ *Yoko Ono's Freight Train*, DETROIT INST. OF ARTS, <http://www.dia.org/calendar/exhibition.aspx?id=32&iid=> (last visited Mar. 30, 2015).

²⁸ *Exhibitions & Events, Ordinary People by Extraordinary Artists: Works on Paper by Degas, Renoir and Friends*, DETROIT INST. OF ARTS, <http://www.dia.org/calendar/event.aspx?id=4635&iid=> (last visited Mar. 30, 2015).

²⁹ *Exhibitions & Events, 30 Americans*, DETROIT INST. OF ARTS, <http://www.dia.org/calendar/event.aspx?id=4998&iid=> (last visited Mar. 30, 2015); *Art at the DIA, The General Motors Center for African American Art*, DETROIT INST. OF ARTS, <http://www.dia.org/art/african-american.aspx> (last visited Apr. 1, 2015).

³⁰ *Detroit Film Theatre*, DETROIT INST. OF ARTS, <http://www.dia.org/detroitfilmtheatre/14/DFT.aspx> (last visited Mar. 30, 2015).

³¹ Katherine Boyle, *Detroit Institute of Arts Works Worth Less than Thought, Surprising Many*, WASH. POST (Dec. 4, 2013), http://www.washingtonpost.com/entertainment/museums/detroit-institute-of-arts-works-worth-less-than-thought-surprising-many/2013/12/04/40d2708e-5ced-11e3-be07-006c776266ed_story.html.

³² *Art at the DIA, Collections*, DETROIT INST. OF ARTS, <http://www.dia.org/art/> (last visited Mar. 30, 2015).

of frescoes³³ span the center court. The DIA is most well-known for its extensive collection of American art, the focus of the museum's acquisitions since its founding in 1885.³⁴ The collection contains pieces from John James Audubon³⁵ to Duncan Phyfe³⁶ to John Singer Sargent³⁷ to Andy Warhol.³⁸ But the collection is not defined by its American art. It also includes works by Rembrandt van Rijn³⁹ and Pieter Bruegel the Elder.⁴⁰

The early twentieth century saw a surge in the Museum's purchase of French paintings, including a self-portrait of Vincent Van Gogh⁴¹ and *The Window* by Henri Matisse, which were among the first paintings by these artists to enter a public collection in America.⁴² The DIA also has an extensive representation of the German expressionist movement, including works by Wassily Kandinsky⁴³ and Edvard Munch.⁴⁴ In addition to its impressive collection of Greek,⁴⁵ Roman,⁴⁶ Etruscan,⁴⁷

³³ *Art at the DIA, Visit Rivera Court*, DETROIT INST. OF ARTS, <http://www.dia.org/art/rivera-court.aspx> (last visited Mar. 30, 2015).

³⁴ *About the DIA*, DETROIT INST. OF ARTS, <http://www.dia.org/about/history.aspx> (last visited Apr. 1, 2015);

³⁵ *Art at the DIA, The Bird of Washington or Great American Sea Eagle*, DETROIT INST. OF ARTS, <http://www.dia.org/object-info/cf6ff70e-d1a3-4fd1-9dc2-493c117a3f64.aspx?position=1> (last visited Mar. 31, 2015).

³⁶ *American Art*, DETROIT INST. OF ARTS, <http://www.dia.org/art/american.aspx> (last visited Mar. 30, 2015).

³⁷ *Id.*

³⁸ Mark Stryker, *The DIA's Priceless Art: What Some of Their Most Valuable Pieces Could Be Worth*, DETROIT FREE PRESS (May 26, 2013, 12:52 PM) [hereinafter *The DIA's Priceless Art*], <http://archive.freep.com/interactive/article/20130526/ENT05/305260067/DIA-sale-arts-Detroit-bankruptcy>.

³⁹ *Art at the DIA, Self Portrait in a Velvet Cap with Plume, Rembrandt Harmensz van Rijn*, DETROIT INST. OF ARTS, <http://www.dia.org/object-info/086e6ded-fa25-4ff9-b3ce-296eadf1b6e8.aspx?position=3> (last visited Apr. 1, 2015).

⁴⁰ *Art at the DIA, The Wedding Dance, Peter Bruegel the Elder*, DETROIT INST. OF ARTS, <http://www.dia.org/object-info/d33ac9fb-e03b-4287-923e-c5e42b7f65e6.aspx?position=1> (last visited Apr. 1, 2015).

⁴¹ *Art at the DIA, Self Portrait, Vincent Willem Van Gogh*, DETROIT INST. OF ARTS, <http://www.dia.org/object-info/662cf867-c9e6-4f6b-9281-8b5ca7dd6c72.aspx?position=2> (last visited Apr. 1, 2015).

⁴² *About the DIA*, DETROIT INST. OF ARTS, <http://www.dia.org/about/history.aspx> (last visited Apr. 1, 2015); *The DIA's Priceless Art*, *supra* note 25.

⁴³ *Exhibitions & Events, Once Upon a Time: Prints and Drawings that Tell Stories*, DETROIT INST. OF ARTS, <http://www.dia.org/calendar/exhibition.aspx?id=2703> (last visited Apr. 1, 2015).

⁴⁴ *Art at the DIA, Boy in Blue, Edvard Munch*, DETROIT INST. OF ARTS, <http://www.dia.org/object-info/6a8eefd5-0994-4206-b98f-0a989e97e544.aspx?position=1> (last visited Apr. 1, 2015).

⁴⁵ *Art at the DIA, Selection of Greco-Roman and Ancient European Art*, DETROIT INST. OF ARTS, <http://www.dia.org/art/search-collection.aspx?searchType=new&department=Greco-Roman+and+Ancient+European&classification=&artist=&nationality=&medium>

Egyptian,⁴⁸ and Islamic⁴⁹ art, the DIA recently created a permanent gallery devoted to the art of puppetry.⁵⁰

The DIA is the result of an extended overseas trip by local newspaper baron James Scripps.⁵¹ Scripps chronicled his five-month journey touring the art and culture of France, Italy, Germany and the Netherlands in a series in his newspaper *The Detroit News*.⁵² Later republished in his book *Five Months Abroad*, his chronicles piqued the interest of his readership in the art he had seen. The advertising manager of the paper, William H. Brearley,⁵³ organized an exhibition featuring many of Scripps' purchases. From this exhibition sprang the Detroit Museum of Arts, precursor to the Detroit Institute of Arts.

Brearley convinced his wealthy friends to join him in the endeavor.⁵⁴ Scripps himself contributed \$50,000.⁵⁵ The Detroit Museum of Arts, incorporated in 1885⁵⁶, featured seventy works donated by Scripps.⁵⁷

=&objectNumber=&keyword=&date_from=&date_to=&action=Search+Art+at+the+DIA (last visited Apr. 1, 2015).

⁴⁶ *Art at the DIA*, Selection of Greco-Roman and Ancient European Art, DETROIT INST. OF ARTS, http://www.dia.org/art/search-collection.aspx?searchType=new&department=Greco-Roman+and+Ancient+European&classification=&artist=&nationality=&medium=&objectNumber=&keyword=&date_from=&date_to=&action=Search+Art+at+the+DIA (last visited Apr. 1, 2015).

⁴⁷ *Id.*

⁴⁸ *Art at the DIA, Africa, Oceania and the Indigenous Americas*, DETROIT INST. OF ARTS, <http://www.dia.org/art/africa-oceania-and-the-indigenous-americas.aspx> (last visited Apr. 1, 2015).

⁴⁹ *Art at the DIA, The Arts of Asia and the Islamic World*, DETROIT INST. OF ARTS, <http://www.dia.org/art/asian-arts-and-culture.aspx> (last visited Apr. 1, 2015).

⁵⁰ *Art at the DIA, Performing Art, Paul McPharlin Puppetry Collection*, DETROIT INST. OF ARTS, <http://www.dia.org/art/performing-arts.aspx> (last visited Apr. 1, 2015).

⁵¹ *The Whitcomb Estate*, GROSS POINT HIST. SOC'Y, <http://www.gphistorical.org/whitcomb/whitcomb01.html> (last visited Apr. 2, 2015).

⁵² JAMES EDMUND SCRIPPS, *FIVE MONTHS ABROAD passim* (Detroit, F.B. Dickerson & Co. 1882).

⁵³ *Id.*

⁵⁴ Scripps challenged forty of the city's most prominent businessmen and industrialists to donate \$1000 each to help build a permanent home for the art. Among those were liquor magnate Hiram Walker, General Russell Alger and Scripps and his own brother George.

⁵⁵ *The Whitcomb Estate*, GROSS POINT HIST. SOC'Y, <http://www.gphistorical.org/whitcomb/whitcomb01.html> (last visited Apr. 2, 2015).

⁵⁶ Conveyance or Transfer of Detroit Institute of Arts Collection, Op. Mich. Att'y Gen. No. 7272 (June 13, 2013) [hereinafter *Conveyance or Transfer*] (issuing the opinion of the Bill Schuette, the State of Michigan's Attorney General); Dan Austin, *Detroit Museum of Art*, HISTORICDETROIT.ORG, <http://www.historicdetroit.org/building/detroit-museum-of-art/> (last visited Apr. 1, 2015); *About the DIA*, DETROIT INST. OF ARTS, <http://www.dia.org/about/history.aspx> (last visited Apr. 1, 2015); Dan Austin, *Detroit Museum of Art*, HISTORICDETROIT.ORG, <http://www.historicdetroit.org/building/detroit-museum-of-art/> (last visited Apr. 1, 2015).

The Museum's success led Scripps and other Detroit philanthropists to spearhead a fundraising campaign to build a much larger space to house the burgeoning collection. The Museum changed its name to the Detroit Institute of Arts in 1919,⁵⁸ and the current location opened in 1927.⁵⁹ The building itself is widely admired in the architectural community.⁶⁰

Over the years, the DIA has been the beneficiary of well-known Detroit families, including auto barons, like the Fords⁶¹, the Dodges, and the Firestones, and the founder of the Hudson's Department Store (now Macy's).⁶²

The DIA was among the first museums to repatriate art deemed looted by the Nazis.⁶³ In 1949, the museum returned Monet's *The Seine at Asnieres* to its rightful owner. In 2002, the museum contacted the rightful owner of a 17th century Dutch painting⁶⁴ the museum was thinking about purchasing. Ultimately, the DIA paid restitution to the rightful owners who allowed the museum to purchase the painting for its notable Dutch collection.

⁵⁷ *The Whitcomb Estate*, GROSS POINT HIST. SOC'Y, <http://www.gphistorical.org/whitcomb/whitcomb01.html> (last visited Apr. 2, 2015); Michael Hodges, *It began with an art show*, THE DETROIT NEWS (Nov. 6, 2007, 1:00 AM), <http://www.detroitnews.com/article/20071106/ENT05/711060400/It-began-with-an-art-show>.

⁵⁸ Dan Austin, *Detroit Museum of Art*, HISTORICDETROIT.ORG, <http://www.historicdetroit.org/building/detroit-museum-of-art/> (last visited Apr. 1, 2015).

⁵⁹ *See About the DIA*, DETROIT INST. OF ARTS, <http://www.dia.org/about/history.aspx> (last visited Apr. 1, 2015).

⁶⁰ *See Evolution of the DIA*, DETROIT INST. OF ARTS, <http://www.dia.org/support/evolution.aspx> (last visited Apr. 1, 2015).

⁶¹ Mark Stryker, *DIA in peril: A look at the museum's long, tangled relationship with Detroit politics and finances*, DETROIT FREE PRESS (Sept. 8, 2013, 12:05 AM), <http://archive.freep.com/interactive/article/20130908/ENT05/130905007/DIA-in-peril-museum-s-relationship-Detroit-politics-finances>.

⁶² Roberta Smith, *In Detroit, A Case of Selling Art and Selling Out*, THE NEW YORK TIMES (Sept. 10, 2013), <http://www.nytimes.com/2013/09/11/arts/design/in-detroit-a-case-of-selling-art-and-selling-out.html>.

⁶³ Morgan Meis, *AN OPPORTUNITY FOR RENEWAL*, THE SMART SET: FROM DREXEL UNIVERSITY (Aug. 9, 2013), <http://thesmartset.com/article08091301/>.

⁶⁴ *Art at the DIA, Coastal Scene with a Man-of-War and Other Vessels, Ludolf Backhuysen*, DETROIT INST. OF ARTS, <http://www.dia.org/object-info/07d9a8ef-08fd-4a9a-8bfd-376ec73755dd.aspx?position=1> (last visited Apr. 1, 2015).

IV. THE LEGAL HISTORY OF THE MUSEUM

A. *Ownership*

The Detroit Museum of Art, now the DIA, was incorporated as a non-profit charitable corporation by its founding members in 1885.⁶⁵ The museum was incorporated under a just-enacted statute that permitted “the formation of corporations for the cultivation of art.”⁶⁶ According to the Act, “[t]he public exhibition of its collection of works of art shall be the duty of every such corporation.”⁶⁷ The Act required that each such corporation adopt articles of incorporation stating its purpose and be governed by a board of trustees serving without compensation.⁶⁸ The property of the corporation was deemed tax-exempt, and there could be “no dividend in money or property” among the corporation’s members.⁶⁹ Any corporation organized under the Act was prohibited from changing its “character and purpose”⁷⁰ and, more importantly, from selling “its general art collection.”⁷¹

The museum, incorporated on April 16, 1885,⁷² in part “set forth its purpose as: ‘the founding of a public art institute in the City of Detroit, which may . . . receive and use such gifts, contributions, devises and bequests as may be made for art purposes: receive, acquire, collect and own paintings, sculptures, engravings, drawings, pictures, coins and other works of art . . .’”⁷³

Subsequent to its incorporation, the Michigan state legislature enacted laws authorizing the City to fund the museum and to issue bonds for the construction of museum buildings.⁷⁴ During this time period, the corporation deeded its real estate and buildings to the City.⁷⁵

⁶⁵ Detroit Institute of Arts: Conveyance or Transfer of Detroit Institute of Arts Collection, Op. Mich. Att’y Gen. No. 7272 (June 13, 2013) [hereinafter *Conveyance or Transfer*] (issuing the opinion of the Bill Schuette, the State of Michigan’s Attorney General); Dan Austin, *Detroit Museum of Art*, HISTORICDETROIT.ORG, <http://www.historicdetroit.org/building/detroit-museum-of-art/> (last visited Apr. 1, 2015).

⁶⁶ *Conveyance or Transfer*, *supra* note 67 (referencing 1885 Mich. Pub. Acts 2).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 4

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *Detroit Museum of Art v. Engel*, 153 N.W. 700 (Mich. 1915); THE CITY OF DETROIT, MICHIGAN, 1701-1922 (S.J. Clarke Publishing 1922), 853 (Clarence M. Burton, William Stocking, & Gordon K. Miller eds.), available at https://archive.org/stream/cityofdetroitmic01burt/cityofdetroitmic01burt_djvu.txt.

In 1915, this municipal expenditure on behalf of a private, non-profit corporation was challenged by taxpayers in *Detroit Museum of Art v. Engel*.⁷⁶ The Michigan Supreme Court found that these expenditures were, in fact, violative of the state constitution, which restricted lending or credit only to public or municipal agencies.⁷⁷ The court came to this conclusion even though the museum served a public purpose and had conveyed its land and building to the municipality.⁷⁸

The Michigan legislature moved to address the funding gap in 1919 by passing two laws. The first act, 1913 PA 245, amended the original 1885 act to expressly permit entities formed under “that Act to convey their property.”⁷⁹ The second act, 1919 PA 67, authorized a corporation founded under the Act to convey its property to a city empowered to maintain a public art institute and that such property would “be faithfully used for the purposes for which such corporation was organized.”⁸⁰ All three of these acts were repealed as part of a revision and consolidation of the relevant law but remain in effect under the “savings provisions.”⁸¹

Detroit’s 1918 Charter authorized the City to operate an art institute and to acquire art on its behalf.⁸² Under the auspices of the statutes and the City Charter, the Detroit Museum of Art “conveyed its building and art collection to the City in 1919.”⁸³ As a result, the City was able to fund both museum operations and acquisitions. Notably, the original non-profit corporation organized under the 1885 Act continues to exist.⁸⁴ The Founders Society continued to assist the museum with operational costs and gifts of art.⁸⁵

The museum has undergone other changes in structure and resource generation over the years as the City has struggled financially. As early as 1955, lack of funding caused the museum to halt acquisitions.⁸⁶ In 1973, the museum was forced to close temporarily due to lack of operating funds.⁸⁷ In the late 1970’s, the State of Michigan began to

⁷⁶ *Detroit Museum of Art v. Engel*, 153 N.W. 700 (Mich. 1915).

⁷⁷ MICH. CONST. art. 10, § 12 (1908); *Detroit Museum of Art v. Engel*, 153 N.W. 700, 701 (Mich. 1915) (citing MICH. CONST. art. 10, § 12 (1908) (“The credit of the state shall not be granted to, nor in aid of, any person, association or corporation, public or private.”)).

⁷⁸ *Detroit Museum of Art*, 153 N.W. at 702.

⁷⁹ *Conveyance or Transfer*, *supra* note 67, at 5.

⁸⁰ 1919 Mich. Pub. Acts 125; *Conveyance or Transfer*, *supra* note 67, at 5.

⁸¹ *Conveyance or Transfer*, *supra* note 67, at 5.

⁸² Mich. Charter ch. XIX, §§ 1, 7; *Conveyance or Transfer*, *supra* note 67, at 6.

⁸³ *Conveyance or Transfer*, *supra* note 67, at 6.

⁸⁴ *Id.*; See also *About the DIA*, DETROIT INST. OF ARTS, <http://www.dia.org/about/history.aspx> (last visited Apr. 1, 2015).

⁸⁵ *Conveyance or Transfer*, *supra* note 67, at 6.

⁸⁶ *Id.*

⁸⁷ *Id.*

contribute to the museum's coffers.⁸⁸ In the early 1980's, employees of the museum became municipal employees.⁸⁹

The validity of State funding of a municipal or private organization was called into question in 1984. At that time, State Attorney General Frank Kelley issued an opinion letter declaring that the museum served a "state" or "public purpose" and was entitled to state funding on the basis that it was a "unique, cultural treasure" which belonged to the people of the State of Michigan.⁹⁰ State grants to the DIA continued, although the amounts dwindled significantly in the 1990's as the State itself struggled financially.⁹¹

The structure of the museum changed again in the late 1990's. In 1997, the City transferred museum operations, and the accompanying costs, "back to the Founders Society."⁹² The City did so while retaining its legal title to the art collection.⁹³ This 1997 Operating Agreement, specifically referenced in the City's Charter,⁹⁴ addresses both the ownership and the disposition of the DIA art collection. In Section E of the Agreement, the City expressly retains ownership of the museum property and its art collection, both present and future.⁹⁵ Under Section F.2(a) of the Agreement, the City transfers its responsibility for managing the art collection to the Founders Society pursuant to the museum's Collection Management policy.⁹⁶ This section also surrenders the right to acquire and dispose of the collection to the Founders Society under the proviso that proceeds from a sale must be used in furtherance of other acquisitions.⁹⁷ In exchange, the Founders Society agreed to assume all responsibility for maintaining the collection (including

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Restrictions upon Appropriations*, Mich. Att'y Gen. Op. No. 6225 303, 308 (May 7, 1984) (opining that "[u]nquestionably, and uniquely in Michigan, the Detroit Institute of Arts, as a widely acclaimed cultural facility, is utilized by the citizens of this state without regard to residency in the city. The facility is an outstanding tourist attraction utilized by tourists and their families. Its vast displays and cultural facilities are readily and regularly available to Michigan students. Both the Governor in his Executive Budget, and the Legislature in the enactment of appropriations for the support of the Detroit Institute of Arts, have recognized its place in the cultural life of this state."); *Conveyance or Transfer*, *supra* note 67, at 6.

⁹¹ *Conveyance or Transfer*, *supra* note 67, at 7.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Detroit Charter art. 7, ch. 3, § 301 (2012) ("The Arts Department shall maintain and operate the Detroit Institute of Arts directly or pursuant to an operating agreement.").

⁹⁵ *Conveyance or Transfer*, *supra* note 67, at 8; OPERATING AGREEMENT FOR THE DETROIT INSTITUTE OF ARTS, at § E (1997) [hereinafter Operating].

⁹⁶ Operating, *supra* note 97, at § F.2(a).

⁹⁷ *Conveyance or Transfer*, *supra* note 67, at 9; Operating, *supra* note 97, at § E.

acquisition and disposition) and mounting exhibitions, for the museum buildings and parking lots, and for fundraising, marketing, and other financial obligations.⁹⁸

B. *The Collections Management Policy*

The City's transfer of responsibility for the collection was made pursuant to the DIA Collections Management Policy in place at that time. The policy explicitly addresses deaccession of pieces in the collection, restricting any such sales to those that are "in the best interest of the Museum, the public it serves, the public trust it represents, and the scholarly and cultural community it serves."⁹⁹ It cautions that "the Museum must be ever aware of its role as a trustee of the collection for the benefit of the public."¹⁰⁰ Under the operating agreement, the funds may not be used for general expenses. Instead, they must be "placed in the selling curatorial department's Art Acquisition Fund."¹⁰¹ The policy underscores the view that the museum and its collection are a public trust.

C. *Subsequent Efforts to Finance Museum Operations*

The Founders Society struggled to meet its obligations using only charitable donations. In 2010, the state legislature passed the Art Institute Authorities Act,¹⁰² which created an authority capable of levying property taxes to support institutions like the museum.¹⁰³ Two years later, a millage was passed by the voters of counties in and around the City of Detroit to help defray the museum's expenses.¹⁰⁴ That the voters supported this millage while faced with mounting municipal debt is suggestive of how valued the DIA is by its community.

⁹⁸ *Conveyance or Transfer*, *supra* note 67, at 9; *Operating*, *supra* note 97, at § D.3.

⁹⁹ *Conveyance or Transfer*, *supra* note 67, at 10; *The Detroit Institute of Arts Collections Management Policy*, § V.E., *republished in* USMUSEUMSURVEY.ORG, <http://usmuseumsurvey.claimscon.org/PDF/1326-58.pdf> (last visited Apr. 6, 2015) [hereinafter *Detroit*].

¹⁰⁰ *Conveyance or Transfer*, *supra* note 67, at 10; *Detroit*, *supra* note 101, at § V.A .

¹⁰¹ *Conveyance or Transfer*, *supra* note 67, at 10; *Detroit*, *supra* note 101, at § V.F .

¹⁰² *Conveyance or Transfer*, *supra* note 67, at 7; MICH. COMP. LAWS § 123.1205 (2010).

¹⁰³ *Conveyance or Transfer*, *supra* note 67, at 7.

¹⁰⁴ *Id.* at 7-8.

V. DEACCESSION

A. *The Politics of Deaccession*

Why all the furor over deaccessioning a few pieces of valuable art in order to resolve a large scale municipal crisis and put money in the pockets of retirees who depend upon it? The word “deaccession” is an industry term that means, quite simply, the act of getting rid of a piece of art. Typically, the term is used when a museum decides to sell its art.¹⁰⁵ What would seem to be a commonplace transaction undeserving of its own nomenclature is, in fact, a controversial issue in the museum community.¹⁰⁶

As a rule, museums own much more than they could ever conceivably display.¹⁰⁷ The practice of selling works on the open market or to other institutions, or even gifting them to other institutions, is longstanding.¹⁰⁸ The practice, born of changing tastes and practical necessity, continues today.¹⁰⁹

The political aspect of deaccession, however, first came to the forefront in the early 1970’s when it was announced that the Metropolitan Museum of Art planned to sell pieces from its modern art collection to finance the purchase of Velazquez’s “Juan de Pareja.”¹¹⁰ When the Met’s intention became known, there was an uproar in the museum community and among the public to the extent that it generated an investigation by the New York Attorney General.¹¹¹ As a result of the investigation, the Met modified its operating guidelines, requiring a list in its annual reports of cash proceeds from any sale of art, an itemized list of deaccessioned objects worth more than \$50,000¹¹², and public

¹⁰⁵ Robin Pogrebin, *The Permanent Collection May Not Be So Permanent*, N.Y. TIMES, Jan. 27, 2011, at C1, available at http://www.nytimes.com/2011/01/27/arts/design/27sell.html?_r=0 (stating “deaccessioning – the art world term for selling pieces from a museum’s collection – has become a dirty word and the focus of increasingly intense attention.”); *Deaccession*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/deaccession> (last visited Apr. 6, 2015).

¹⁰⁶ *Id.*

¹⁰⁷ Geraldine Fabrikant, *The Good Stuff in the Back Room*, N.Y. TIMES, Mar. 19, 2009, at F30, available at <http://www.nytimes.com/2009/03/19/arts/artsspecial/19TROVE.html?pagewanted=all> (quoting Elliot Bostwick Davis, “chairwoman of the art of Americas department” at the Museum of Fine Arts in Boston, as stating, “[m]ost museums show between 2 and 4 percent of a collection.”).

¹⁰⁸ See Sara Tam, Note, *In Museums We Trust: Analyzing the Mission of Museums, Deaccessioning Policies, and the Public Trust*, 39 FORDHAM URB. L.J. 849, 859 (2012).

¹⁰⁹ Pogrebin, *supra* note 107.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Tam, *supra* note 110, at 864-65.

notice of the proposed sale of a work if it has been on view in the preceding ten years.¹¹³

In response to this controversy, the most prominent professional organizations in the museum community amended their codes of ethics to discourage deaccession and to restrict any proceeds from deaccession to the benefit of the collection from which the pieces were sold.

B. *U.S. and International Museum Policy*

Virtually all of the museums in the United States, including the DIA, are members of the American Alliance of Museums.¹¹⁴ This organization, founded in 1906, defines its mission as “nurtur[ing] excellence in museums through advocacy and service.”¹¹⁵ The organization’s Code of Ethics serves as a guide for member museums on issues including collection management, fundraising, and governance.¹¹⁶ The AAM, like its international counterpart, the International Council of Museums, adopted Codes of Ethics late in the last century as deaccession became a matter of increasing concern.¹¹⁷

The AAM and AAMD positions are consistent with that expressed in the Code of Ethics adopted by the International Council of Museums. The collections are considered a public trust and “may not be treated as a realizable asset.”¹¹⁸ Proceeds from disposition of collections or pieces “should be used solely for the benefit of the collection and usually for acquisitions to that same collection.” Under the Code,

disposal of collections through sale, trade, or research activities is solely for the advancement of the museum’s mission. Proceeds from the sale of nonliving collections are to be used consistent with the established standards of the museum’s discipline, but in no event shall they be

¹¹³ *Id.*

¹¹⁴ *Museums Committed to Excellence*, AM. ALLIANCE OF MUSEUMS, <http://www.aam-us.org/resources/assessment-programs/accreditation/accredited-museums> (last visited Apr. 6, 2015).

¹¹⁵ *About Us*, AM. ALLIANCE OF MUSEUMS, <http://www.aam-us.org/about-us> (last visited Apr. 6, 2015).

¹¹⁶ *Ethics, Standards and Best Practices*, AM. ALLIANCE OF MUSEUMS, <http://www.aam-us.org/resources/ethics-standards-and-best-practices> (last visited Apr. 6, 2015).

¹¹⁷ *See* Tam, *supra* note 110, at 864-65.

¹¹⁸ ICOM CODE OF ETHICS FOR MUSEUMS, § 2.16 (Int’l Council of Museums 2013), http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf (last visited Apr. 6, 2015).

used for anything other than acquisition or direct care of collections.¹¹⁹

The position of the professional museum is clear: museums and their collections are the subject of a public trust and their collections may not be diminished in an effort to meet general expenses.

C. *Judicial and Legislative Positions*

Courts are often called upon to adjudicate matters of deaccession.¹²⁰ In doing so, they may look at factors including the museum's internal policy, financial exigencies, donor intent, and the extent to which such deaccession is consistent with the fiduciary duties of the decision makers.¹²¹ The growing sentiment against deaccession is evident in many of these decisions.¹²² To date, New York is the only state to have a legislated deaccession policy.¹²³

VI. ART AS ASSET: THE POSITIONS TAKEN BY THE CREDITORS

While there was much discussion over how and to what extent the DIA collection could be used in resolving the bankruptcy, it boils down to three possible interpretations: 1) the Michigan Attorney General's position, shared by the DIA, that none of the DIA assets could be used because all were held in a public trust for the people of the State of Michigan;¹²⁴ 2) Emergency Manager Kevin Orr's position that works purchased after 1919 – the date the museum was transferred to the City – were available for deaccession;¹²⁵ and 3) the position of many creditors that the DIA and all of its assets were owned by the City and freely

¹¹⁹ CODE OF ETHICS FOR MUSEUMS (Am. Alliance of Museums 2000), <http://www.aam-us.org/resources/ethics-standards-and-best-practices/code-of-ethics> (last visited Apr. 6, 2015).

¹²⁰ See Tam, *supra* note 110, at 866-68.

¹²¹ *Id.* at 866.

¹²² *Id.* at 864-65.

¹²³ *Id.* at 868-72 (discussing The New York Board of Regents rules. The New York State Board of Regents charters museums as educational institutions, making its regulations binding on the museums. The Regents Rules define and restrict deaccession according to established criteria but reflect the predominant position that collections should be kept intact.).

¹²⁴ See *infra* Part VIII.

¹²⁵ *Id.*

available for sale.¹²⁶ The parties disagreed not only on what portion of the collection were available but also the value of the collection and to what extent they would be useful in relieving the municipal debt.

VII. DIA ASSET VALUATION

Art valuation tends to be a mysterious matter – conducted under confidential circumstances and, if you will, much more art than science. The valuation of the DIA collection opened the curtain, just a bit, on how this process is conducted. It certainly highlighted the range of values that can be assessed on works of art.

In order to determine to what extent the deaccession of the DIA collection would mitigate any outstanding municipal obligations, it was first necessary to determine its market value. Here, the determination depended upon a variety of factors, including which pieces of the collection were available for sale, the threat of litigation to block the sale of one or all of the items, and prevailing market conditions.¹²⁷

A quick and relatively unscientific assessment conducted by the Detroit Free Press estimated that thirty-eight of the masterpieces in the DIA collection would be worth approximately 2.5 billion dollars.¹²⁸ Eleven of the works represented 75% of this amount.¹²⁹

At the behest of the Emergency Manager, Kevin Orr, the well-known auction house, Christie's, appraised a portion of the collection. This portion, a total of 2,773 items – roughly 5% of the entire collection – represented the works acquired by the museum since the City of Detroit “took over” the museum in 1919.¹³⁰ Orr depicted this portion as having been purchased with City funds.¹³¹ It was the proceeds from the sale of this portion that was part of the proposed “Grand Bargain.”¹³² Christie's valued this portion at somewhere between 454 and 867 million dollars.

Dissatisfied with this appraisal, municipal creditor, Syncora Guarantee, Inc., arranged for its own evaluation, hiring the Winston Art

¹²⁶ Kevin P. Ray, *Art Valuation: The Detroit Institute of Arts*, GREENBERG TRAURIG, LLP (Nov. 4, 2014) [*Art Valuation*], <http://www.gtlaw-culturalassets.com/2014/11/art-valuation-the-detroit-institute-of-arts/>.

¹²⁷ *See id.*

¹²⁸ *See* Mark Stryker & John Gallagher, *City's debt puts DIA works at risk*, DETROIT FREE PRESS (May 24, 2013), <http://archive.freep.com/article/20130523/NEWS01/305230154/DIA-Kevyn-Orr-Detroit-bankruptcy-art>.

¹²⁹ Randy Kennedy, *Christie's Reveals Detroit Art Institute Appraisal*, N.Y. TIMES (Dec. 5, 2013), <http://www.nytimes.com/2013/12/05/arts/design/christies-releases-appraisal-of-part-of-detroit-museums-collection.html>.

¹³⁰ *Art Valuation*, *supra* note 128.

¹³¹ *Id.*

¹³² *The City, Its Creditors and the Art*, *supra* note 22.

Group for its appraisal. This appraisal evaluated 582 selected objects, including those deemed to be the most valuable in the collection.¹³³ These pieces were appraised at a considerably higher value of \$1.74 billion.¹³⁴

In response to the objections of other creditors, the City hired Artvest Partners LLC to appraise the entire DIA collection regardless of when or how it was acquired.¹³⁵ The Expert Witness Report provided to the court put the low estimated value of the entire collection at \$2,760,978,432 and the high estimated value at \$4,607,953,704.¹³⁶ The company determined that, considering all of the variables, the value of the collection was 1.1 billion dollars if there was some litigation delay of the sales, or 1.8 billion dollars if there was no delay.¹³⁷

Finally, another objecting creditor hired Victor Weiner Associates LLC to value the entire collection. This appraisal came in at over 8 billion dollars¹³⁸ — nearly twice as high as Artvest’s estimate — and was accompanied by a proposal that the collection be used as collateral for a loan to the City.

Although the estimated valuations varied widely if not wildly, it became clear that the DIA collection presented the possibility of a huge influx of cash into empty municipal coffers and the potential for reimbursement of the City’s many creditors. Although there was much ado about, and much money spent in pursuit of, the valuations, it was unclear how they would figure in to the final resolution. As one Detroit paper noted:

Though [Bankruptcy Court Judge] Rhodes has signaled several times that selling DIA treasures would not sustain city finances or services in the long term, the fight over the value of the museum speaks directly to the legality of the \$815 million grand bargain at the core of [Emergency Manager] Orr’s plan—and whether the plan is fair and feasible.¹³⁹

¹³³ *Art Valuation*, *supra* note 128, at 2.

¹³⁴ *Id.*

¹³⁵ Expert Witness Report of Michael Plummer at 4, *In re City of Detroit*, 504 B.R. 97 (Bankr. E.D. Mich. 2013) (No. 13-53846) [hereinafter Michael Plummer], <http://archive.freep.com/assets/freep/pdf/C422218479.PDF>; *see Art Valuation*, *supra* note 128, at 2.

¹³⁶ Michael Plummer, *supra* note 137, at 19; *see Art Valuation*, *supra* note 128, at 2.

¹³⁷ *See* Michael Plummer, *supra* note 137; *see Art Valuation*, *supra* note 128, at 2.

¹³⁸ *Art Valuation*, *supra* note 128, at 2.

¹³⁹ Mark Stryker, *Fight Over DIA Value Resumes in Court Next Week*, DETROIT FREE PRESS (Sept. 25, 2014, 12:12 AM), <http://www.freep.com/story/news/local/2014/09/25/dia-art-detroit-bankruptcy-trial-valuation/16184545/>.

In response to the controversy over the valuations, the DIA issued a statement declaring that there was no reason for the valuations in light of the Michigan Attorney General's opinion that the collection could not be sold. The DIA stated that while it "applaud[ed] the [Emergency Manager]'s focus on rebuilding the city," selling the DIA collection would undercut that goal by jeopardizing Detroit's most important cultural asset.¹⁴⁰ The DIA also asserted that any efforts to sell the collection would undermine the tri-county millage that provided operating funds and would virtually ensure the rapid demise of the DIA.¹⁴¹

VIII. THE OPINION OF THE MICHIGAN ATTORNEY GENERAL

With municipal bankruptcy looming large, a state senator asked the Michigan Attorney General to opine on whether or not the DIA and its collection could be used to satisfy debts of the City of Detroit unrelated to its operation.¹⁴² Attorney General Bill Schuette issued an opinion letter on June 13, 2013, interpreting the State's non-profit corporations act and its law on charitable trusts. The opinion letter stated unequivocally that the DIA assets could not be conveyed or transferred for such purposes.¹⁴³

After setting out the detailed social and legal history of the institution,¹⁴⁴ the opinion analyzed the issue at hand as governed by the law of charitable trusts. The opinion noted that, while there are several statutes in Michigan which codify the law of charitable trusts,¹⁴⁵ the basic principles of the law are rooted in common law and have been uniformly interpreted.

A. *The Law of Charitable Trusts*

Both statutory and case authority support a broad interpretation of the word "trust." Under Michigan law, the term is not limited to express or private trusts and extends to corporations created to administer

¹⁴⁰ DETROIT INST. OF ARTS, *Detroit Institute of Arts Statement re: Valuation of Art, August 5, 2013*, (Aug. 5, 2013), http://www.dia.org/user_area/uploads/Four-Statements.pdf.

¹⁴¹ *See id.*

¹⁴² *Conveyance or Transfer, supra* note 67.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*; MICH. COMP. LAWS §§ 14.251 - .266 (2010); MICH. COMP. LAWS §§ 450.2101-.2151 (1983); MICH. COMP. LAWS §§ 700.1101-.8206 (2000).

trusts.¹⁴⁶ Consistent with the Restatement (Third) of Trusts,¹⁴⁷ the Michigan statutes define a charitable trust simply as a trust created for a charitable purpose.¹⁴⁸ None of these authorities mention art museums specifically, but there is little argument that the exhibition of art to the public constitutes such a purpose.¹⁴⁹

Defined by the Michigan Supreme Court in *Scarney v. Clarke*,¹⁵⁰ the determinative factor for a charitable trust is that the public is the beneficiary, “[a] distinguishing characteristic . . . is that the prospective beneficiary is undetermined and unknown, and while such a trust need not be for the benefit of the entire public, yet it must be public in nature and for unascertained beneficiaries.”¹⁵¹

This concept of a “public trust” is well established. Courts have used it to determine the fate of museums from Fresno, California¹⁵² to New York City.¹⁵³ The concept of a “public trust” should not be confused with the “Public Trust Doctrine,” which governs the public’s use of navigable waters and the state’s obligation to protect that right.¹⁵⁴

The creation of a charitable trust is not dependent upon the use of particular language. It is only necessary that there is intent to use the property for a charitable purpose.¹⁵⁵ There are no limitations as to what

¹⁴⁶ *Conveyance or Transfer*, *supra* note 67 (citing MICH. COMP. LAWS § 700.1107(n) and *In re Americana Foundation*, 145 Mich. App. 735 (1985)).

¹⁴⁷ *Conveyance or Transfer*, *supra* note 67 (citing RESTATEMENT (THIRD) OF TRUSTS §§ 27-28 (2003); MICH. COMP. LAWS § 700.7103(c); MICH. COMP. LAWS § 700.7405(1); and MICH. COMP. LAWS § 14.252 (2)(b) that defines “charitable trust” as the relationships where a trustee holds property for a charitable purpose.”).

¹⁴⁸ *Id.*

¹⁴⁹ *Conveyance or Transfer*, *supra* note 67 (citing 15 AM. JUR. 2D, CHARITIES § 49; *see also* *Hardman v. Feinstein*, 240 Cal. Rptr. 483, 486 (Cal. Ct. App. 1987) (“Art museums advance education and therefore serve a charitable purpose.”)); In her article, Tam points out that charitable trusts and nonprofit corporations are the typical structure of private museums. *See* Tam, *supra* note 110, at 855-56.

¹⁵⁰ *Conveyance or Transfer*, *supra* note 67 (referencing *Scarney v. Clarke*, 282 Mich. 56, 63-64; 275 (N.W. 765 1937)).

¹⁵¹ *Id.*

¹⁵² The doctrine was applied to the disposition of assets from the closure of the Fresno Metropolitan Museum of Art and Science in 2010. *See* Tam, *supra* note 110, at 895-96 (2012). The Fresno Metropolitan Museum of Art and Science defaulted on a fifteen million dollar municipal loan, taken to finance the renovation and rejuvenation of the museum, and thus resulted in “the Fresno Metropolitan [selling] its collection at auction, [and] using the proceeds toward paying off its debts.” *See id.* at 851.

¹⁵³ The American Folk Art Museum was threatened with closure after it defaulted on a loan taken out to finance a new museum building. *See* Tam, *supra* note 110, at 850-51.

¹⁵⁴ *Id.* at 860-61, n.74.

¹⁵⁵ *Conveyance or Transfer*, *supra* note 67, at 16 (citing *Knights of Equity Memorial Scholarship Comm. v. Univ. of Detroit*, 359 Mich. 235, 242-243, 102 N.W. 2d 463 (1960); *In re Rood’s Estate*, 41 Mich. App., 405, 413, 200 N.W.2d 728 (1972); *see also* MICH. COMP. LAWS §§ 700.7401(1), 700.7402).

sort of legal entity can serve as a trustee for this type of trust.¹⁵⁶ Under Michigan law, a municipality is capable of acting as the trustee of a charitable trust established to facilitate an art museum.¹⁵⁷ It is, however, subject to the same duties and obligations as any other trustee.¹⁵⁸ Thus, the City of Detroit can act as a trustee of the charitable trust that maintains and operates the DIA.¹⁵⁹

As the trustee, the City is obligated to administer the trust according to its purposes and for the benefit of its intended beneficiaries.¹⁶⁰ While the trustee may hold the legal interest or title in the assets, the equitable title rests with the beneficiary.¹⁶¹ As a result of this split between the legal and equitable title, the trustee's ability to use or dispose of assets is restricted.¹⁶² Any use or disposition must be consistent with the purposes, express or implied, of the charitable trust.¹⁶³

B. Reasoning

In his opinion, the Attorney General reiterated that the DIA was incorporated in 1885 as a nonprofit corporation that expressly stated its charitable purpose: “the public exhibition of its collections of works of arts.”¹⁶⁴ This purpose is mirrored in its Articles of Incorporation.¹⁶⁵ Under the incorporation statute, the museum was not permitted to change its “character or purpose” or to sell its general art collection unless authorized to do so by the state legislature.¹⁶⁶ These restrictions on the change of purpose, disposition of assets and even its “winding up” were consistent with legislative intent that the museum function, and the art collection be displayed, in perpetuity to the extent possible.¹⁶⁷

¹⁵⁶ *Id.* at 16.

¹⁵⁷ *Id.* at 16-17 (citing *Hardman v. Feinstein*, 240 Cal. Rptr. 483, 485-866 (Cal. Ct. App. 1987) (holding that the City of San Francisco may act as trustee of the Fine Arts Museum of San Francisco)).

¹⁵⁸ See generally, Patty Gerstenblith, *The Fiduciary Duties of Museum Trustees*, 8 COLUM.-VLA J.L. & ARTS 175 (1983).

¹⁵⁹ *Conveyance or Transfer*, *supra* note 67, at 19-21.

¹⁶⁰ *Id.* at 17 (citing MICH. COMP. LAWS §§ 700.7801).

¹⁶¹ *Id.* (citing *Appollinari v. Johnson*, 104 Mich. App. 673, 675, 305 N.W.2d 565 (1981)).

¹⁶² *Id.* (citing MICH. COMP. LAWS § 700.7801; see also *In re Friends for Long Island's Heritage*, 911 N.Y.S.2d 412 (N.Y. App. Div. 2010) (holding that assets donated for an exhibition could not be sold to pay off debts after the dissolution of the museum corporation)).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 18.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See *id.* at 18-19 (citing 1885 Mich. Pub. Act 3, § 10774).

The state legislature considered how to best support the museum after direct municipal support was banned by the Michigan Supreme Court ruling in *Detroit Museum of Art v. Engel* in 1919. In passing laws that permitted the City to support the museum directly, no effort was made to undermine the nature of the charitable trust created by the original incorporation. In accepting the transfer of the art collection from the Founders Society in 1919, the City was bound by the statutory language that the purpose of the corporation was to “maintain a public art institute”¹⁶⁸ that would display art to the general public and to use the collection for that purpose alone. This transfer from the Founders Society transferred the legal interest, but the equitable interest “remained with the people of Michigan, the ultimate beneficiaries of the museum’s or Founders Society’s charitable purpose.”¹⁶⁹ Even though the City added to the collection over the intervening years, the Attorney General determined that these additions were part of the initial charitable purpose and were, therefore, subject to the same limitations.¹⁷⁰

In concluding his opinion, the Attorney General acknowledged the “serious financial hardships that face the City, the difficulties that the people who live and work in the City have endured for decades, and the many challenges facing the citizens of Detroit and the State in the future.”¹⁷¹ He found, however, that “abandoning or selling the public’s artwork would damage not only the City’s but the State’s cultural commonwealth. In Michigan, we not only appreciate our cultural treasures, we guard them zealously in charitable trust for all state residents, present and future.”¹⁷² The opinion was met with relief by the museum’s supporters, but dismissed as unrealistic by those attempting to resolve the enormous financial crisis facing the municipality.¹⁷³

¹⁶⁸ *Id.* at 19.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 20-21.

¹⁷¹ *Id.* at 22.

¹⁷² *Id.*

¹⁷³ See *Detroit Institute of Arts Statement Regarding Michigan Attorney General’s Opinion, June 13, 2013*, DETROIT INST. OF ARTS (June 13, 2013), http://www.dia.org/user_area/uploads/Four-Statements.pdf; Attorney General’s Corrected Motion to Quash Syncora’s Subpoena to Depose Attorney General Bill Schuette *In re* City of Detroit, 504 B.R. 97 (Bankr. E.D. Mich.) (No. 13-53846), <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket5285.pdf>; John Gallagher, Mark Stryker & Nathan Bomey, *Spinning off Museum from City Could Save Art, Pensions*, DETROIT FREE PRESS (Dec. 5, 2013, 8:31 AM), <http://archive.freep.com/article/20131204/BUSINESS06/312040157/Orr-DIA-bankuprtcy-Detroit-Rosen>, *republished in* USA TODAY (Dec. 5, 2013, 1:21 PM), <http://www.usatoday.com/story/news/nation/2013/12/05/detroit-bankruptcy-art-museum-spinoff/3879957/>.

IX. THE GRAND BARGAIN

Despite the Attorney General's opinion, the pressure to sell the DIA continued to mount. Creditors salivated at the results of the various assessments. Supporters of the DIA, and those interested in coming to a speedy and workable resolution of the bankruptcy, searched for creative ways to balance the public interest in art with the needs of the City's creditors, including many pensioners who relied on the City's promises.¹⁷⁴ And they found one.

The deal to save the DIA collection, known as "the Grand Bargain," began as a doodle on a legal pad.¹⁷⁵ In November 2013, leaders from some of the largest philanthropic organizations gathered at the behest of Judge Gerald Rosen, the appointed mediator in the bankruptcy case.¹⁷⁶ Rosen asked these groups to donate hundreds of millions of dollars to alleviate the municipal deficit faced by the City's pension funds.¹⁷⁷ The donations would be made not to the pension funds directly, but to the DIA.¹⁷⁸ The DIA would then in turn contribute directly to the pension funds. By addressing the needs of the pension funds, the donations would effectively protect the DIA collection from deaccession. The proposal was a bold one,¹⁷⁹ virtually unheard of as a solution to a municipal bankruptcy. Ultimately, the idea went from doodle to court-approved solution, with its fair share of twists and trials along the way.

A. Donations

Within a matter of months, the foundations had pledged 366 million dollars. The Ford Foundation, with its headquarters in New York but its

¹⁷⁴ Randy Kennedy, Monica Davey, & Steven Yaccino, *Foundations Aim to Save Pensions in Detroit Crisis*, NEW YORK TIMES (Jan. 13, 2014), http://www.nytimes.com/2014/01/14/us/300-million-pledged-to-save-detroits-art-collection.html?_r=0.

¹⁷⁵ That doodle will be donated to the DIA. Nathan Bomey & Mark Stryker, *Historic Detroit Bankruptcy Doodle to be Donated to DIA*, DETROIT FREE PRESS (Mar. 18, 2015, 3:24 PM), <http://www.freep.com/story/news/local/detroit-bankruptcy/2015/03/18/detroit-bankruptcy-grand-bargain-detroit-institute-of-arts-judge-gerald-rosen/24965149/>.

¹⁷⁶ Monica Davey, *Finding \$816 Million, and Fast, to Save Detroit*, N.Y. TIMES, Nov. 7, 2014, http://www.nytimes.com/2014/11/08/us/finding-816-million-and-fast-to-save-detroit.html?_r=0.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ "My initial reaction was, this is a crazy idea," Darren Walker, the president of the Ford Foundation, remembered thinking as he listened that afternoon. "Eight hundred million dollars from a group of foundations? I thought it was rather over the top in its boldness," Mr. Walker said, adding of the mood in the room: "I think there was a collective gulp." Monica Davey, *Finding \$816 Million, and Fast, to Save Detroit*, N.Y. TIMES, Nov. 7, 2014, http://www.nytimes.com/2014/11/08/us/finding-816-million-and-fast-to-save-detroit.html?_r=0.

roots in Detroit, pledged 125 million dollars. The Kresge Foundation, based in Michigan, pledged 100 million dollars. The John S. and James L. Knight Foundation, based in Miami, pledged 30 million dollars – perhaps a nod to the Detroit newspaper once owned by the organization’s benefactors.¹⁸⁰ Some nine other foundations have pledged similar sums.¹⁸¹ The pledges will be paid over a period of twenty years.¹⁸² These funds are expressly earmarked for securing both the pensions and the collection of the DIA.¹⁸³

The DIA mounted an independent fundraising campaign more local in scope, targeting individuals, businesses and area foundations. In less than a year, the DIA met its goal of 100 million dollars.¹⁸⁴

So many foundations coming together so quickly for such a large financial commitment is unusual enough. That these foundations came to the aid of a city struggling, not with a weather catastrophe but years of neglect, which was even more amazing. There is really no precedent for this sort of philanthropic bailout of a major American city.¹⁸⁵ The success of the fundraising effort is attributed both to Rosen’s audacious

¹⁸⁰ *Id.*

¹⁸¹ *Id.*; Supplemental Opinion Regarding Plan Confirmation, Approving Settlements, and Approving Exit Financing at 131, *In re City of Detroit*, 504 B.R. 97 (Bankr. E.D. Mich.) (No. 13-53846), <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket8993.pdf>.

¹⁸² Supplemental Opinion Regarding Plan Confirmation, Approving Settlements, and Approving Exit Financing, *In re City of Detroit*, 504 B.R. 97 (Bankr. E.D. Mich.) (No. 13-53846), <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket8993.pdf>.

¹⁸³ In an interview with PBS, Ford Foundation President, Darren Walker, was asked if he was writing an “unconditional check.” He responded:

“Absolutely not. We were clear our resources would be used to secure the pensions and secure the museum’s collection, but we are investing in its future, in the civic grid. Democracy needs to work in Detroit, and in order for that to happen we need to invest in civic organizations, in cultural organizations, in health and well-being, and of course in education. All of the foundations who are engaged in the grand bargain are deeply committed to investing in those areas. It’s going to be essential for the future of the city.”

PBS Newshour: Behind Detroit’s ‘Grand Bargain’ to Emerge from Bankruptcy, PBS (Nov. 7, 2014), available at <http://www.pbs.org/newshour/bb/behind-detroits-grand-bargain-emerge-bankruptcy/>.

¹⁸⁴ Mark Stryker, *DIA Hits Its Grand Bargain Goal*, DETROIT FREE PRESS (Jan. 5, 2015, 9:50 PM), <http://www.freep.com/story/entertainment/arts/2015/01/05/dia-grand-bargain-payments/21306891/>.

¹⁸⁵ “To the boards of most of the foundations, the concept was peculiar. There was no program for a bankrupt city.” Monica Davey, *Finding \$816 Million, and Fast, to Save Detroit*, N.Y. Times, Nov. 7, 2014, http://www.nytimes.com/2014/11/08/us/finding-816-million-and-fast-to-save-detroit.html?_r=0.

plan and to the crucial role of the DIA in the success of rebuilding the city.¹⁸⁶

B. *Legislative Apportionment and Financial Oversight*

The State of Michigan contributed nearly 200 million dollars¹⁸⁷ to make the Grand Bargain a reality. The legislature was not of one mind when it came to making such a whopping contribution to the settlement.¹⁸⁸ Ultimately, however, the legislature agreed to the amount, drawing upon the state's tobacco settlement payments to help ease the pain.¹⁸⁹ In return, the State demanded a mechanism for oversight of the City's pension governance. Under the terms of the agreement, the City was required to create an oversight commission comprised, in part, of state-appointees.¹⁹⁰

C. *Transfer of Title and Interest*

Although the Michigan Attorney General takes the position that equitable title to the DIA collection rests with the beneficiaries of its public trust,¹⁹¹ the agreement requires an express transfer of any legal interest in the collection back to the Founders Society. In executing this agreement, the City cedes all interest in the DIA collection, regardless of when and how the pieces were acquired. The Founders Society, then, is the institutional body responsible for making operating and capital decisions, and for financing the daily operations and special exhibits of the DIA.

¹⁸⁶ Others suggest that the Grand Bargain was more of a public relations effort to minimize expensive and protracted litigation that would delay the resolution of the bankruptcy. See Bob Adelman, *Detroit's Grand Bargain Will Satisfy No One*, *The Light from the Right* (Feb. 25, 2014, 6:38), <http://lightfromtheright.com/2014/02/25/detroits-grand-bargain-will-satisfy-one/>.

¹⁸⁷ Supplemental Opinion Regarding Plan Confirmation, Approving Settlements, and Approving Exit Financing at 20, *In re City of Detroit*, 504 B.R. 97 (Bankr. E.D. Mich.) (No. 13-53846), <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket8993.pdf>.

¹⁸⁸ Monica Davey, *State Senate Passes Plan to Ease Cuts Detroit Faces*, *N.Y. Times*, June 4, 2014, <http://www.nytimes.com/2014/06/04/us/michigan-senate-passes-plan-to-ease-detroit-pension-cuts.html>.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See *supra* Part VII.

D. *The Terms of the Settlement*

The specific terms of the deal were altered in various proposals submitted to the bankruptcy court.¹⁹² The basic principles underlying the deal, though, remained the same. According to the final proposal, under the Grand Bargain:¹⁹³

1) The DIA pledged to secure 100 million dollars in commitments from individuals, local foundations, and the business community (the DIA Funders). The DIA agreed to make payments of 50 million dollars each to the General Retirement System (“GRS”) and the Police and Fire Retirement System (“PFRS”) over the next twenty years. The DIA also agreed to provide free or low-cost art programs to Michigan residents.

2) The Foundation Funders (the large philanthropic organizations) pledged 366 million dollars to be divided equally between the GRS and PFRS. The Foundation Funders agreed to pay 5% of that amount at the close of the settlement. The DIA and DIA Funders agreed to pay five million dollars at that same time.

3) In exchange for this, the City agreed to transfer all title and interest in the DIA collection to be held in a perpetual charitable trust on behalf of the citizens of the City and State.

4) As a condition precedent to the pension payments, “[t]he City is required to adopt and maintain certain pension governance mechanisms, including the creation of a review board and the production of annual reports.”¹⁹⁴

5) In addition to other mutual indemnifications, the pension funds agreed to waive and release all claims against the DIA Funders, Foundation Funders, and the City’s commitment to make payment into the retirement system.

The effect of the Grand Bargain on those receiving city pensions was a positive one under the circumstances. As a result of the Grand Bargain, “pension reductions for retirees . . . are now significantly less than the City has originally concluded would be necessary.”¹⁹⁵ In exchange, the expansive and unique art collection was protected for generations to come.

¹⁹² Supplemental Opinion Regarding Plan Confirmation, Approving Settlements, and Approving Exit Financing, *In re City of Detroit*, 504 B.R. 97 (Bankr. E.D. Mich.) (No. 13-53846), <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket8993.pdf>.

¹⁹³ Supplemental Opinion Regarding Plan Confirmation, Approving Settlements, and Approving Exit Financing at 30-31, *In re City of Detroit*, 504 B.R. 97 (Bankr. E.D. Mich.) (No. 13-53846), <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket8993.pdf>.

¹⁹⁴ *Id.* at 31.

¹⁹⁵ *Id.* at 36.

X. JUDICIAL APPROVAL OF THE GRAND BARGAIN

The final resolution of Detroit's bankruptcy was outlined in Judge Rhode's opinion issued on November 7, 2014, and in his supplemental opinion issued on December 31, 2014.¹⁹⁶ In addition to addressing a myriad of other efforts to satisfy the City's creditors, the court considered whether the Grand Bargain met the requirements of fairness and the best interests of the creditors as required by the governing statute.¹⁹⁷ The court found that, under "the Bankruptcy clause of the U.S. Constitution, the federal bankruptcy power could be used to impair pension right . . . even if the Michigan constitution protects them."¹⁹⁸

In its opinion, the court reiterated the DIA's position that the sale of the art would violate the public trust and many transfer restrictions made by donors to the collection. It noted credible evidence presented at trial that the sale of the collection would be "vigorously challenge[d]" and that it may result in the cancellation of the millage that constitutes nearly 70% of the DIA's operating budget. The court also found credible the DIA's historical evidence of a public trust created by the museum and acknowledged by the City and considered the opinion of the DIA's chief operating officer that to sell the collection would violate the professional standards established by the American Association of Museum Directors and impact any proposed sale.¹⁹⁹

XI. PROPOSAL

In order to assure that no other museum finds itself in such peril, I propose a two-part solution: 1) a mandatory legal audit for all institutions; and 2) express proclamations by the governing professional organizations prohibiting collections, or pieces of collections, from being

¹⁹⁶ See generally Supplemental Opinion Regarding Plan Confirmation, Approving Settlements, and Approving Exit Financing, *In re City of Detroit*, 504 B.R. 97 (Bankr. E.D. Mich.) (No. 13-53846), <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket8993.pdf>.

¹⁹⁷ 11 U.S.C. § 943(b)(7) (2006); Supplemental Opinion Regarding Plan Confirmation, Approving Settlements, and Approving Exit Financing at 39, 95, *In re City of Detroit*, 504 B.R. 97 (Bankr. E.D. Mich.) (No. 13-53846), <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket8993.pdf>.

¹⁹⁸ Supplemental Opinion Regarding Plan Confirmation, Approving Settlements, and Approving Exit Financing at 39, *In re City of Detroit*, 504 B.R. 97 (Bankr. E.D. Mich.) (No. 13-53846), <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket8993.pdf>.

¹⁹⁹ "Accordingly, it is likely that if the City sold any of its art to pay its debts, the national and international art community would refuse to do business with the DIA." Supplemental Opinion Regarding Plan Confirmation, Approving Settlements, and Approving Exit Financing at 34, *In re City of Detroit*, 504 B.R. 97 (Bankr. E.D. Mich.) (No. 13-53846), <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket8993.pdf>.

considered part of municipal assets in the event of bankruptcy. The combination of these two solutions should provide institutions with the foresight to protect their collections and the wherewithal to prevent them from being an attractive target to creditors.

A. *Legal Audit*

The DIA is not alone in its complicated legal entanglement with local and state government. For many not-for-profit institutions, funding needs often dictate unusual legal arrangements, making it at times unclear who owns what and who is responsible for what. Any institution older than twenty years should undertake a candid and thorough legal audit to untangle and clarify any complicated ownership relationships. These complications could include funding arrangements (like the DIA millage), ownership structure and public trust (like the issues among the City and the Founders Society), and testacy issues (like restrictions on deaccession and transfer made by donors of major and minor works). Additionally, a review should be conducted to determine if the documents governing the boards of directors and trustees are consistent with current law regarding rights, obligations, and potential liability. To be forewarned is to be forearmed in these circumstances. Ideally, the legal audit will prompt institutions to make changes to clarify any confusion as to their rights to control the work they do in furtherance of their important public purpose.

B. *Actions by Professional Organizations*

Professional organizations in the museum community are vital and powerful. Both the American Alliance of Museums and the International Council of Museums have acted as advocates on behalf of member institutions in the past. Their restrictions on deaccessioning were considered by the Michigan Attorney General in his determination that the DIA collection could not be sold to finance Detroit's debt.²⁰⁰ There was some discussion by member institutions of boycotting any sale of the DIA works and penalties for those who failed to comply.²⁰¹ I encourage these important organizations to consider amending their guidelines to: 1) clarify the circumstances under which a museum is held in the public trust (presuming a broad interpretation of this view); 2) expressly prohibit the use of museum collections and resources from being considered a municipal or governmental asset in the case of financial insolvency; 3) prohibit member institutions from purchasing

²⁰⁰ *Conveyance or Transfer*, *supra* note 67 at 10.

²⁰¹ *See* Michael Plummer, *supra* note 137, at 29, 33-35.

any works brought to sale under these circumstances; and 4) specify the consequences for members who violate these bans. Guidelines for the professional organizations governing auction houses²⁰² and art galleries²⁰³ should be amended similarly to prevent the use of private sales to circumvent these restrictions.

While such restrictions would not have the force of law, they would reinforce an ethical code of conduct to be observed by this relatively small, tightly knit community. They would also serve to deter those outside the community from seeing art as fair game.

XII. CONCLUSION

A cultural tragedy was averted when the City and the DIA reached the Grand Bargain. This remarkable outcome relied not so much on legal acumen as on creative, almost outlandish thinking. This thinking was matched by a torrent of support for the DIA from its blue-collar neighbors and patrons to the more elite museum community. The stunning level of generosity from the philanthropic realm – from organizations with roots in Detroit and those with only an appreciation of what would be lost if the DIA collection were compromised was facilitated at lightning speed by dedicated administrators and boards of directors. What was accomplished here was nothing shy of amazing. It is a spectacular reminder of the power of art. When faced with the question of pensions or paintings, Detroit and its supporters answered “both” in a way that blazes a trail for other creative solutions to equally compelling dilemmas.

²⁰² See e.g., *Code of Business Conduct*, SOTHEBY'S, http://www.sothebys.com/content/dam/sothebys/PDFs/legal_code_of_conduct_brochure.pdf.

²⁰³ *Code of Ethics and Professional Practices*, ART DEALERS ASS'N OF AM., <http://www.artdealers.org/about/code-of-ethics-and-professional-practices>.