

Art and the Nazi Era: What belongs to whom?

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Art and the Nazi Era: What Belongs to Whom?

It is the stuff of thrillers. A valuable art collection, questionable sales or transfers of that art or even outright thievery, a disappearance of the art for decades or even for generations, a resurfacing of the art in museum collections or at auctions, and the ensuing tussles between the heirs of the original owners and the current owners who acquired the art in good faith. Add in the massive appreciation in value in some of the works and complex litigation is almost inevitable.

Over the past six decades, litigation over works lost during the Nazi era has posed complex questions involving a web of interrelated legal principles, according to Judith Bresler, counsel to Withers Bergman LLP and co-author of *ART LAW: The Guide for Collectors, Investors, Dealers and Artists* (1st, 2d and 3d editions), the leading treatise on art law in the US. "The fact patterns in many of these cases are so byzantine," she notes, but some common legal issues surface in most cases. Bresler offers a brief guide:

What constitutes a forced sale?

Much of the art that changed hands during the Nazi era was not stolen outright, rather it was sold under questionable circumstances. But what questionable circumstances constitute a forced sale of art allowing for a potential claim? Some common situations that may indicate a forced sale include an all-cash sale, a sale at a price significantly below market value, a hurried transaction (implying at least one of the parties was fleeing the venue), or other circumstances suggesting that the sale was an element in a means of escape. "It's a shame that some of these cases have been dismissed on the technicality of the statute of limitations," Bresler declares. These cases were missed opportunities to clarify the parameters for determining forced sales. Some experts, she notes, argue any sale made during the Nazi era should be considered a forced sale. Bresler argues against this view, asserting "there were some legitimate transactions."

Statute of Limitations and Choice of Law

A common question is whether the original owner or heir can bring a claim to recover the art or whether too much time has passed. The answer "varies from state to state," Bresler observes. New York law is characterized by the demand-refusal rule. The rule states the original owner or heir has three years to bring a legal action from the date such person informs the current good-faith purchaser of the claim and the purchaser refuses to return the work.

Choice of Law

Many cases involve laws of different US states and of other nations. Deciding where to pursue a claim can impact the success of the action. "New York law is the most friendly to original owners in terms of being able to sue," Bresler notes, adding that the law is deliberately fashioned to prevent New York from becoming a haven for stolen art.

Declaratory Judgment

To forestall such claims, Bresler says, some collectors and museums have resorted to declaratory judgment as a kind of pre-emptive strike to assure their ownership to works where a claim is made. "When a good-faith possessor gets a claim letter, the possessor may initiate a lawsuit to quiet title [confirm ownership in the possessor]. It's a growing trend." She cites recent cases in which museums in Detroit, Toledo and Boston have won declaratory judgments on technical grounds because the statute of limitations had been exceeded.

International Consensus

Cases concerning stolen Nazi-era art have become the subject of international conferences in recent years. In 1998, the US Department of State organized a conference, at which 44 nations including the US, adopted governing principles for handling these cases. The principles came to be known as the Washington Principles and called for mutual cooperation among nations and their museums, art galleries and auction houses in tracing looted art through more thorough provenance research, publicizing unrestituted art and promoting its restitution, and taking steps to achieve a fair resolution of controversies relating to such art. In 2009, the Washington Principles were affirmed at a Conference in Prague giving rise to the "Terezin Declaration" signed by 47 nations, including the US, which seeks to resolve art claims expeditiously and based on the facts and merits of each claim.

However, as Bresler points out, both the Washington Principles and the Terezin Declaration are non-binding, and in the intervening years the spirit of such Conferences has not always been honored. One reason for this, she maintains, is that museums, as nonprofit institutions, have a

competing fiduciary responsibility to hold works of art in trust for the benefit of the public. "There's a natural tension between museums and the rights of heirs."

Some commentators have, in fact, asserted it's time to let go of the past and to allow these works to remain with those who have acquired them in good faith – whether museums or private collectors. Bresler cites the example of Sir Norman Rosenthal, former Exhibitions Secretary of the British Royal Academy of Arts. Rosenthal's own parents were Jewish refugees from Nazi-occupied Europe; yet he is opposed to the restitution movement and believes that there is no obligation to return any more art lost during the Nazi era. On the other side, Bresler notes, "Some commentators think there should be no statute of limitations – at least where a museum is the good-faith possessor – so that those cases can be decided on the facts and the merits."

Since none of the principles adopted at these international conferences on the subject are legally binding and huge amounts of money are at stake; the claims and ensuing cases are likely to continue for some time to come.