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Charities in the Courtroom 2.2: WW Two Art Claim With a Twist (Part Two)

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"Why haven't claims about the 'theft, looting, and forced sale of hundreds of thousands of artworks' long ago been barred by a statute of limitations or other time-related defense?"

That's how we ended Part One (February 2) of the latest episode of our "Charities in the Courtroom" series. It focuses on a new lawsuit filed on January 20, 2023, in a New York court: *Thomas A. Bennigson et al. v. The Solomon R. Guggenheim Foundation*.

The period from 1933 through 1945 has been called the "...greatest displacement of art in human history." The sheer number of items lost by the legal owners amid persecution and war is staggering: estimates are at least in the hundreds of thousands.

Despite valiant efforts, particularly in the years just after the end of the Second World War, to facilitate the return of the artwork or fair compensation, many items including major art treasures never made their way back to the victims or their heirs.

Instead, they have disproportionately landed in the collections of America's cultural institutions, including the most prestigious ones.

So many decades after the end of the Nazi reign of terror, most people likely assume that claims for return or restitution of art unfairly lost, would have slowed to a dribble or stopped entirely. But that's *not* happening. United States arts organizations will continue to remain embroiled, at least for a few more years, in the difficult process of sorting out and dispensing "fairness" and "justice."

It's all due to a 2016 law enacted by the U.S. Congress: the Holocaust Expropriated Art Recovery Act of 2016 (the "HEAR Act"). For a brief window of time, this Act temporarily suspends existing federal and state statutes of limitations in connection with certain artwork lost due to Nazi persecution

during the period of The Third Reich. The law sunsets in 2027.

It appears intentionally expansive in scope to broaden the definition of "lost" Nazi-era artwork to more than situations of *direct* confiscation by the Nazis. However, there are clear eligibility parameters for plaintiffs. And defendants may still raise a number of equitable defenses in appropriate circumstances.

There are more than a few cases popping up on dockets in American courthouses. Our focus case, *Bennigson et al. v. Guggenheim*, has generated considerable media interest and attention in the short time that it has been on the state court docket in Manhattan. It may – or may not – be a viable lawsuit. But it's certainly fascinating as a test case under the HEAR Act.

"Woman Ironing" at the Guggenheim

Before turning to the law in the next section, let's summarize the key facts again.

Ordinarily at the earliest stages of a lawsuit, there's little more information than available from a brief and vague complaint. Here, though, the 22-page Complaint by a very good law firm is highly specific and meticulously sourced (albeit presented from the plaintiffs' perspective). It masterfully sets the stage with deep and compelling historical background and context as well as a satisfying narrative of what happened. Even if you think you know what happened to the Jews in Germany in the 1930's, this is an eye-opening read.

In Part One (February 2) of this two-part series, we linked to several meaty news articles and commentary that help fill in more detail and confirm many of the plaintiffs' allegations.

In a nutshell: A 1904 Picasso masterpiece titled Woman Ironing ("La repasseuse"), currently valued between about $100-200 million, has been hanging prominently in the Thannhauser Collection at the Guggenheim Museum since its posthumous donation in the late 1970s.

But the heirs of once wealthy German-Jewish industrialist, the late Karl Adler, now want the masterpiece back or, at least, fair restitution. Adler had bought the painting in 1916 for fair market value from (also Jewish) Heinrich Thannhauser, a major Munich gallery owner and art dealer.

Then, in 1938, while Adler and his family were fleeing for their lives because of Nazi persecution – their assets and business interests "Aryanized" and confiscated; in desperate need of cash to pay exorbitant exit and visa fees – he reluctantly relinquished his prized Picasso. He let it go "for a pittance" to Justin Thannhauser, son and heir of the late Heinrich who had died in the mid-1930's.

In the late 1970s, Woman Ironing was among the major pieces of artwork donated from the estate of the late Justin Thannhauer to the Guggenheim and other institutions.

Now, a group of Karl Adler's descendants and other heirs, as well as several nonprofit organizations that are the residuary legatees of some deceased relatives, assert that the donee-museum, the Guggenheim, continues to "wrongfully possess" this Picasso masterpiece within the meaning of the HEAR Act of 2016.

The Time-Lapse Conundrum

"Following World War II, the United States and its allies attempted to return the stolen artworks" although many "were never reunited with their owners."

The obstacles in post-war property-recovery efforts were extraordinary and unprecedented: owners, relatives, and other heirs deceased or wandering Europe and beyond as displaced refugees as well as (mistaken) information that some treasures had been destroyed or irretrievably lost during the chaos, only to surface years later and far away. Those seeking recovery have had to "… painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide."

Continuing through the second half of the twentieth century, the search continued with accommodations being made by many governments. The aim was to ease recovery by rightful claimants and effect a "just" and "fair" resolution despite standard barriers of property or time-bar laws of many jurisdictions.

"In recent decades … there has been a growing sense of urgency that some measure of justice, albeit incomplete, be given to those victims or their heirs. There have been significant international efforts to continue these accommodations, including the U.S. State Department-facilitated *Washington Principles* of 1998 signed by nearly 50 countries. "One of these principles is that ''steps should be taken expeditiously to achieve a just and fair solution' to claims involving such art that has not been restituted if the owners or their heirs can be identified."

The U.S. Congress followed up with the Holocaust Victims Redress Act (Public Law 105–158, 112 Stat. 15), "which expressed the sense of Congress that 'all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner."

These non-binding efforts were beefed up again in 2009 by the (also toothless but well-meaning) *Terezin Declaration* signed by some 46 nations at a Holocaust-recovery conference in Europe. International resolutions and "sense of the Congress" measures helped, but only up to a point.

So the United States Congress took action in late 2016 to bring "binding and meaningful relief" to valid claimants suing in our courts at least for a while longer until the sunset date of 2027. The new Holocaust Expropriated Art Recovery Act of 2016 (the "HEAR Act"), Public Law 114-308, serves "… to override state statutes of limitations as well as make sure that claims to Nazi era confiscated or otherwise lost art "are adjudicated in accordance with United States policy as expressed in the…" *Washington Principles* and the *Terezin Declaration*.

By this short-term measure, Congress has temporarily re-set the clock on bringing claims related to "… any artwork or other property that was lost during the covered period (1933 through 1945) because of Nazi persecution…."

Claim Eligibility and Defense

Any plaintiffs (like those in this new lawsuit) seeking relief under the HEAR Act must meet the eligibility parameters described in Section 5 and augmented by the statute's definitional sections.

Section 5 reads: "Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property *that was lost* during the covered period *because of Nazi persecution* may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of— (1) the identity and location of the artwork or other property; and (2) a possessory interest of the claimant in the artwork or other property. (emph. added).

The expansive language intentionally adopted in the final version of Section 5 reflects the growing understanding over many decades of the true scope and breadth of the damage inflicted during the Nazi era on "… the Jewish people and other persecuted groups" throughout Europe. This key Section 5 appears to be broad enough to include many situations beyond direct confiscation or misappropriation by the Nazis. These dire circumstances may include, for instance, "forced sales" to third parties or other transactions so triggered by distress that it would be unfair to uphold the wartime-era deal as valid.

See, generally: *Congress Passes Holocaust Expropriated Art Recovery Act* (December 12, 2016, Audrey Gascho, *news.artnet.com* and *Lawsuit Over Egon Schiele Artworks Gets Boost From New Legislation* (February 28, 2017) Hili Perlson, *news.artnet.com*.

Similarly, any defendant sued under the HEAR Act may assert "equitable defenses." These include familiar ones like "waiver" or "estoppel. There is another, less well-known, concept called "laches." Simply put, a defendant asserting laches argues that – notwithstanding this temporary suspension of the ordinary statutes of limitation – a plaintiff dawdled too long in bringing the case.

The Second Circuit (which includes New York) has already ruled that a laches defense may be available, when factually appropriate, in a lawsuit brought under the HEAR Act. See *Zuckerman v. Metropolitan Museum of Art: Second Circuit Holds that the Holocaust Expropriated Art Recovery Act of 2016 Does Not Preclude Application of Laches Defenses to Nazi-Looted Art Recovery Claims*, Case Note, 133 Harv. L. Rev. 2196 (April 4, 2020).

Defendant Guggenheim has already indicated in public statements that it intends to vigorously dispute the plaintiffs' eligibility under the HEAR Act as well as raise waiver and laches defenses.

Parties' Positions

"The museum states that because the painting was not confiscated by Nazis," and since it was sold to Thannhauser — a Jew who also faced Nazi persecution — "there is no issue regarding ownership." It was "a fair transaction" between people with a "longstanding and continuing relationship."

In the lawsuit, the plaintiffs take a different view: "Thannhauser, as a leading art dealer of Picasso, must have known he acquired the painting for a fire sale price. At the time of the sale, Thannhauser was buying comparable masterpieces from other German Jews who were fleeing from Germany and profiting from their misfortune." They add: "Thannhauser was well-aware of the plight of Adler and his family, and that, absent Nazi persecution, Adler would never have sold the Painting when he did at such a price."

According to arts lawyer, Nicholas M. O'Donnell, quoted recently in *The New York Times*, "Thannhauser is … a controversial figure" who just so happened to be in the right place at the right time to take a lot off the hands of Jews desperately fleeing Europe." He adds: "Those who defend him say, 'He was the one who helped them get something.' Those who criticize him say, 'It's funny how he always seemed to end up with this depressed-value art.'"

The name Justin Thannhauser pops up in connection with several art-recovery lawsuits over the years. See *Whose Picasso is it?* (January 19, 2003), Howard Reich, *The Chicago Tribune, via lootedart.com* and *One Jewish Family's Battle with a Munich Museum* (October 18, 2011) Michael Sontheimer, *Spiegel International.*

And defendant Guggenheim, it should be noted, is already familiar with the story of its donor, Justin Thannhauser. In 2009, the museum settled with the heirs of another Jewish family over the Picasso painting Le Moulin de la Galette; the family claimed Thannhauser acquired it as a 'product of economic duress.'"

Conclusion

Of course, if or when the dust settles in plaintiffs' favor, it will come down to a matter of money. They demand "that the painting be returned to the family or that the museum pay damages between $100-200 million."

The plot continues to thicken.

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