

CALIFORNIA'S HOLOCAUST ERA STATUTE OF LIMITATIONS STRUCK DOWN

BUT GOUDSTIKKER HEIR ALLOWED TO PURSUE CLAIM FOR CRANACHS

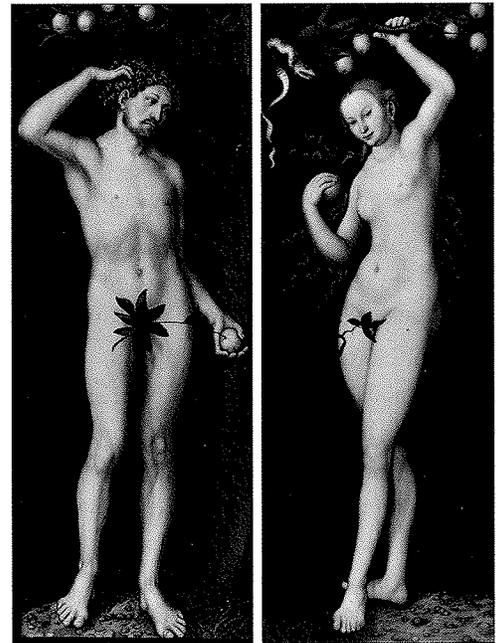
The claim by Marei von Saher, heir to the famed Goudstikker art collection, to recover two 16th century paintings by Lucas Cranach the Elder from the Norton Simon Museum in California has been dealt both a blow and victory by the United States Court of Appeals for the Ninth Circuit.¹ The bad news for von Saher — and potentially other claimants — is that the court struck down as unconstitutional California's unique Holocaust Era statute of limitations under which she sued.² The good news is that the court reversed a lower court ruling and von Saher has been given an opportunity to amend her complaint to allege facts sufficient to fall within California's general three-year statute of limitations.

The original decision, by a three-judge panel, came down in August 2009. In September, the parties filed Petitions for Rehearing and Rehearing *en banc* (by the full court) in the Ninth Circuit. On January 14, 2010, as *IFAR Journal* went to press, the Ninth Circuit issued an Amended Opinion and denied von Saher's Petitions for

Rehearing and Rehearing *en banc*. The amended portion of the ruling is brief, stating: "Because it is not clear that Saher's complaint could not be amended to show a lack of reasonable notice, dismissal without leave to amend was not appropriate (citation omitted). We, therefore, grant Saher leave to amend her complaint to allege the lack of reasonable notice to establish diligence under California Code of Civil Procedure § 338, and remand this case to the district court for that purpose."

This Amended Opinion suggests that not only does von Saher have the burden of proving that she diligently sought the Cranachs within California's general three-year statute of limitations, but the Museum may also have had an affirmative duty to give "reasonable notice" to the public of its possession of the Cranachs, including, perhaps, information about their provenance.

The two Cranachs, life-size oil paintings of *Adam* and *Eve* on wood, were among approximately 1,200 works of art that the art dealer and collector, Jacques Goud-



LUCAS CRANACH THE ELDER. *Adam and Eve*, c. 1530, currently in the collection of the Norton Simon Museum, but part of a World-War II-related ownership dispute in federal court in California.

stikker, left behind when he fled the Netherlands in 1940, in advance of the Nazi invasion. He died soon thereafter. The Cranachs have been prized possessions of the Norton Simon Museum since 1970 and '71, when the museum purchased them from George Stroganoff, whose family was said to have owned them in Russia before the Bolshevik Revolution and to whom they were returned after World War II. Whether, in fact, they were ever part of the Stroganoff collection is one of the issues in dispute.

¹ *Marei Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016 (9th Cir. 2009), amended, ___ F.3d ___, 2010 WL 114959 (9th Cir., Jan 14, 2010). For a thorough discussion of this case and the ownership history of the panels, see Carla Shapreau, "Nazi-Era Restitution Lawsuits: New Developments in the California Courts," *IFAR Journal*, Vol. 10, no. 2 (2008), pp. 21-28.

² California Code of Civil Procedures § 354.3

The California Holocaust Era statute, enacted in 2002, extended the limitations period for claims for the recovery of Holocaust Era artwork that might otherwise have been untimely under the state's general three-year statute of limitations. The Holocaust Era statute permitted suit against a California museum or gallery (but not an individual) so long as the suit was begun by December 31, 2010. In part, the statute was intended to address the unique difficulties claimants faced regarding the investigation of origin, authenticity, and movement of looted Holocaust Era art.

Finding that the Holocaust Era statute did not conflict with any federal law or foreign policy, the Ninth Circuit nevertheless held that, under a field preemption analysis, it infringed upon a foreign affairs power reserved by the U.S. Constitution exclusively to the federal government. The 2-1 majority stated that "the relevant question is whether the power to wage and resolve war, including the power to legislate restitution and reparation claims, is one that has been exclusively reserved to the national government by the Constitution. We conclude that it has."³

The dissenting opinion by Judge Pregerson disagreed, remarking that property, such as the artwork at issue, is a subject traditionally regulated by the State and that California has a legitimate interest in regulating museums and galler-

ies subject to its jurisdiction. The majority, Pregerson added, read the statute too broadly when it characterized it as providing for war reparations.⁴

The majority also concluded that the statute was too broad and appeared intended to create a "world-wide forum" for all Holocaust victims and their heirs to sue a museum or gallery located within or without the state, rather than merely protect the interests of California residents by regulating its art trade.⁵ Again, Judge Pregerson disagreed, commenting that a reasonable interpretation of the statute would limit its reach to entities subject to California jurisdiction.⁶

Although the Ninth Circuit foreclosed von Saher's claim under the Holocaust Era statute, it permitted her to proceed under California's general three-year statute of limitations pertaining to personal property stolen or converted before 1983.⁷ In so doing, it reversed the trial court's ruling that von Saher's claim was time-barred under the general statute of limitations.

The Ninth Circuit stated that, in determining when the three-year California statute of limitations expired, it would apply a "constructive discovery accrual rule," in other words, the clock would start to run on von Saher's claims when

she discovered or "reasonably could have discovered her claim to the Cranachs, and their whereabouts." However, the California Supreme Court has not yet ruled on the issue of when the clock starts to run on such a claim, and the few California appellate courts that have addressed this issue have adopted disparate standards.⁸

California's Holocaust Era statute of limitations is now dead, unless von Saher decides to appeal to the U.S. Supreme Court and succeeds. In any case, even if revived, this statute will not benefit other claimants unless their suits are filed by December 31, 2010.

This lawsuit, like many other battles over allegedly looted art, hinges on whether, or not, von Saher can overcome the statute of limitations. But the Amended Opinion suggests that both the Museum and von Saher will have to address questions about their own diligence, or lack of it. Was the Museum diligent in notifying the public that it possessed the Cranachs? Did that diligence require notice of their full provenance? Could von Saher reasonably have discovered her claim to the Cranachs, and their whereabouts, earlier? These are among the many issues that may play out in the trial court on remand.

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⁴ *Id.*, at 1031-1032.

⁵ *Id.*, at 1026-1027

⁶ *Id.*, at 1032.

⁷ California Code of Civ. Proc. § 338(3).

⁸ See, Carla Shapreau, "California Adopts an 'Actual' Discovery Accrual Rule for Claims to Recover Stolen Art," *Int'l. Journal of Cultural Property*, Vol. 7, no. 1, (1998) pp. 177-189.

³ *Von Saher*, 578 F.3d, at 1028.