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Holocaust Art Restitution Litigation in 2009

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Introduction

Several Holocaust-era art restitution cases decided in 2009 brought to the forefront the myriad of issues that drive such litigation, including the Act of State doctrine, international comity, laches, choice-of-law and the Foreign Sovereign Immunities Act. Although not all the cases present a favorable outcome for the plaintiff, each provides an important addition to the field as a whole. This article highlights some of the year's most significant art restitution cases and their outcomes.

Sotheby's, Inc. v. Shene

In *Sotheby's, Inc. v. Shene*, 2009 U.S. Dist. LEXIS 23596 (S.D.N.Y. 2009),¹ a dispute arose about the title to a volume of drawings and etchings known as the *Augsburger Geschlechterbuch*, which was created in Germany in the sixteenth century. From at least 1858 to 1945, the book was stored in the collections of the Staatsgalerie Stuttgart, located in Germany. After World War II, the Staatsgalerie discovered that the book was missing and assumed that it had been destroyed. In 2001, however, Shene purchased the volume at a private auction, and then gave it to Sotheby's to sell. During its investigation of the book's provenance, Sotheby's discovered that the book had likely been stolen by a United States Army Captain during World War II. Sotheby's brought an interpleader action against Shene and the German state of Baden-Wurttemberg, which came to possess the Staatsgalerie, to determine the book's proper title.

With few exceptions, courts in the United States adhere to the proposition that “[a] good-faith purchaser of a stolen object is not considered to have valid title to the object, because a purchaser cannot acquire good title from a thief.”² Even if an individual purchases an object without knowing it was stolen, the title to the object remains with the true owner and does not transfer to the good-faith purchaser. Baden-Wurttemberg presented considerable evidence demonstrating its ownership of the book. For example, each page of the book was stamped with the Staatsgalerie's insignia, and evidence demonstrated that the Captain who had likely taken the book was stationed in Waldenburg, where the book was stored. Also, the Captain had told his family that although soldiers often burned books and other objects, he had “rescued” some of the books. Based on this evidence, the court determined that Baden-Wurttemberg owned the book at the time it was taken by the Captain, and because the Captain could not pass valid title of the book to any subsequent purchaser, Baden-Wurttemberg was the legal owner.

Von Saher v. Norton Simon Museum of Art at Pasadena

In 2002, the California legislature enacted a law extending the statute of limitations for claims for the recovery of Nazi-looted artwork brought in the state of California against museums and galleries. In *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016 (9th Cir. 2009),³ that statute was held an unconstitutional violation of the federal government's foreign affairs power. The Ninth Circuit concluded that by enacting legislation extending the statute of limitations for claims for the recovery of Nazi-looted art, without limiting its scope solely to museums and galleries actually located in California, the state legislature had enacted legislation that does not address a traditional state interest and that conflicts with the federal government's exclusive power to resolve war.

Von Saher, heir of the noted Jewish art dealer Jacques Goudstikker, brought an action against the Norton Simon Museum of Art and the Norton Simon Art Foundation to recover a pair of life-size paintings of Adam and Eve by Cranach the Elder that were looted from Goudstikker's gallery by Hermann Göring when the Nazis invaded the Netherlands. The Norton Simon Museum of Art and/or the Norton Simon Art Foundation had come into possession of the paintings around 1971. The defendants moved to dismiss the complaint, arguing that the statute is unconstitutional, and the district court granted the defendants' motion on the grounds that the statute is facially unconstitutional under the foreign affairs doctrine. The Ninth Circuit affirmed, and denied rehearing and rehearing en banc.⁴ The matter has been stayed pending a petition for writ of certiorari in the Supreme Court.

The Ninth Circuit determined that even though the California statute does not conflict with any specific federal statute, treaty or policy, and thus conflict preemption is inapplicable, because it could apply to museums and galleries outside of California, the legislature's interest in enacting the statute was not to protect its residents and regulate its art trade, but to create a "worldwide forum for the resolution of Holocaust restitution claims," which the court held was not a "traditional state function." Having found that California was not exercising a traditional state function, the panel went on to analyze whether the statute conflicts with the field of foreign affairs and determined that it does, because its intent was to rectify wartime wrongs. The court, however, did not rule out the possibility that the plaintiff could bring her case under the California Civil Practice Code, which provides a three-year statute of limitation for such claims. Accordingly, the court granted the plaintiff leave to amend her complaint, giving her a second chance to bring her claim.

Dunbar v. Seger-Thomschitz

In *Dunbar v. Seger-Thomschitz*, 638 F.Supp.2d 659 (E.D. La. 2009), the plaintiff had been in possession of an Oskar Kokoschka painting for ten uninterrupted years. Under Louisiana prescription laws, a party in possession of movable property for ten years becomes the owner of that property, even where the possession was acquired in bad faith. Where the injury relates to stolen art, however, the court must consider whether the claimant diligently tried to recover her art. In this case, the plaintiff sought to preempt the defendant's claim that the painting was looted by the Nazis and should be returned to her by seeking a judgment declaring the plaintiff to be the owner.

The court held that the plaintiff had acquired valid title to the work under Louisiana law and rejected the defendant's argument that Louisiana prescription laws should be supplanted to ensure better compliance with the goals of the Holocaust Victims Redress Act, § 202, 112 Stat. at 17-18. The Act provides that "all governments should undertake good faith efforts to facilitate the return of

the private...property, such as works of art, to their rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule.”

Museum of Fine Arts, Boston v. Seger-Thomschitz

At issue in *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 2009 U.S. Dist. LEXIS 58826 (D. Mass. 2009), is the title to another painting by Oskar Kokoschka. The defendant, who is the same defendant in *Dunbar*, made a demand for the painting on the Museum of Fine Arts, Boston, claiming that she was the sole heir of the true owner, who lost the painting to Nazi looting. The Museum responded by bringing an action seeking a declaratory judgment affirming its ownership, as did the plaintiff in *Dunbar*.

In a motion for summary judgment, the Museum argued that the defendant’s claim should be time barred under the Massachusetts statute of limitations, which provides that where circumstances exist so that the plaintiff could not have reasonably known that she has been harmed by another, the three-year statute of limitations begins to run only when the first event occurs that would put a reasonable person on notice to inquire into the possible injury. The court granted summary judgment, finding that the defendant’s family had sufficient notice of possible injury since the 1940s, and the action was, therefore, not timely.

Bakalar v. Vavra

Bakalar v. Vavra, 2008 U.S. Dist. LEXIS 66689 (S.D.N.Y. 2008), is a New York case currently on appeal before the Second Circuit. In *Bakalar*, the court held that Swiss law, not New York law, should govern the case. Pursuant to Switzerland’s laws, where a person purchases art in good faith, the purchaser acquires valid title to the art even if it was stolen at the time of the transfer.

The plaintiff in *Bakalar* brought an action seeking judgment declaring that he was the rightful owner of an Egon Schiele drawing in order to stave off the defendants’ claim that they were the heirs of the true owner, a Jewish art collector who was arrested by the Nazis. New York’s choice-of-law analysis provides that the validity of a transfer is governed by the law of the state where the property is located at the time of the transfer. The drawing had been sold by a Swiss gallery to a New York gallery in 1956. Upon that fact, the court determined that Swiss law should apply. The fact that the artwork’s presence in Switzerland was fleeting before its ultimate transfer to New York was not dispositive for the court. Since the New York gallery had purchased the drawing in good faith in Switzerland, it had obtained good title; and the plaintiff, who had purchased the drawing from the New York gallery, prevailed.

Schoeps v. The Museum of Modern Art

The court’s decision in *Bakalar* stands in direct contrast to a later decision, *Schoeps v. The Museum of Modern Art*, 2009 U.S. Dist. LEXIS 5647 (S.D.N.Y. 2009). The dispute in *Schoeps* centered around two Picasso paintings that were in the possession of the Museum of Modern Art and the Solomon R. Guggenheim Foundation. The claimants alleged that the paintings were transferred by their ancestor as a direct result of Nazi duress, and that the subsequent transfer of one of the paintings, which was being held in Switzerland at the time of the transfer, should be governed by New York law since New York was the location of the ultimate purchaser. Under New York law, this transfer could not pass valid title to the purchaser because the painting was stolen property at the time of the transfer.

To determine choice of law in a contract dispute, New York courts apply an interest analysis, which includes the following five factors: 1) the place of contracting, 2) the place of negotiation, 3) the place of performance, 4) the location of the subject matter of the contract, and 5) the domicile or place of business of the contracting parties. Using this analysis, the court determined that New York law should apply. The court made this determination even though the transfer occurred in Switzerland, a fact that would normally cause the court to apply Switzerland's laws. The court found that New York had a more significant relationship to the matter than Switzerland did, and denied the museum's summary judgment motion. The case did not, however, proceed to trial. The parties settled the case in a private agreement, despite the court's request that the terms of the settlement be made public.

Vineberg v. Bissonnette

Vineberg v. Bissonnette, 548 F.3d 50 (1st Cir. 2008), involved the disputed ownership of a painting looted by the Nazis from a Jewish gallery owner. In the years following World War II, the gallery owner and his heirs had taken a variety of measures to attempt to locate lost works. Unbeknownst to the gallery owner or his successors, since being purchased from the Nazis in the 1930s, the painting had remained in a private collection and was publicly exhibited only once. In 2005, when the defendant, who had inherited the painting from the purchaser, proposed to auction the painting, the heirs of the gallery owner learned of the painting's whereabouts and demanded its return.

In the litigation that followed, the lower court granted summary judgment in favor of the heirs, finding that they had pursued their claim to the painting diligently, and that the defendant had failed to demonstrate any evidence of prejudice as a result of a delay in bringing the claim. The appellate court easily affirmed the lower court's finding in favor of the plaintiffs.

Cassirer v. Kingdom of Spain

Art restitution cases often involve litigation against foreign governments or museums owned by such governments. Consequently, the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605, often becomes key to a case's outcome. Under the FSIA, foreign states are immune from the jurisdiction of United States courts. There are, however, exceptions. One such exception, called the "expropriation exception," provides that where property has been taken in violation of international law, a foreign state will not be immune where the rights to such property are at issue.

In *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009), the court considered for the first time whether the expropriation exception should apply where the foreign state involved in the litigation was not the entity that expropriated the property in violation of international law.⁵ *Cassirer* involved a dispute over the ownership of a painting that the plaintiff alleged was taken from his grandmother by the Nazis in violation of international law in 1939. After a series of transfers, some documented and others not, the painting was sold to Baron Hans-Heinrich Thyssen-Bornemisza, whose art collection was purchased by Spain in 1993.

The court held that the expropriation exception applied to the transfer despite the fact that Germany, not Spain, was responsible for the looting. The court also held that the FSIA does not require exhaustion of domestic remedies in every case; rather, exhaustion should be considered on a case-by-case basis. Accordingly, the appellate court remanded the case to the lower court to determine whether an exhaustion requirement should be applied.

Chabad v. Russian Federation

Chabad v. Russian Federation, 528 F.3d 394 (D.C. Cir. 2008), which was decided in late 2008, involved the allegedly unlawful taking by the Soviet Union of religious books, manuscripts and documents that comprise the textual basis for the teachings and traditions of Agudas Chasidei Chabad of the United States. The materials at issue were taken from Chabad on two occasions. The first occurred when the Russian government seized a portion of the materials during the October Revolution in 1917. The second occurred when Nazi forces seized another portion of the materials during the German invasion of Poland. In 1945, the Soviet military commandeered the materials and brought them to Moscow. In the years after World War II, Chabad leaders made several efforts to recover the materials and eventually brought suit.

Chabad argued that the expropriation exception to the FSIA precluded the defendant's immunity from suit under the FSIA. Chabad also argued that under the circumstances of the case, it was not required to exhaust Russian domestic remedies before bringing the action in the United States. The court agreed with the plaintiff on both grounds and added that the remedy provided under Russian law would be inadequate. Under Russian law, a successful claimant gets the right to buy its own property back from Russia, but the law provides no rules for calculating the property's value. Thus, the court held that Russia would not be shielded from suit under the FSIA.

Freund v. Republic of France

In the third case to tackle the issue of sovereign immunity, *Freund v. Republic of France*, 2008 U.S. Dist. LEXIS 105432 (S.D.N.Y. 2008), Holocaust survivors and their heirs sued for compensation for the expropriation of their property that occurred during their deportation from France to Nazi concentration camps. The plaintiffs sued three defendants: 1) the agents that operated the trains during the deportation, 2) the Republic of France for providing civil servants to run the holding camps, and 3) the bank where the proceeds of the confiscations were allegedly deposited.

In its examination of the defendants' FSIA defense, the court had to determine whether the expropriation exception should apply. The exception, in addition to requiring the property to have been taken in contravention of international law, provides that the property has to be present in the United States in connection with a commercial activity, carried on in the United States by the foreign state. 28 U.S.C. §1605(a)(3).

The court determined that neither of the agencies fell under the scope of the exception because either they were not engaged in a commercial activity in the United States or the expropriated property was not present in the United States. Since neither agency was covered by the exception to the FSIA, the court held that France was outside the scope of the exception as well. Based on this analysis, the FSIA applied and the court lacked jurisdiction to hear the matter.

Westfield v. Federal Republic of Germany

The final case to discuss the issue of foreign sovereign immunity is *Westfield v. Federal Republic of Germany*, 2009 U.S. Dist. LEXIS 65133 (M.D. Tenn. 2009). *Westfield* involved the alleged looting of an art and tapestry collection by the Nazi regime. The plaintiff argued that Germany should be considered a successor to the Nazi government, and therefore should be held liable for the theft. Germany argued that the FSIA should apply.

Central to the dispute was whether the seizure of the art collection constituted “commercial activity” within the meaning of the expropriation exception. The plaintiff argued that Germany’s act of converting the artwork was done in furtherance of the “commercial activity” of selling the art on the private art market, and that this act had a “direct effect in the United States” because the owner had intended to transfer the art to the United States. The court rejected the plaintiff’s argument, stating that although the theft was “ineffably horrendous,” no commercial activity was involved. An act that is unique to a sovereign power cannot be considered a commercial act. Thus, the court determined that it lacked jurisdiction to hear the case under the FSIA.

Conclusion

The year 2009 was a noteworthy year for cases involving the restitution of Nazi-looted art. Despite the amount of time that has passed since World War II, the restoration of Holocaust-era artwork remains important to the individuals who lost their works. The cases above demonstrate this continued effort and present an overview of some of the more significant issues in the field as a whole.

1 Later proceeding at *Sotheby’s, Inc. v. Shene*, 2009 U.S. Dist. LEXIS 30714 (S.D.N.Y. Apr. 9, 2009).

2 See *Sotheby’s, Inc. v. Shene*, 2009 U.S. Dist. LEXIS 23596, *7 (S.D.N.Y. 2009).

3 Herrick, Feinstein LLP represents the plaintiff in this action.

4 Affirmed in part and reversed in part by *Von Saher v. Norton Simon Museum of Art at Pasadena*, 2010 U.S. App. LEXIS 1019 (9th Cir. Cal. 2010).

5 Rehearing en banc granted by *Cassirer v. Kingdom of Spain*, 2009 U.S. App. LEXIS 28751 (9th Cir. Dec. 30, 2009).