

Holocaust Expropriated Art Recovery Act 2016

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Limitation period of *action to reclaim ownership*

- Action lapses ('statute barred')
- When does limitation period start?
 - Moment of loss/theft?
 - Discovery rule
 - Demand and refusal rule (New York)

Purpose of prescription periods

- Origin: land law
- Applied by way of analogy to movables
- Double rationale:
 - Reproach of sitting still
 - Legal certainty
- Reproach argument difficult in relation to movables
- Hence: discovery/demand and refusal rule

Holocaust Expropriated Art Recovery Act 2016

- Passed in December 2016
- Freezes all limitation periods in State law until 1 January 2027
- 'Hear supplants the statute of limitations provisions otherwise applicable to civil claims such as these' (NY Supreme Court, AD, Nov 2, 2017 in *Maestracci v Helly Nahmad Gallery*)
- Only for Holocaust-claims of artworks and other property
- Purpose: to judge these cases *on their merits*

Holocaust Expropriated Art Recovery Act 2016

- expressly pre-empts other federal law and state law:
- S. 5 (a): 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.'

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- S. 4(3) the 'covered period' is 'the period beginning on January 1, 1933, and ending on December 31, 1945.'
- S. 5(g) sunset rule: the statute ends at 1 January 2027. 'Any civil claim or cause of action commenced on or after that date' will be subject to the normal regime of federal and state law.

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- First case in which the HEAR Act was applied:
- Cassirer v Thyssen-Bornemisza Collection Foundation 10 July 2017
- Camille Pissarro
 - Rue Saint-Honoré, dans l'après-midi. Effet de pluie
 - 1897

Rue Saint-Honoré, dans l'après-midi. Effet de pluie
1897



Cassirer v Thyssen-Bornemisza Collection Foundation

- 1898 sold by Pissarro to Julius Cassirer
- Owned by heir Lilly Cassirer
- 1939 Lilly wished to leave Germany
- She had to sell the painting to a German dealer Scheidwimmer for a low price, which she never received
- Scheidwimmer forced the Jewish dealer Sulzbacher to exchange this painting for three of Sulzbacher's paintings
- Sulzbacher fled from Germany to the Netherlands
- After invasion of the Netherlands painting seized from Sulzbacher by Gestapo
- Auctioned off in 1943

Cassirer v Thyssen-Bornemisza Collection Foundation

- 1951 two subsequent sales to US collectors
- 1958 Lilly was compensated by the German government (Bundesrückgabegesetz)
- 1973 sold to a New York dealer who sold it on to Baron Hans-Heinrich Thyssen-Bornemisza
- 1993 sale to Spanish State as part of the Thyssen-Bornemisza Museum and Foundation in Madrid

Cassirer v Thyssen-Bornemisza Collection Foundation

- In 2000 Claude Cassirer discovered the painting's location
- 2005 Claude Cassirer commenced proceedings before the Central District Court of California against the Foundation and the Kingdom of Spain

Cassirer v Thyssen-Bornemisza Collection Foundation

- June 2015 District Court:
- Spanish law applied to the question of ownership
- under Spanish law the Foundation had acquired ownership of the painting by publicly displaying it for years without any objection by the Cassirer heirs.

Cassirer v Thyssen-Bornemisza Collection Foundation

- On appeal Cassirer argues: acquisitive prescription under Spanish law impossible because of HEAR Act
- Court of Appeals rejects the argument:
- 'TBC's Article 1955 defense is a defense on the merits: that TBC has *acquired title to the Painting based on Spain's property laws*. ... HEAR does not bar claims based on the substantive law that vests title in a possessor, that is, the substantive law of prescription of title.'

Conflict of laws

- Holocaust claims: often based on expropriation, theft or forced sale in Europe.
- Defendant sometimes invokes bona fide sale or adverse possession in Europe after the war.
- Which legal system has to be applied?
- Based on Restatement (second) of Conflict of Laws US courts use different tests.
 - Result: rather unpredictable

Conflict of laws

- Laurel Zuckerman v Metropolitan Museum of Art (Leffmann Estate), District Court SD New York Feb 7, 2018
- The Leffmanns fled Germany to Italy in 1937
- They sold a Picasso for less than market value to art dealers Perls and Rosenberg
- Rosenberg sold it to Knoedler Gallery NY
- Knoedler sold to Thelma Chrysler Foy, who donated it to the Museum

Pablo Picasso, The Actor (1904/05)



Conflict of laws

- The New York test:
- Contract and passing of ownership: 'centre of gravity' test ('situs' rule)
- Establishing the most significant relationship:
 - (1) the place of contracting
 - (2) the place of negotiation of the contract
 - (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.

Conflict of laws

- 'Here, as in Bakalar, the interests of a European jurisdiction where one party to the transaction was temporarily passing through are "tenuous" when compared to those of New York. New York's interests surpass those of Italy, where, as here, the artwork was transferred to New York shortly after the 1938 transaction, was ultimately sold to a New York resident, and donated to a New York institution where it has remained, mostly on display to the public, since 1952.

Conflict of laws

- Moreover and consistent with *Bakalar*, New York has an interest in “preserv[ing] the integrity of transactions and prevent[ing] the state from becoming a marketplace for stolen goods” by having its substantive law applied. For these reasons, under an “interest analysis,” New York has the greatest interest in, and is most intimately concerned with, the outcome of this litigation. Accordingly, under New York choice-of-law analysis, New York substantive law is applicable to the 1938 transaction.’