Published on *The National Law Review* https://natlawreview.com

Von Saher: Court Says Statute of Limitations for Recovery of Stolen Art Runs Anew Against Subsequent Purchasers/Transferees

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Nearly two decades have passed since more than 40 governments and many international non-governmental organizations gathered in Washington, DC, for the Washington Conference on Holocaust-Era Assets (the "Washington Conference"). The states attending that conference endorsed a set of 11 principles, known as the Washington Conference Principles, broadly calling upon states, institutions, individuals, and others to identify Nazi-confiscated art and to provide for the restitution of such art to its rightful owners or their heirs. Last fall, the Conference on Jewish Material Claims Against Germany issued a report, Holocaust-Era Looted Art: A Current World-Wide Overview, assessing (and largely critiquing) states' efforts to implement the Washington Conference Principles. I have discussed that report here.

Repose v. Restitution

However, the tension between repose and return has not abated. If anything, it has grown more heated, and nowhere more than in the controversy over whether statutes of limitations barring claims after a period of time should be applied in Nazi-confiscated art cases. In recent weeks, Klaus Albrecht Schröder, director of Vienna's Albertina Museum, made headlines by calling for a time limit to be placed on restitution claims against public institutions concerning Nazi-confiscated art. In Schröder's view, museums have largely followed the Washington Conference Principles, and he calls for an outer time limit (or 20 or 30 years from the present date) after which future claims would be barred. In support of such a limit, Schröder points out that cultural objects taken during other periods are not exempted from statutes of limitations. "If we don't set a time limit of around 100 years after the end of the Second World War," he noted, "then we should ask ourselves why claims regarding crimes committed during the First World War should not still be valid; why we don't argue anymore about the consequences of the 1870-1871 Franco-Prussian war, and why we don't claim restitution of works of art that have been stolen during previous wars?"

On Apr. 7th, Ronald Lauder, former U.S. ambassador to Austria and current president of the World Jewish Congress, rejected any limitations period. "There should be no statute of limitations in the case of Nazi-looted art," Lauder wrote, "just as there is no statute of limitations for genocide, because for almost every stolen painting, a felony murder was committed and a family was destroyed. The crimes of the Nazis were unique. 70 years after the end of World War II, there is a

moral obligation for museums and countries to do the right thing. These families have waited long enough."

Von Saher and California's Statute of Limitations

This tension between repose and return is at the heart of several current Nazi-confiscated art restitution cases, and none more prominently than that brought by Marei von Saher, the heir of Dutch Jewish art dealer Jacques Goudstikker, against the Norton Simon Museum of Art at Pasadena for the return of two paintings by Lucas Cranach the Elder, titled "Adam and Eve." For background on the case, see my earlier discussion here.

U.S. courts typically articulate the policy behind statutes of limitations as encouraging diligence and timely prosecution of claims, often referred to as the avoidance of stale claims. As the New Jersey Supreme Court observed, "[t]he purpose of a statute of limitations is to 'stimulate to activity and punish negligence' and 'promote repose by giving security and stability to human affairs.'. . . A statute of limitations achieves those purposes by barring a cause of action after the statutory period."[O'Keeffe v. Snyder, 83 N.J. 478, 490 (N.J. 1980).] The key issue for the application of a statute of limitations is when the cause of action "accrues," which is the date from which the limitations period runs. In actions for the return of stolen cultural property, there are, broadly-speaking, four distinct approaches to the question of accrual: (1) at the time the theft occurs (Louisiana); (2) at the time the original owner knows, or should know, the location of the stolen property and the identity of the current possessor (the "discovery rule")(most states); (3) a modified discovery rule requiring the original owner to exercise due diligence (New Jersey); and (4) at the time when the original owner makes demand upon the current possessor for the return of the object and the current possessor refuses to return it (the "demand and refusal" rule)(New York). Accrual at the time of the theft favors the current possessor, and is often regarded as harsh for original owners. The demand and refusal rule, on the other hand, favors the original owner, and is regarded by some as harsh for good faith purchasers.

In adopting the demand and refusal rule, the New York Court of Appeals believed that it was best to place the burden of due diligence on the purchaser, explaining:

To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art. Three years after the theft, any purchaser, good faith or not, would be able to hold onto stolen art work unless the true owner was able to establish that it had undertaken a reasonable search for the missing art. This shifting of the burden onto the wronged owner is inappropriate. In our opinion, the better rule gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser. [Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311, 320 (N.Y. 1991).

California has long been a discovery rule jurisdiction, but just how the discovery rule applies has been the subject of considerable discussion. A seminal case in the development of California's statute of limitations has been Von Saher v. Norton Simon Museum of Art at Pasadena, which has been litigated now for eight years chiefly on the question of whether the case should be barred by a statute of limitations defense. The case has had a tremendous (and tremendously important) impact on California's statute of limitations for actions to recover stolen artwork. In the most recent decision in the case, the U.S. District Court for the Central District of California on Apr. 2nd issued an order denying the museum's latest motion to dismiss. [Von Saher v. Norton Simon Museum of Art at Pasadena, Case No. CV 07-2866-JFW (C.D. Cal. Apr. 2, 2015).] In doing so, however, the court

answered a question on the application of California's statute of limitations for stolen art that has important implications for art transactions. The court held that California's 6-year statute of limitations for claims for the return of stolen art begins to run anew each time the work is transferred, even if the statute of limitations has already expired on claims against the seller or transferor.

California's Modifications to Its Statute of Limitations for Stolen Art

A little history is helpful. California has modified its statute of limitations for actions to recover stolen art three times since 1983. Before 1983, the state had a 3-year statute of limitations that applied across the board to all actions to recover stolen property, including artwork. Since the statute did not state when a cause of action for return of stolen property accrued (i.e., what conditions were necessary to set the limitations clock running), courts variously interpreted it to mean that the statute of limitations began to run at the time of the theft or, alternatively when the rightful owner discovered where the object was located and the identity of its present possessor (the discovery rule). In 1983, the state amended its statute of limitations to adopt the "discovery rule" for accrual of causes of action for the recovery of stolen artwork. In Naftzger v the American Numismatic Society, [42 Cal.App.4th 421, 435 (Cal. App. 1996).] the California Court of Appeal held that even the pre-1983 statute had an implied discovery rule. The court noted that "[t]he discovery rule protects those who are ignorant of their cause of action through no fault of their own. It permits delayed accrual until a plaintiff knew or should have known of the wrongful conduct at issue." [Id. at 428.]

California Holocaust-Era Artwork Statute

In 2002, responding to concerns that the statute of limitations was unfairly frustrating efforts by parties seeking the return of Nazi-confiscated artworks, the California legislature enacted Section 354.3 of the California Code of Civil Procedure, which extended the statute of limitations until Dec. 31, 2010 to allow "any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, [to] bring an action to recover Holocaust-era artwork from . . . any museum or gallery that displays, exhibits or sells any article of historical, interpretive, scientific, or artistic significance." [Cal. C.C.P. § 354.3, quoted in Von Saher v Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 958 (9th Cir. 2010).] However, the United States Court of Appeals for the Ninth Circuit struck down section 354.3 as unconstitutional, reasoning that the statute is preempted under the foreign affairs doctrine, since it impermissibly intrudes "into a field occupied exclusively by the federal government."[Id. at 968.]

Shortly after the Ninth Circuit issued its decision, the California legislature amended Section 338 to provide for a 6-year statute of limitations for actions to recover stolen artwork (not only Holocaust-era artwork), but only when the claim is made against a museum, gallery, auctioneer, or dealer. However, actions are limited to those for the return of artworks that were taken "within 100 years prior to enactment of this statute."[Cal. C. C. P. § 338(c)(3)(B).] Under revised Section 338, the cause of action accrues upon the actual discovery by the plaintiff of the location of the object and the identity of the current possessor. The revised statute provides that:

an action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer . . . of a work of fine art, including a taking or theft by means of fraud or duress, shall be commenced within six years of the actual discovery by the claimant or his or her agent, of both of the following:

(i) The identity and the whereabouts of the work of fine art. In the case where there is a possibility of misidentification of the object of fine art in question, the identity can be satisfied by the identification of facts sufficient to determine that the work of fine art is likely to be the work of fine art that was

unlawfully taken or stolen.

(ii) Information or facts that are sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art that was unlawfully taken or stolen. [Cal. C. C. P. § 338(c)(3)(A).]

Significantly, the amendment also exempts actions for the recovery of stolen artwork brought against museums, galleries, auctioneers, and dealers from the application of Section 361, which disallows suits where the cause of action has arisen in another jurisdiction if the statute of limitations for bringing the action in that jurisdiction has already run.[1] So, under revised Section 338(c)(3)(A), restitution actions may be brought against museums, galleries, auctioneers, and dealers within six years after the claimant actually discovers the identity and whereabouts of the stolen work, and can be brought irrespective of whether the statute of limitations has run in the jurisdiction where the cause of action arose.

District Court Decision

In its amended motion to dismiss, the museum argued that Ms von Saher's cause of action was time-barred by the statute of limitations, even as amended. Ms von Saher's cause of action, the museum argued, accrued between 1946 and 1952, when Desi Goudstikker, Jacques's widow, actually discovered that the paintings were then in the possession of the Dutch government (which later erroneously returned the paintings to the wrong party, who later sold them to the museum). The museum argued that Ms von Saher, as plaintiff, stands in the shoes of Desi Goudstikker, Ms von Saher's predecessor-in-interest. Ms von Saher argued that the statute of limitations applies only to the current claimant, not to predecessors-in-interest.

The District Court disagreed with Ms von Saher, holding that heirs are subject to their ancestors' knowledge and actions with respect to statutes of limitations. However, the District Court disagreed with the museum that the mere fact that the statute of limitations would have run with respect to Desi Goudstikker's claim against the Dutch government would also mean that Ms von Saher's action against the museum is likewise time-barred. The court noted that if it were to accept Ms von Saher's position that the statute of limitations runs with respect to each claimant, "[a]n expired claim would be revived any time a claimant died and passed that claim to an unknowledgable heir or the claimant assigned that claim to an ignorant third party. Such a result would eviscerate the purpose of a statute of limitations." [Von Saher v. Norton Simon Museum of Art at Pasadena, Case No. CV 07-2866-JFW, at *7 (C.D. Cal. Apr. 2, 2015).]

However, the court went on to consider when Ms von Saher's cause of action against the museum accrued. The museum's position was that the cause of action that accrued at the time Desi Goudstikker discovered the whereabouts of the paintings then in the possession of the Dutch government was continued in the museum's later possession (a concept in U.S. law known as "tacking."). [2] There is a certain appeal of symmetry in this, since if Ms von Saher is the successor-in-interest of Desi Goudstikker, why wouldn't the museum be the successor-in-interest of the Dutch government? The answer, the District Court held, lay in the nature of title to stolen property.

In most common law jurisdictions (the U.S., the U.K., and others) a thief cannot transfer title to stolen property, and, as a result, the stolen property remains tainted in the hands of all subsequent possessors. Moreover, as the court stated, California law has long recognized that "each time stolen property is transferred to a new possessor, a new tort or act of conversion has occurred," and so "the statute of limitations . . . begins to run anew against each subsequent purchaser." [Id. at *8.] The new or subsequent possessor, even if he or she purchased the stolen property in good faith and

without knowledge of the theft, nevertheless “commits a new act of conversion, and a new statute of limitations begins to run, even if the new possessor purchases the property honestly and in good faith.” [Id.]

Sale or Transfer of the Stolen Artwork Sets the Statute of Limitations Running Anew

The question for the District Court, however, was whether a purchaser who acquires a stolen artwork after the limitations period has run is subject to a new statute of limitations. That is, if the statute of limitations has expired and the possessor then sells the artwork, does the statute of limitations begin to run anew against the buyer/new possessor? Although several courts had previously raised this question, none had yet answered it. [3] The District Court noted that “it is an open question in California whether a subsequent possessor who acquires stolen property after the statute of limitations has already expired is subject to a renewed limitations period.”[Id. at *8-9.]

Quoting a late-19th century decision, Harpending v. Meyer, 55 Cal. 555 (Cal. 1880), the District Court stated:

[I]t is distinctly held that where the possession of property is obtained from one who had no right to transfer it, a right of action by the owner against the transferee accrues as soon as the latter acquires possession of it; that the bare taking of possession under such circumstances constitutes a new conversion on the part of the person taking it, and that from the time of the commission of that act, the statute will commence running. [Id. at *8.]

The District Court reasoned that the expiration of the statute of limitations “merely extinguishes the owner’s right to seek a remedy from the thief or possessor; it does not thereby divest the owner of title or convey title to the thief or possessor. . . . Accordingly, because the thief cannot convey valid title no matter how much time has passed, the subsequent possessor’s acquisition of stolen property constitutes a new conversion. Because a new tort has occurred, the owner is entitled to a new limitations period.” [Id. at 10.] So, for stolen artwork, even when the statute of limitations has expired as to one owner, if that owner sells or transfers the work to someone else, the statute of limitations begins to run fresh against the new owner.

The District Court addressed the question of the fairness of allowing the statute of limitations to run anew against a subsequent purchaser or transferor, noting that:

> there is nothing unfair about affording Plaintiff an opportunity to pursue the merits of her claims against Norton Simon. As the California Legislature recognized by enacting AB 2765, museums are sophisticated entitled that are well-equipped to trace the provenance of the fine art that they purchase. After carefully weighing the equities, the Legislature determined that the importance of allowing victims of stolen art an opportunity to pursue their claims supersedes the hardship faced by museums and other sophisticated entities in defending against potentially stale ones. [Id. at 11.]

Statutes of Limitations or Statutes of Repose?

The approach that California has taken, particularly with the District Court’s rejection of tacking for stolen art cases, contrasts sharply with practice in many European civil law countries. There, after a

period of time, title to the stolen artwork affirmatives vests in the current possessor. It is not, as in most U.S. jurisdictions, that the expiration of the statute of limitations bars the original owner from bringing a claim; rather, after the expiration of the limitations period, the original owner's title to the stolen object is cut off, and title vests in the current possessor. The New Jersey Supreme Court articulated a similar principle in New Jersey's approach to its statute of limitations. "Read literally, the effect of the expiration of the statute of limitations under N.J.S.A. 2A:14-1 is to bar an action such as replevin. The statute does not speak of divesting the original owner of title. By its terms the statute cuts off the remedy, but not the right of title." However, the O'Keeffe court continued, interpreting New Jersey's statute of limitations as being fundamentally a statute of repose, and stating that:

Nonetheless, the effect of the expiration of the statute of limitations, albeit on the theory of adverse possession, has been not only to bar an action for possession, but also to vest title in the possessor. There is no reason to change that result although the discovery rule has replaced adverse possession. History, reason, and common sense support the conclusion that the expiration of the statute of limitations bars the remedy to recover possession and also vests title in the possessor." [O'Keeffe v. Snyder, 83 N.J. 478, 497 (N.J. 1980).]

Harbinger or Outlier?

Cultural views and legal rules on how statutes of limitations should apply to stolen artwork have changed significantly in the last twenty or so years, and they continue to develop. Whether the 9th Circuit will affirm the District Court's interpretation of the modified statute of limitations remains an open question. And, should the 9th Circuit affirm the decision, the broader question is whether California's current approach to statutes of limitations for actions for the recovery of stolen art is a harbinger of similar developments elsewhere or merely an outlier.

What does seems clear, however, is that a change that has begun within Nazi-confiscated art cases has much broader implications for the recovery of stolen art more generally.

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[1] See Cal. C. C. P. § 361, which states that "When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued."

[2] See, e.g., Patty Gerstenblith, "The Adverse Possession of Personal Property," 37 Buff. L. Rev. 119, 146-147 (1988/1989)("The ability of a possessor to add his or her time of possession to that of a prior possessor so that the total comprises the time period required for the running of the statute of limitations is known as 'tacking' and is applied in the doctrine of adverse possession of real property. . . . Although tacking is almost universally accepted for adverse possession of real property, this has not been the case for personal property.").

[3] Id. at *9 (citing Soc'y of California Pioneers v. Baker, 43 Cal. App. 4th 774, 783 n.4 (1996)("[W]e need not decide whether a purchaser who acquired the item after the statute expired would be subject to renewal of the limitations period."); and Naftzger v. American Numismatic Soc'y, 42 Cal. App. 4th 421, 433 (1996) ("We do not decide, for example, if an owner who fails to file a lawsuit under the prior version of section 338, subdivision (c) within three years of discovering the property's whereabouts will be time barred if the thief or subsequent possessor later moves the stolen property to an unknown

National Law Review, Volume V, Number 121