

# Spencer's Art Law Journal

Edited by Ronald D. Spencer

## Editor's Note

This is Volume 3, Issue No. 3 of *Spencer's Art Law Journal*. This Winter issue contains three essays which will become available by posting on Artnet starting February 2013.

The first essay (*Protection from Legal Claims for Opinions . . .*) discusses constitutional First Amendment defenses against legal claims for expert opinion about art — claims which have driven art authentication boards out of existence and seriously chilled public and private scholarly expression.

The second essay (*Can Art Owners, Consigning or Lending Protect Themselves in Bankruptcy . . .*) addresses the question of whether an owner can keep himself and his art out of bankruptcy court when the gallery goes into bankruptcy, by imposing his arbitration agreement with the gallery on a bankruptcy court.

The third essay (*When Is It Too Late to Recover Artwork You Own . . .*) addresses the question of an owner's unreasonable delay in claiming art — the very interesting, important, and heavily factual, defense of laches.

Three times a year, issues of this *Journal* continue to address legal issues of practical significance for institutions, collectors, scholars, dealers and the general art-minded public.

— RDS

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## PROTECTION FROM LEGAL CLAIMS FOR OPINIONS ABOUT THE AUTHENTICITY OF ART

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Ronald D. Spencer

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*This essay addresses legal protection for expert opinion - opinion which has been the subject of many recent and highly publicized legal claims. These claims, past and current, have “chilled” scholarly expression and driven authentication boards and committees of experts out of existence. In order for robust art scholarship about authenticity in the visual arts — the essence of which is connoisseurship — to flourish, protection is needed for expert opinion rendered by the academic scholars, curators and other specialists. This essay will propose that this protection can be had in the courts (as opposed to legislatures) based on (1) the recent successful defense of claims against rating agencies like Moody’s for their ratings of residential mortgage-backed bonds, and (2) a line of court decisions providing First Amendment protection for opinion, so long as the facts or reasoning upon which the opinion is based is fully disclosed. — RDS*

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First, this essay will briefly examine the nature of the opinion about authenticity we are proposing to protect. In most circumstances it is expressed by an expert — usually an art scholar, who is expressing his ideas in the form of scholarly judgment, evaluation, deduction or (even) conjecture based on art-historical information and tangible physical facts about the art, and upon the connoisseur’s informed visual perceptions. When the recognized connoisseurs have the same idea (more or less) about the identity of the artist who created the work in question, the scholarly art community, and then the art market, will usually accept the work as “authentic”.

### The Authentication Process

Of course a determination of authenticity does not proceed directly from ideas in the head of a scholar or connoisseur. Indeed, three lines of inquiry are basic to the determination of authenticity in art: (1) the provenance of the work, (2) the application of connoisseurship to a work’s visual and physical aspects, and (3) scientific testing to determine the work’s physical properties. The courts, as well as the art market, have accepted the importance of these three lines of inquiry.<sup>1</sup>

Connoisseurship is informed visual perception, based upon a trained scholar or other art expert having looked long and hard at hundreds, maybe thousands, of works by the artist in question — and absorbing their salient characteristics into visual memory — combined with an understanding of the artist’s method of working (known as “facture”). This informed visual perception (supported by provenance and any available information on the work’s physical properties) is expressed in an expert judgment, usually referred to as expert opinion on authenticity.

It is the expression of this expert opinion, in essence, the expert’s *idea*, based on connoisseurship, which today is at risk (or “chilled”) from a proliferation of legal claims, or perceived threats, over the authentication of visual art.

### Protecting the Expert’s Idea

It is the well and truly held view that an *idea* can never result in liability for the person who expresses it, because ideas are so personal and subjective and because society should protect ideas as inherently beneficial, even if sometimes wrongheaded, and, indeed, negligently so. In art attribution this unexceptional view of the value of ideas is equated with an “opinion”.<sup>2</sup>

Experts who determine the authenticity of a work of art, whether in the context of the publication of a catalogue raisonné, curating an exhibition, a sale or purchase, an appraisal of the value, or a scholarly essay, almost always describe their conclusion as their *opinion* on the authenticity or attribution of the work.<sup>3</sup>

Of course, they use the term *opinion* because that is the nature of what they are rendering: their judgment, evaluation, or deduction, based upon an interpretation of existing *facts* which they have collected and analyzed, and to which they have applied their learning and experience.<sup>4</sup>

In 1984 a U.S. federal Court of Appeals attempted to describe the nature of opinion in *Ollman v. Evans and Novak* (a case involving a defamation claim against two journalists, where the defense was that their published statement was constitutionally protected opinion):

At one end of the continuum are statements that may appropriately be called “pure” opinion. These are expressions which are commonly regarded as incapable of being adjudged true or false in any objective sense of those terms.

... Perhaps far more common ... are statements that reflect the author’s deductions or evaluations but are “laden with factual content”. The apparent proportions of opinion and fact in these “hybrid” statements varies considerably.

Hybrid statements differ from pure opinion in that most people would regard them as capable of denomination as true or false, depending upon what the background facts are revealed to be. At the same time, they generally are not propositions that a scientist or logician would regard as provable facts. The hard question is whether these kinds of statements, which both express the author’s judgment and indicate the existence of specific facts warranting that judgment are within the absolute privilege for opinion.<sup>5</sup>

In light of the *Ollman* analysis, a statement by an expert about the authenticity of a painting, even if preceded by the phrase “I think,” “I believe,” or “in my opinion,” is, not “pure opinion,” but is at least, “hybrid” opinion, in that it implicitly suggests the existence of specific underlying facts and conveys the author’s judgment upon, or interpretation of, those facts. Of course, there often is also an intimation of personal aesthetic taste with respect to the art, but there can be no question that the judgment is based, in large part, on express or implied facts which can be proven true or false (and being so provable, the stated judgment could be actionable as negligence, defamation, product disparagement, etc.).

### **Analytical Similarity in Evaluations of Bond Creditworthiness and Art Authenticity**

The frequent garden variety evaluation by financial analysts of the credit-worthiness of bonds seems analytically similar in process to an evaluation of authenticity of art. Financial analysts evaluating the credit-worthiness of a company’s bonds are deciding upon the relevance of “facts” about the company’s business, market share, strength of competition, etc., and the company’s financial structure, and the relative weight to be given these “facts”. (Although the analysis of residential mortgage-backed bonds presumably took the form of an examination of the underlying security for the bond, numerous, perhaps thousands, of residential property mortgages.)

Of course, in evaluating the authenticity of art, the “facts” deemed relevant by an art expert and their relative importance are quite different from those examined by a credit analyst. Thus, most of the important “facts” which the art expert identifies and weighs are his visual perceptions, that is, his verbal articulation or description of what the trained connoisseur’s eye “sees”. Other facts include the provenance, that is, the chain of title and possession and public exhibition history of the work from the artist to the current owner. Both the credit analyst and the art expert are analyzing facts and, after applying their historical experience, arriving at conclusions or judgments, which they both choose to call opinion.

### **Fear of Legal Claims Causing Connoisseurs To Cease Authentication Activities**

As is well known, many art authentication boards and committees are ceasing their authentication activities over concerns about legal liability for their decisions, the most well-known example being the cessation of activities in 2011 of the Andy Warhol Art Authentication Board. Of course individual art scholars are concerned about

liability as well. Theodore Stebbins, Jr., Curator of American Art at the Harvard University Art Museums, quotes Dr. Abigail Gerdts, director of the Winslow Homer catalogue raisonné, pointing out the financial and personal risk to today's art expert, "The stakes are just too high. I believe we should all get out of the opinion giving business".<sup>6</sup> And, as Rachel Cohen recently wrote in *The New Yorker*,

When a painting could be worth \$100 million, what happens to the experts who have to say whether the work is authentic? Lately, they get sued. ... The threat of these suits has begun to affect the state of available scholarship. ... Prices could not have risen so high ... without confident, creditable attribution. Now these astronomical sums are driving away the specialists who made them possible in the first place.<sup>7</sup>

Fear of legal claims is likely the reason that recent catalogues raisonnés no longer have extremely useful sections dealing with "False Attributions" (as found in Volume 4 of the 1978 Jackson Pollock catalogue raisonné) or even an innocuous, "Problems for Study" section (as found in the 1995 Pollock *Supplement*) which contained a subsection, "Unresolved Attributions", for which there was "not sufficient evidence" to attribute works to Pollock. (A work listed in the "False Attributions" section of Volume 4 was the subject of a 1994 lawsuit against the Pollock-Krasner Authentication Board).<sup>8</sup>

### **The Experts' Fear of Legal Claims Is Not of Recent Vintage: It Goes Back at Least to 1929.**

In the famous case of *Hahn v. Duveen*<sup>9</sup> Sir Joseph Duveen looked at a photograph of a supposed Leonardo da Vinci painting owned by Mrs. Andrée Hahn, and told a newspaper reporter that it was only a copy, the "real one" being in the Louvre.<sup>10</sup> Mrs. Hahn sued Duveen, saying that as a result of Duveen's disparagement, she could no longer sell the painting for its real value. After a trial, and before the jury rendered its decision, Duveen settled out of court, paying Mrs. Hahn \$60,000, "forever establishing in the minds of many people that opinions are dangerous things to give".<sup>11</sup>

### **Legislation, Unlikely to Protect Scholars and Other Experts**

This author has often been asked by art scholars, museum curators, authors of catalogues raisonnés and art dealers whether protection for their opinions might be somehow possible through some clever new federal or state legislation. But the prospects for such legislation seem remote, at least because many other professionals, such as doctors, lawyers, accountants and, civil engineers, among many others, render important opinions upon which people rely, and would demand this same legislative protection sought by art experts.

### **The Courts Are the Sole Likely Source of Protection for Connoisseurship**

In default of protective legislation, it is usual for art experts to obtain a written "no-sue" agreement from an owner/applicant. These agreements have been held legally enforceable since, at least, the year 2000, when the New York Supreme Court, decided *Lariviere v. Thaw*.<sup>12</sup> (An owner who sues the expert in breach of the no-sue agreement would be liable for damages for breach of contract. The damages would be the expert's legal fees and costs in defending the owner's claim.) Some confusion and consternation, at least among non-lawyers, arose in 2009 when a federal district court in the case of *Joe Simon v. Andy Warhol Foundation for the Visual Arts et al.*, allowed a lawsuit to proceed despite a no-sue agreement. In the *Simon* case (on a motion to dismiss, which procedurally, had to assume that everything the plaintiff alleged was true), the court merely held that the Warhol Foundation's no-sue agreement signed by plaintiff Simon might not be enforceable *if* the (otherwise legal and enforceable) agreement had facilitated an illegal plan (as Simon alleged, but never proved) to manipulate prices in the market for Warhol paintings.<sup>13</sup> The plaintiff later withdrew all his claims.

Thus, protection for expert opinion is unquestionably available by agreement (not to sue) with an art owner/applicant. Second, the credit rating agency cases (see below) suggest there is also federal constitutional protection available for expert opinion about the authenticity of art. And third, another line of court decisions strongly suggest there is also constitutional protection available for such expert opinion if the expert is able and willing to set forth the factual information on which the expert relies for his opinion (see below).

### Rating Agency Cases (Moody's Investors, Standard & Poor's, et al.): Matters of "Public Concern" and the "Actual Malice Standard"

The Fall 2011, Volume 2, No. 2, issue of this *Art Law Journal* contains an essay entitled, *Opinions About the Authenticity of Art*, dealing with investor claims against bond rating agencies for their ratings (depending upon the pool or "tranche" of mortgage loans being rated, often times AAA, the same rating as U.S. Treasury debt!) of bonds backed by residential real estate mortgage loans. The rating agencies' defense (which has been accepted by the federal courts, as we will see below) was that their statements about the creditworthiness of the rated bonds were protected, as *opinion* about a "matter of public concern", by the First Amendment to the U.S. Constitution guaranteeing freedom of speech. "Congress shall make no law ... abridging the freedom of speech, ..." <sup>14</sup> Essentially, the rating agencies' defense is that their judgments about creditworthiness (in the form of the credit rating itself) are akin to unprovable predictions about future events.

As the *Compuware* Court said in 2007:

[A] viable defamation claim exists only where a reasonable fact finder could conclude that the challenged statement connotes actual objectively verifiable facts. A Moody's credit rating is a predictive opinion dependent on a subjective and discretionary weighing of complex factors. <sup>15</sup>

The *Compuware* decision regarding "the credit rating itself" relied on First Amendment protection of opinions, defined by the Supreme Court as opinions that are not provably false (in *Ollman* terms, pure opinion). <sup>16</sup>

But, where a statement *is* provably false, such as the factual assertions within the *Compuware* ratings report accompanying the credit rating itself, First Amendment protection for a statement about a matter of public concern means that a plaintiff must prove (something *very* difficult to prove, namely) that the defendant made the statement (that is, rendered the opinion) with actual knowledge of its falsity or with reckless disregard of its truth, to wit, the so-called (constitutional) "actual malice" standard. And reckless disregard is "not measured by whether a reasonably prudent man would have published [ ] or would have investigated before publishing" but by whether "the defendant in fact entertained serious doubts as to the truth of its publication". <sup>17</sup>

The protection afforded by the actual malice standard for matters of *public concern* is difficult to overstate. If a statement is of public concern it can be unreasonable, false or dead wrong (as the bond ratings in the years 2000–2007 were, in fact), and even negligent, but the agency rating opinion is not legally actionable.

#### Application of the Actual Malice Standard to Both the Credit Rating Itself and Its Factual Basis

A 2012 decision, *Abu Dhabi Commercial Bank et al v. Morgan Stanley & Co. et al* <sup>18</sup> in the federal court for the Southern District of New York again took up the question of whether credit ratings are opinions and, if so, what kind. The agencies again argued that their ratings are subjective opinions about creditworthiness (of the mortgage-backed bonds) just like, for example, an opinion in a newspaper editorial about bonds or any other subject of public importance addressed by the editorial.

However, *Abu Dhabi/2012* does not treat credit ratings as predictions of future events or as "pure statements of either fact or opinion, but as a hybrid of the two (in *Ollman* terms, a hybrid opinion), that is, a "fact-based opinion". Credit ratings are understood to be "statements of creditworthiness based on an analysis of underlying facts ...".

While ratings are not objectively measurable statements of fact, neither are they mere puffery or unsupported statements of belief akin to the opinion that one type of cuisine is preferable to another. Ratings should best be understood as fact-based opinions. When a rating agency issues a rating, it is not merely a statement of the agency's unsupported belief, but rather a statement that the rating agency has analyzed data, conducted an assessment and reached a fact-based conclusion as to creditworthiness. <sup>19</sup>

Thus, *Abu Dhabi/2012* analyzes hybrid opinion in the rating agency context by categorizing ratings as "fact-based" conclusions, which are not afforded the absolute protection provided to statements which are not provably false, *i.e.*, "pure" opinions.

*Abu Dhabi/2012* requires that a credit rating opinion be (a) supported by reasoned analysis and (b) have a factual foundation or a basis in fact in order to receive First Amendment protection as nonactionable hybrid opinion. Without expressly stating so, *Abu Dhabi/2012* decided that a credit rating opinion which is not supported by reasoned analysis and a factual foundation could not be defensible under the actual malice standard, i.e. the rating agency could not have believed its own opinion.<sup>20</sup>

### **Private Opinion Which Is Not a Matter of Public Concern**

But where the rating agency sent its report only to a select group of investors, and did not publicly disseminate its ratings report, the actual malice standard would not be a good defense for the rating agency, that is, the plaintiff would not have to prove actual malice in order to prevail on its claim of actionable misrepresentation.

It is well established that under typical circumstances, the First Amendment protects rating agencies, subject to an “actual malice” exception, from liability arising out of their issuance of ratings and reports because their ratings are considered matters of public concern. However, where a rating agency has disseminated their ratings to a select group of investors rather than the public at large, the rating agency is not afforded the same protection.<sup>21</sup>

But such a private opinion is *precisely* what most art experts render to owners and buyers. (Although, a catalogue raisonné or an essay published in a scholarly journal and disseminated to the public would presumably be a matter of public concern, and therefore constitutionally protected.)

### **Guidance Derived from the Credit Rating Agency Cases**

The rating agency cases leave us with the following rules about legal protection for opinion: a credit-worthiness rating is an opinion, but a certain kind of opinion — a fact-based opinion (in *Ollman* terms, a hybrid opinion which could be proved true or false). As such, in order to receive the “actual malice” protection as hybrid opinion accorded by the First Amendment, it must be supported by reasoned analysis and based on a factual foundation. However, even when so supported and so based, where the statement is disseminated to a “select group of investors” rather than the public at large, this hybrid opinion is not considered “a matter of public concern” and does not receive First Amendment “actual malice” protection.

These court decisions from 1999 onward about credit ratings suggest that, for example, a catalogue raisonné published, as it always is, for a public audience would receive “actual malice” protection as hybrid opinion under the First Amendment as a matter of “public concern”, but an opinion on authenticity delivered to single or a limited number of owners or buyers would not be so protected (even if supported by analysis and based on a factual foundation).

If we wish to find constitutional protection for expert opinion, given *privately* to a single owner/buyer or limited number of persons, we will need to examine a second line of court decisions.

### **A Second Line of Cases More Broadly Protects Opinion (That Is, Even When Not a Matter of Public Concern Because the Opinion Is Given Privately)**

As the New York Court of Appeals said in 1986 in *Steinhilber v. Alphonse*:

It is settled rule that expressions of an opinion “false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions.”<sup>22</sup>

This constitutional protection for opinion was established by the U.S. Supreme Court in 1974 in *Gertz v. Robert Welch, Inc.*<sup>23</sup> and later clarified in *Milkovich v. Lorain Journal*.<sup>24</sup> Under *Gertz* and *Milkovich*, if the statements are held to be expressions of opinion that cannot be proved true or false, they are entitled to absolute protection of the First Amendment to the U.S. Constitution by virtue of the Supreme Court’s categorical statement that:

Under First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.<sup>25</sup>

The *Steinhilber* court went on to say:

The rule to be applied may be simply stated. An expression of pure opinion is not actionable. It receives the Federal constitutional protection accorded to the expression of ideas, no matter how vituperative or unreasonable it may be. ... A “pure opinion” is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless be “pure opinion” if it does not imply that it is based upon undisclosed facts. ... When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a “mixed opinion” and is actionable.<sup>26</sup>

An opinion accompanied by a recitation of the facts upon which it is based is not actionable because, as noted in Justice Brennan’s dissenting opinion in *Milkovich v. Lorain Journal Co.*,<sup>27</sup> a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture.<sup>28</sup>

### Advice to Experts Giving Opinions

Where the expert is giving a *private* opinion, that is, one not published for the public (and, by definition, not a matter of constitutional “public concern”) these New York cases strongly suggest that, in order to receive First Amendment protection for their opinions, experts should make a reasonably full recitation of the facts upon which their opinion is based.

It should not be necessary for the expert to write a detailed essay on why the work is, or is not, authentic. All that should be necessary is a simple recitation of the major facts relied upon by the connoisseur, following the usual three lines of inquiry: provenance, application of connoisseurship to the work’s visual aspects and the work’s physical properties (that is, any available forensic analysis).<sup>29</sup> (Even if certain of those major facts should turn out to be inaccurate or wrong, it seems unlikely that the courts would involve themselves in weighing up wrong against right facts — so long as there is some reasonable basis in fact for the expert opinion). Since many committees and boards of experts do not want to provide “roadmaps” for would-be forgers, providing “reasons” or facts to back-up their private opinions is not the usual practice in art scholarship involving private opinions for owners. But, it appears that giving some “reasons” for their opinion is the procedure that will provide experts with a First Amendment defense. In that circumstance, an unhappy owner would have to prove (again, something very difficult to prove) that the expert acted with actual malice, that is, did not believe his opinion or had no factual basis, at all, for his opinion.

It will be objected (and fairly so) that these constitutional defenses will still not keep experts who have rendered opinions in good faith from being sued. But, quite obviously, the more difficult it becomes for a plaintiff to succeed, the fewer plaintiff claims will be made.

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**NOTES**

<sup>1</sup> *The Expert Versus the Object: Judging Fakes and False Attributions in the Visual Arts*, at 195 (Oxford University Press, New York 2004).

<sup>2</sup> *Id.* at 180.

<sup>3</sup> *Id.* at 180.

<sup>4</sup> *Id.* at 180.

<sup>5</sup> *Ollman v. Evans and Novak*, 750 F. 2d 970, 1021-1022 (D.C. Cir. 1984).

<sup>6</sup> Conversation with Abigail Booth Gerdts, July 1, 2002, cited in “The Art Expert, the Law, and Real Life,” in *The Expert Versus the Object* at 140.

<sup>7</sup> Rachel Cohen, “Priceless,” *The New Yorker*, October 8, 2012, at 64.

<sup>8</sup> *Vitale v. Marlborough Gallery, The Pollock-Krasner Foundation, et al.*, No. 93-CV-6276, 1994 WL 654494; 1994 U.S. Dist. LEXIS 9006 (S.D.N.Y. July 5, 1994).

<sup>9</sup> *Hahn v. Duveen*, 133 Misc. 871, 234 N.Y.S. 185 (Sup. Ct. N.Y. County 1929).

<sup>10</sup> The “real one” might *not* have been in the Louvre, but that is an issue for another day.

<sup>11</sup> T.E. Stebbins, “Possible Tort Liability for Opinions Given by Art Expert,” in Franklin Feldman and Stephen E. Weil, eds., *Art Law: Rights and Liabilities of Curators and Collectors* (Boston: Little, Brown, 1986, vol. 2, p. 517).

<sup>12</sup> *Lariviere v. Thaw*, Index No. 100627/99, 2000 N.Y. Slip Op. 5000 (Sup. Ct. N.Y. County June 26, 2000) (Goodman J.).

<sup>13</sup> *Joe Simon-Whelan v. The Andy Warhol Foundation for the Visual Arts et al.*, No. 07 Civ. 6423, 2009 WL 1457177. (S.D.N.Y. May 26, 2009) (Swain, J.).

<sup>14</sup> Forming part of the Bill of Rights, ratified December 15, 1791.

<sup>15</sup> *Compuware Corp. v. Moody’s Investor Services*, 499 F. 3d 520 (6<sup>th</sup> Cir. 2007).

<sup>16</sup> See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

<sup>17</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

<sup>18</sup> *Abu Dhabi Commercial Bank et al. v. Morgan Stanley et al.*, No. 08 Civ. 7508, 2012 WL 3584278 at 1 (S.D.N.Y. Aug. 17, 2012).

<sup>19</sup> *Id.* at 36.

<sup>20</sup> On February 4, 2013, the U.S. Justice Department brought a civil action against Standard & Poor’s for its ratings of mortgage-backed bonds. *The Wall Street Journal* on the same date reported the “Justice Department’s view that the First Amendment wouldn’t protect a ratings firm if it defrauded investors by ignoring its own standards ...”, and that the Illinois Attorney General, in a separate state claim, “sought to skirt First Amendment protections by focusing on what the [rating] firm told investors about its rating process rather than actual ratings”. Like *Abu Dhabi/2012*, both the federal and state claims appear to proceed on theory that the rating agency, based on its underlying factual analysis, could not have believed its own opinion, that is, the federal and state government plaintiffs could prove actual constitutional malice on the part of the rating agency.

<sup>21</sup> *Abu Dhabi Commercial Bank v. Morgan Stanley et al.*, 651 F. Supp.2d 155 (S.D.N.Y. 2009).

<sup>22</sup> *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 286 (1986); see also *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235 (1991) (applying *Milkovich* to determine whether a statement is actionable based on it being capable of objective verification).

<sup>23</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>24</sup> *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990) (The constitutional doctrine referred to in *Milkovich* protects statements that cannot be proved false (which we might call “pure opinion”) and statements that cannot be reasonably interpreted as stating actual facts, including name calling, hyperbole, figurative language, and imaginative expression. *Milkovich* goes on to address how statements that *can* be proved false are protected by the actual malice requirement).

<sup>25</sup> *Gertz*, 418 U.S. at 339.

<sup>26</sup> *Steinhilber*, 68 N.Y.2d at 289.

<sup>27</sup> *Milkovich*, 497 U.S. at 26-27.

<sup>28</sup> *Gross v. New York Times*, 82 N.Y. 2d 146, 154 (1993).

<sup>29</sup> *The Expert Versus the Object* at 195.

## **CAN ART OWNERS, CONSIGNING OR LENDING THEIR ART, PROTECT THEMSELVES IN A BANKRUPTCY PROCEEDING OF THE GALLERY OR BORROWER BY SPECIFYING ARBITRATION AND A CHOICE OF LAW IN THEIR CONSIGNMENT OR LOAN AGREEMENT? PROBABLY NOT.**

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Aaron R. Cahn

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*This essay is about an art owner who sought to protect himself from the consequences of a bankruptcy by his consignee art gallery. Ordinarily, of course, courts will enforce a contractual choice of law and forum, but apparently not in a bankruptcy proceeding. — RDS*

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The art community has been slow to react to the intrusion of modern commercial concepts into a world traditionally ruled by the handshake. But financial difficulties, resulting in such events as gallery bankruptcies and sales by museums of significant portions of their collections, have brought home to all who delight and deal in art the perils inherent in parting with possession of a work. To help protect owners against some of these perils, lawyers who advise clients contemplating consigning or loaning art have built in extra protections in the event of a dispute with the consignee. Such items as arbitration clauses (requiring that disputes be arbitrated rather than the subject of possibly lengthy and expensive court proceedings) and choice of law and forum provisions (requiring that disputes be decided in a the consignor's home state, province or country, and according to the law of that jurisdiction) can give comfort to a consignor that a legal issue that may arise will not be subject to an unfamiliar body of law in an inconvenient locale.

In many situations, these types of protections work well. But in the context of a bankruptcy proceeding initiated by or against a consignee, enforceability of these protections may not be permitted. The function of a bankruptcy case is to bring together in one forum all the issues relating to the financial condition and future prospects of a debtor, and the U.S. federal policy of ensuring the efficacy of bankruptcy proceedings may sometimes operate to curtail the rights of other parties.

In 2011, this Journal discussed how the failure of a consignor to file a one-page financing statement (form UCC-1) can result in the effective loss of ownership of a work if the consignee files a bankruptcy case.<sup>1</sup> In this essay, we review one consignor's unsuccessful attempt to maneuver around the consequences of this omission.

One of the most notorious art-related bankruptcy cases in recent years was that of Salander-O'Reilly Galleries.<sup>2</sup> Salander-O'Reilly Galleries, which was operated in an historic townhouse on New York's Upper East Side by Lawrence Salander, was a well-known name to collectors and artists alike, regarded as a major force in, among other things, dealing in the works of Old Masters. By 2007, however, the gallery was in bankruptcy proceedings in the midst of accusations of unpaid debts and fraud, including numerous instances of diverting the proceeds of works sold by the gallery, and the facts which came to light eventually resulted in a criminal conviction of Mr. Salander.

The collapse of Salander-O'Reilly was an unwelcome development for Dr. Ronald Fuhrer, an Israeli art dealer who owned Kraken Investments Ltd., a British Virgin Islands corporation with its principal place of business in Jersey, Channel Islands. In 2006, Kraken and Salander entered into a consignment agreement for Salander to sell

a piece of artwork owned by Kraken — Sandro Botticelli’s “Madonna and Child.” Kraken was to receive no less than \$8.5 million from the sale of the painting.

The consignment agreement mandated that all disputes between the parties be decided by arbitration in Jersey, and also provided that Jersey law would control any such proceedings. Kraken did not file a UCC-1 financing statement protecting its interest in the artwork. Kraken, as was its contractual right, requested the return of the work at the expiration of the consignment period, but Salander did not comply. Kraken wished to commence an arbitration proceeding in Jersey to enforce the terms of the consignment agreement and declare that it remained the owner of the work, but since the bankruptcy case had been commenced, Kraken was required by bankruptcy law to request bankruptcy court permission to proceed to arbitration.

The stakes for both sides were high. Kraken’s U.S. counsel were, presumably, well aware of the rule, noted earlier, that a consignor who does not file a financing statement runs a significant risk of losing control of the consigned works to the bankruptcy trustee and the estate’s creditors. Accordingly, they sought to enforce the agreement to arbitrate in Jersey, Channel Islands, hoping perhaps for more favorable treatment under Jersey law. The risk to the bankruptcy trustee and the Salander Gallery estate was just as significant; namely, if forced to litigate in a distant forum before a tribunal unfamiliar with American bankruptcy law, they might not only lose rights to a valuable work but also see a flood of similar requests made by other consignors to Salander-O’Reilly Galleries.

The bankruptcy court denied Kraken’s motion, finding that the trustee was not obligated to abide by the provisions of the consignment agreement because the questions presented were central to the operation of the bankruptcy system.<sup>3</sup> Kraken then appealed to the district court.

Judge Cathy Seibel of the Southern District of New York affirmed the judgment of the bankruptcy court.<sup>4</sup> She noted that while a bankruptcy trustee is in many cases bound by the contracts made by the debtor before bankruptcy, it is not so bound when enforcement of a contract would impede the operation of the bankruptcy scheme.<sup>5</sup> Since the ultimate issue between the parties was whether the bankrupt estate or Kraken had superior rights to the Botticelli, and thus whether the work could be sold to satisfy claims of creditors rather than being returned to Kraken, the court held that that determining what is and is not property of the estate is a principal function of the bankruptcy court, and thus should be decided there.

The District Court also determined that its finding that the consignment agreement as a whole was not binding on the trustee negated the choice of Jersey law as governing the rights of the parties. In addition, Seibel found that the bankruptcy court did not abuse its discretion in choosing New York law, as New York was the location of the artwork, the debtor, and the bankruptcy proceedings, among other factors.

Clearly, this was not a happy result for Kraken, and Judge Seibel went out of her way, at the end of the opinion, to offer some measure of verbal comfort (not being able to provide more tangible support) to Kraken. “The Court well understands why Kraken is perturbed, even outraged, by the idea that [Salander’s] creditors may well enjoy the proceeds of a valuable painting concededly owned by Kraken. The law of the state in which Kraken consigned the painting, however, allows for such an outcome where the consignor does not protect itself by filing a financing statement giving notice of the consignment to the consignee’s creditors.”<sup>6</sup>

The lesson to art owners is clear: the risks of not filing a UCC-1 financing statement for consigned art far outweigh any inconvenience involved in filing one. And while the odds against a dealer going bankrupt may be small, the possibility does exist, and should be guarded against.

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**NOTES**

<sup>1</sup> Aaron R. Cahn, *A Funny Thing Happened on the Way to the Gallery: A Bankruptcy Fable (or Not)*, Spencer's Art Law Journal, Vol. 2, No. 1 (Spring 2011).

<sup>2</sup> *In re Salander-O'Reilly*, 475 B.R. 9, 28-29 (S.D.N.Y. 2012).

<sup>3</sup> *In re Salander O'Reilly Galleries*, 453 B.R. 106 (Bankr. S.D.N.Y. 2011).

<sup>4</sup> *In re Salander-O'Reilly*, 475 B.R. 9, 28-29 (S.D.N.Y. 2012)...

<sup>5</sup> *See Hays and Co. v. Merrill Lynch, Peirce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1153 (3rd Cir. 1989).

<sup>6</sup> *In re Salander-O'Reilly*, 475 B.R. 9, 33.

## WHEN IS IT TOO LATE TO RECOVER ARTWORK YOU OWN? LACHES: THE STEALTH DEFENSE

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Judith Wallace

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*This essay examines the defense of laches in claims to recover works of art and its particular importance in New York, and offers advice both for those attempting to recover art and those defending against claims from the distant past. --- RDS*

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When is it too late to reclaim lost or stolen art? This question may arise when fiduciaries dealing with an estate begin to discover missing artwork stored, loaned, or consigned and never returned, or perhaps in the hands of someone who may have stolen it. Executors may receive unexpected demands to turn over artwork the decedent possessed for decades and that was assumed to be part of the estate.

Most people are aware that statutes of limitations set a deadline to file a lawsuit, but are less familiar with another “deadline.” To prevent unfairness resulting from unreasonable delay in asserting legal rights, the equitable defense of “laches,” which embodies the ancient principle that equity does not aid those who sleep on their rights, may bar a claim that is not barred by the statute of limitations.<sup>1</sup>

### **The Particular Importance of the Laches Defense in New York**

Understanding the laches defense is important in New York, because of the state’s distinctive rule on the statute of limitations to recover artwork.

The deadline for an original owner (or her successor) to recover artwork possessed by someone else is generally governed by the statute of limitations for conversion. Conversion is any act that excludes the rights of the owner, such as selling or destroying someone else’s property. It is a civil wrong that may give rise to a claim for damages. In New York, someone who merely possesses artwork owned by another has not “converted” it until she refuses a demand by the owner for the return of the artwork, because until the possessor has refused a lawful demand, she has done nothing wrong. (There is an exception to this rule if the demand would be futile because the artwork no longer exists or possession already has been transferred to someone else, or if the work was stolen and is in the hands of the thief, who would presumably ignore such a demand.) This definition of conversion is significant because the statute of limitations for a tort does not start to run until the tortious act — *i.e.*, the refusal of the demand — has taken place.

Furthermore, in New York the expiration of the statute of limitations against the possessor of the art does *not* extinguish the true owner’s title to the art. Accordingly, even if the statute of limitations has expired against the thief or converter, and the thief has sold the artwork, the true owner can make a timely claim against the person who possesses it. As a result, under New York’s distinctive rule, a demand for the return of artwork that had been stolen or converted decades earlier could be within the statute of limitations. (See the Spring 2012 issue of Spencer’s Art Law Journal for a comprehensive discussion of the this rule and the public policy reasons for protecting true owners of lost or stolen art, originally set forth in the landmark 1991 Court of Appeals decision in *Solomon R. Guggenheim Foundation v. Lubell*.)<sup>2</sup> Nevertheless, the doctrine of laches may bar an otherwise timely claim under New York law. In jurisdictions where the statute of limitations runs from the time of the original misappropriation and extinguishes the owner’s title, the laches defense is less important and less often raised.<sup>3</sup>

## What is Laches?

The doctrine of laches is intended to prevent unfairness resulting from the assertion of long-delayed claims. The laches defense has two elements: (1) unreasonable delay by the claimant and (2) prejudice to the defendant resulting from that delay.

Courts and claimants struggle with this seemingly straightforward test, especially when its application forecloses the claims of a sympathetic party. Two recent cases involving Holocaust-era claims are particularly helpful in illustrating the challenges in applying the laches defense.

### Delay — Whose Delay?

A threshold question is *whose* delay is relevant in the laches test. This is important in a claim by an estate, when the heirs or executors only recently discovered a claim that the decedent knew about for decades, but for some reason did not pursue. A recent federal court decision by the Second Circuit Court of Appeals in *Bakalar v. Vavra* makes it clear that descendants are charged with their predecessors' knowledge and delay.<sup>4</sup>

The *Bakalar* case involved Holocaust-era issues, although it was not a typical claim for Nazi-looted art. This dispute involved the competing claims of the successors of two groups of family members of Fritz Grunbaum, the original owner of a drawing by Egon Schiele entitled *Seated Woman with Bent Left Leg (Torso)*, and a prominent Austrian Jewish cabaret performer and art collector. Grunbaum died in a concentration camp, as did his wife Elisabeth. Decades later, Milos Vavra and Leon Fischer (remote relatives of the Grunbaums) asserted their claim as heirs to the estate in 1999, and eventually demanded the return of the Schiele drawing from Bakalar, who had filed a federal lawsuit seeking a declaratory judgment that he had good title. Bakalar had purchased the drawing in 1964 from the highly regarded Galerie St. Etienne in New York, and could trace his ownership back to Mathilde Lukacs, Grunbaum's sister-in-law, who sold the drawing to a Swiss gallery in 1956. At the time of his purchase, Bakalar had no knowledge of any question or disputes concerning ownership of the drawing.

After a non-jury trial, the district court, applying New York law,<sup>5</sup> held that Bakalar had the burden of proof to demonstrate that Mathilde Lukacs acquired good title to the artwork, and that Bakalar had not met that burden.<sup>6</sup> The fact that Lukacs possessed the drawing in 1956 "suffices to establish by a preponderance of the evidence that the [d]rawing was not looted by the Nazis." However, the district court found that there was no evidence from which to determine whether Lukacs was simply entrusted with the work for safekeeping (in which case she did not acquire good title) or whether she received it as a gift (in which case she would have good title). The court noted that Lukacs had not complied with the necessary legal formalities to acquire title as an intestate heir at any point prior to her sale of the drawing in 1956.

Because Bakalar failed to meet his burden to demonstrate that Mathilde Lukacs had good title, he would have lost his claim to the drawing if he had not asserted the laches defense. Although Bakalar could not trace his title to Grunbaum, the district court held that he established the elements of the laches defense, which defeated Vavra's and Fischer's claim. The court held that the inaction by Vavra and Fischer's family members who were their predecessors in interest could be charged to Vavra and Fischer. Bakalar demonstrated that Vavra and Fischer's family members knew about Grunbaum's death in a concentration camp and should have known about their potential claim to Grunbaum's sizeable art collection, and had not been diligent in attempting to locate the collection. Those family members need not have known the location or even the existence of this particular drawing. The court found that given the political circumstances "a certain amount of delay or specificity might be excused" and noted that "[i]t may have been sufficient if . . . their ancestors had been diligent in their efforts to recover Grunbaum's property generally, or if they had made intermittent efforts," but they had made none, other than a 1952 effort to recover some music royalties.

### Prejudice – Must Be Caused by the Unreasonable Delay

Bakalar more easily met the second required element – prejudice caused by Vavra and Fischer's delay – which the court disposed of in two paragraphs. Citing the *Guggenheim* decision by the New York Court of Appeals, the district court found the prejudice "clear" because the delay resulted in "deceased witnesses, faded memories, lost

documents, and hearsay testimony,” including the death of Lukacs in 1979, the only person who could have testified as to how she acquired the drawing and therefore could have supported Bakalar’s chain of title.

A second recent case involving a Holocaust-era claim illustrates circumstances in which lack of prejudice was found. In that decision, the New York state appellate court ordered the return of artwork from a Holocaust survivor’s estate to a German museum.

That case, *In re Flamenbaum*, concerned a German museum’s claim to a small Assyrian gold tablet, acquired by German archaeologists during excavations in 1914.<sup>7</sup> The tablet was looted from a German national museum in Berlin during World War II, and bartered for cigarettes by a Russian soldier to a Holocaust survivor, Riven Flamenbaum, who kept the tablet until his death in 2003. The executor apparently did not disclose the tablet in Flamenbaum’s estate accounting, and Flamenbaum’s son objected and informed the Vorderasiatisches Museum in Berlin about the executor’s possession of the tablet. The family then learned that the solid gold tablet was worth \$10 million.<sup>8</sup> The Surrogate held that the Museum had unreasonably delayed making any efforts to recover the tablet by failing to undertake any investigatory or recovery efforts in more than sixty years, even though it had learned that the tablet had been seen in the hands of a New York dealer in 1954. The court also found prejudice to the estate, because “[a]s a result of the museum’s inexplicable failure to report the tablet as stolen, or take any other steps toward recovery, diligent good-faith purchasers over the course of more than sixty years were not given notice of a blemish in the title.”<sup>9</sup> The Surrogate also found that the estate was prejudiced by the fact that Flamenbaum was not available to testify.

The Appellate Division reversed, finding that the estate had not shown that the Museum had exercised a lack of due diligence by failing to report the tablet stolen to law enforcement or listing it on an international stolen art registry. The Appellate Division also found a lack of prejudice — despite the fact that the estate’s principal witness had died — because the estate had failed to show that the Museum’s failures to act prejudiced the estate’s ability to defend its claim, or that the estate changed its position in reliance on such delay. As New York Court of Appeals noted in *Guggenheim*, the continued enjoyment of artwork that one is not entitled to possess is a benefit, not a prejudice. Courts may also find that someone who has not paid for artwork is less likely to have suffered prejudice.<sup>10</sup> The Appellate Division directed the Surrogate to order the estate to return the tablet to the Museum, but three weeks later, referred the case to the New York State Court of Appeals, the state’s highest court, for review.<sup>11</sup> Nevertheless, the Appellate Division’s decision makes it clear that, although laches is an equitable test, courts do not regard it as a license to award artwork to the more sympathetic party. Prejudice to the possessor caused by the owner’s delay is always required.

### **Can Delay Be So Long That It Is Presumed to Be Prejudicial?**

One question often raised is whether a delay can be so long that it can be presumed to be prejudicial. There may be, but sixty years is not enough. The courts rejected Bakalar’s argument that the delayed claim in his case was prejudicial as a matter of law, and required him to demonstrate prejudice based on the facts of his case.<sup>12</sup>

*Bakalar* and *Flamenbaum* provide an instructive contrast, in that the courts reached different conclusions about prejudice from the fact that a principal witness had died. Lukacs could have testified as to how she received the disputed artwork, as could Riven Flamenbaum. However, it appears that the courts will consider what kind of testimony the missing witness could have offered when deciding whether the loss of the witness is prejudicial. The estate did not argue (and could not) that Riven Flamenbaum had purchased the tablet or received it as a gift from its owner, the German state.

### **Courts Will Apply New York Law When New York Galleries Are Involved in Order to Enforce New York State Policy of Protecting Owners’ Rights**

The *Bakalar* case also demonstrates that courts will enforce New York’s public policy, reflected in New York’s distinctive owner-protective rules, by analyzing cases that involve sales by New York galleries under New York law, even if critical events took place overseas. The initial transfer to Lukacs took place in Austria, and her 1956 sale was to a Swiss gallery. Swiss law is more protective of a good faith purchaser. In a preliminary decision, the federal district court initially decided that Swiss law would govern, but it was reversed by the Second Circuit on

this point because Bakalar purchased the artwork from a New York gallery, which gave New York a “compelling interest” in the application of its law to this dispute. As the Court of Appeals held in the *Guggenheim* decision, New York is a “preeminent cultural center,” and the state has a public policy interest in ensuring it does not become “a haven for cultural property stolen abroad.”<sup>13</sup>

### **Equity Allows Courts to Consider the Conduct of the Parties**

Laches is an equitable defense, and courts are therefore compelled to consider whether a party asserting the defense is a wrongdoer.

As noted above, equity does not mean that courts simply decide which party is more sympathetic. Instead, Courts decide a narrower question — whether finding an ownership claim barred by laches will cause an inequitable result. The possessor must *also* demonstrate unreasonable delay by the original owner (or her successor), and prejudice that resulted from that delay, which the Flamenbaum estate did not.

It is not only outright thieves who will fail this equitable test. In a recent federal decision, *Shiotani v. Walters*, because the possessors paid substantially less than the appraised value and did not fully investigate the provenance, they were not good faith purchasers. Therefore the court stated that finding their claim barred by laches would not lead to an inequitable result.<sup>14</sup>

### **Does a Successful Laches Defense Confer Good Title to Artwork? (As a Successful Statute of Limitations Defense Does Not)**

The *Bakalar* decision also dealt with the seldom-litigated issue of the precise legal effect of a successful laches defense. As noted above, one distinctive aspect of New York’s statute of limitations rule is that the expiration of a statute of limitations eliminates a remedy — a conversion claim — but does not confer a right — good title to the artwork — on the possessor. This is not necessarily the rule in other jurisdictions, in which expiration of the statute of limitations may result in a judgment granting good title to the possessor of the artwork. New York’s rule thus raises the question of whether a successful laches defense confers good title or simply defeats the non-possessor’s claim for return of his art. A finding that the possessor had obtained good title by a laches defense would shut the door forever on recovery of art from a subsequent downstream transferee.

If the possessor of artwork obtains the right to continued possession but does not obtain good title, he has a somewhat limited victory. The *Guggenheim* decision shows that, under New York’s demand and refusal rule, a true owner whose conversion claim is time-barred against a thief or converter can make a fresh demand on a future transferee (and any other future transferee in the chain of title) and have a timely claim.

There is a surprising scarcity of authority on whether a successful laches defense by a possessor conveys good title (as opposed to possession only) on the successful defendant. One New York lower court decision for 1979 directly holds that laches does not extinguish a plaintiff’s ownership rights. In *Village of Larchmont v. City of New Rochelle*, the plaintiff sought a determination that it was the legal owner of a piece of property that was subject to an easement that the plaintiff granted to the defendant forty-seven years earlier. Despite the lapse of time, the court held that the plaintiff’s action was not barred by laches because “[t]itle can only be divested by conveyance, or by adverse possession . . . Laches cannot deplete legal title for the law exacts no diligence as a condition to the retention of title to property.”<sup>15</sup> The court cites to no case law for this proposition and, on this point, the case has only been cited by two other courts, one in California and the other in Guam. Secondary sources do not address the issue directly, but they do refer to laches as a bar to relief or remedy, rather than causing the divestiture of ownership rights or title.<sup>16</sup>

The Appellate Division decision in the *Guggenheim* case also recognized the distinction between the right to possession and title, and appeared to hold that laches, like the statute of limitations, would only determine “the relative possessory interests of the parties” and would not lead to an actual transfer of title to the possessor based on delay, leaving the owner free to claim title and attempt to recover the artwork from any other future transferee in the chain of title. The court contrasted this to the statute allowing adverse possession of real property to transfer title to someone who exclusively occupies real property owned by another under an open claim of right for the required period of time.<sup>17</sup>

None of this was discussed in *Bakalar*. Instead, the district court's decision concluded, without explanation that, as a result of his successful laches defense "Bakalar ... holds lawful title to the [d]rawing." There was no analysis or specific holding that this necessarily follows as a result of a successful laches defense in New York. The Second Circuit affirmed the district court's decision without any independent analysis of this point.

*Bakalar* is a federal decision. Therefore, this may still be an open issue in state court, and a contrary decision by the New York Court of Appeals on this point of state law would be binding on the federal courts. Unfortunately, it does not seem likely to be presented to the New York Court of Appeals in the pending *Flamenbaum* appeal.

### **Why Should Laches Quiet Title When the Expiration of a Statute of Limitations Does Not?**

There does not appear to be any reported decision in which the courts have discuss why laches should quiet title when the expiration of the statute of limitations for conversion does not. However, there is a reasonable explanation based on differences in the issues that form the element of a laches defense and the burdens of proof.

Under a doctrine known as collateral estoppel, parties who have litigated an issue and lost, and those closely aligned in interest with them, generally cannot re-litigate that issue on the same facts against another party. Once having lost the point, the party is deemed to have lost it in subsequent cases.

An original owner (or her successor) who has lost her claim to recover artwork based on a successful laches defense will have been found to have unreasonably delayed her attempt to recover her art. A second court would be evaluating the same delay by the original owner in searching for the art and making a claim. An original owner who has lost on a laches defense would also be found to have caused prejudice by that delay. If the prejudice is a witness who is deceased, it would be very unusual if any subsequent possessor of the artwork in a subsequent lawsuit was not prejudiced in exactly the same way as the possessor in the first lawsuit. After all, dead witnesses (often cited as the source of prejudice in laches cases) are not going to come back to life. Quieting title as a result of a successful laches defense may simply be a recognition that collateral estoppel will bar any future claim by the original owner and there is no practical way that she can recover title.

In contrast, a conversion claim against a subsequent possessor, defending on statute of limitations grounds, would examine an entirely distinct issue — the facts of the date and circumstances of the demand on that particular possessor, and the response to the owner's demand, which may constitute the tort of conversion. A previous lawsuit against a previous possessor that was time-barred would not dictate the result in a later case following a demand on a subsequent possessor.

### **Lessons for Owners and Heirs — What Can Be Done To Preserve a Potential Claim or Defend Against Claims**

*Bakalar* held that a good-faith purchaser of art has the burden of proving that the work was not stolen.<sup>18</sup> This makes New York a favorable forum for an owner seeking to recover stolen art. A plausible claim that is not rebutted by a preponderance of the evidence should prevail.

When evaluating a laches defense, courts consider the owner's due diligence in searching for or attempting to recover artwork. Courts have often excused failure to notify legal authorities about lost or stolen artwork. In the decision in *Guggenheim*, the New York Court of Appeals recognized that museums might justifiably fear that publicity about the theft would drive stolen artwork further underground, further delaying recovery. Nevertheless, a police report and filing of notice with International Foundation for Art Research Art Loss Registry can serve as evidence of due diligence. Owners should forego making a report only if there is a legitimate reason to believe that it could be harmful to their recovery efforts and can substantiate that concern.

Owners also cannot indefinitely delay investigating missing artwork or demanding its return if they know where the artwork is or may be. There may be a temptation to postpone making a demand, because a demand (in New York) starts the three-year statute of limitations for recovery to run, and the owner may not feel prepared, financially or otherwise, to file a lawsuit within the following three years. A court will decide whether that delay was unreasonable if a laches defense is asserted.

Accordingly, owners not in possession face a conundrum when they learn of a potential sale of their artwork. If an owner asserts a claim and the artwork is withdrawn from sale, the owner may be at risk of a claim that she tortiously interfered with the sale. At the same time, if the owner does not intervene at that point, but asserts her claim of ownership later, the possessor may argue that the owner should have spoken up at the time of the sale.

Owners not in possession of artwork also should be cautious about leaving claims for artwork unresolved during their lifetimes if they have knowledge of the facts that would help to establish ownership. A possessor may assert that the loss of a fact witness who might have had testimony helpful to them is prejudicial. This is particularly important because a laches defense, unlike a statute of limitations defense, may be found to transfer title to the possessor, and thereby shut the door forever on efforts to recover a work of art.

It is not too late to bring claims to recover Nazi-looted art. The widely reported results in *Bakalar* and *Flamenbaum* may give the impression that courts are beginning to bar World War II-era claims simply because too much time had passed. Neither *Bakalar* nor *Flamenbaum* support that proposition.

Finally, before deciding whether they have a good claim or defense, owners and heirs should appreciate that their conduct, the conduct of their predecessors in interest, and how they acquired the art, will be scrutinized by the court to determine whether an equitable defense of laches will bar the claim.

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## NOTES

<sup>1</sup> See *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 321 (year). The word “laches” is derived from the old french “lachesse,” meaning “lassitude.”

<sup>2</sup> Judith Wallace, *New York's Distinctive Rule Regarding Recovery of Misappropriated Art After the Court of Appeals' Decision in Mirvish v. Mott*, Spencer's Art Law Journal, Vol. 3, No. 1 (Spring 2012), at p. 17, available at [http://www.clm.com/docs/7045310\\_1.pdf](http://www.clm.com/docs/7045310_1.pdf).

<sup>3</sup> California also has a unique statute of limitations, set forth in California Code of Civil Procedure Section 338, enacted in 2011, which allows claims for “specific recovery of a work of fine art” brought within six years of actual discovery of artwork for claims against a “museum, gallery, auctioneer or dealer,” when the case involves “unlawful taking or theft ... of a work of fine art, including a taking or theft by means of fraud or duress.” See *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9<sup>th</sup> Cir. 2010); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016 (9<sup>th</sup> Cir. 2003). The statute was enacted following the invalidation by the U.S. Supreme Court of a California statute that explicitly extended the statute of limitations for claims by Holocaust victims, on the grounds that it unconstitutionally intruded on the federal government's foreign affairs powers, and the invalidation of an earlier version of the statute in the *Von Saher* case. See *id.*; see also *American Ins. Assn. v. Garamendi*, 539 U.S. 396 (2003) (invalidating California's Holocaust Victim Insurance Relief Act of 1999).

<sup>4</sup> *Bakalar v. Vavra*, No. 11-4042-CV, 2012 WL 4820801 (2d Cir. Oct. 11, 2012).

<sup>5</sup> An earlier decision in the case, later reversed by the Second Circuit, had held that Swiss law would govern the case. See *Bakalar v. Vavra*, 619 F.3d 136, 146 (2d Cir. 2010).

<sup>6</sup> *Bakalar v. Vavra*, 819 F. Supp.2d 293 (S.D.N.Y. 2011). Additional facts are set forth in the earlier district court decisions in this case. See *Bakalar*, 851 F. Supp.2d 489 (S.D.N.Y. 2011); 05 Civ. 3037, 2008 WL 4067335 (S.D.N.Y. Sept. 2, 2008); 550 F. Supp.2d 548 (S.D.N.Y. 2008); 2006 WL 2311113 (S.D.N.Y. Aug. 10, 2006); 237 F.R.D. 59 (S.D.N.Y. 2006).

<sup>7</sup> The tablet was excavated prior to World War I by a German team of archaeologists from the foundation of the Ishtar Temple, around the city of Ashtur, in what is now northern Iraq and was then part of the Ottoman Empire. The tablet, which describes the construction of the Ishtar Temple, dates to the reign of King Tukulti-Ninurta I of Assyria (1243-1207 BCE).

<sup>8</sup> Kieran Crowley & Chuck Bennett, *Holocaust Survivor's Kin Can Keep \$10M Relic*, N.Y. POST, Apr. 6, 2010.

<sup>9</sup> *In re Flamenbaum*, 27 Misc. 3d 1090, 899 N.Y.S.2d 546, 544 (Surr. Ct. Nassau Cty. 2010).

<sup>10</sup> *See Hoelzer v. City of Stamford, Connecticut*, 933 F.2d 1131, 1138 (2d Cir. 1991) (stating that although the possessor of Works Progress Administration murals from a Stamford, Connecticut school had not asserted a defense of laches, he “would have failed to establish the prejudice necessary” because he “paid nothing for the murals” and “would . . . receive a windfall were he granted title.”).

<sup>11</sup> *See* Andrew Keshner, *Court of Appeals to Review Ancient Tablet's Ownership*, N.Y.L.J., June 28, 2012.

<sup>12</sup> *Bakalar v. Vavra*, No. 05-Civ.-3037, 2006 WL 2311113 (S.D.N.Y. Aug. 10, 2006), *affirmed* 619 F.3d 136, 147 (2010).

<sup>13</sup> *Bakalar*, 619 F.3d 136, 143-44 (2010).

<sup>14</sup> *Shiotani v. Walters*, No. 10-Civ.-1375, NYLJ 1202582521467, at \*1 (S.D.N.Y., Decided Dec. 3, 2012).

<sup>15</sup> *Village of Larchmont v. City of New Rochelle*, 100 Misc. 2d 463, 418 N.Y.S.2d 966, 969 (Sup. Ct. 1979).

<sup>16</sup> *See, e.g.*, 1 Dan B. Dobbs, *Law of Remedies* s. 2.4(4) (2d ed. 1993) (“A plaintiff guilty of laches may be barred from recovery of any kind of equitable remedy.”); John Norton Pomeroy, *A Treatise on Equity Jurisprudence* s. 419 (5th ed. 1941) (noting that laches “operates as a bar in a court of equity”).

<sup>17</sup> *Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 150-51 (1<sup>st</sup> Dep’t 1990).

<sup>18</sup> *Bakalar v. Vavra*, 619 F.3d 136, 142 (2d Cir. 2010).

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