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Enactment of Federal Holocaust Expropriated Art Recovery (HEAR) Act Expands Opportunities for Claims to Nazi-Confiscated Art

On December 16, 2016, President Obama signed the Holocaust Expropriated Art Recovery (HEAR) Act, which provides heirs and other potential claimants with an additional six years to recover art lost due to Nazi persecution, generally starting from the time the claimant learns of his or her interest in the artwork, its identity, and where it is located.[1] The law applies broadly to art and similar property, "lost" between 1933 and 1945, if the loss was "because of" Nazi persecution. This may allow recovery of art sold under distressed circumstances, in addition to art actually confiscated by Nazi officials. Claimants have a ten-year window to locate still-missing artwork, as the law contains a sunset provision and expires on January 1, 2027.

The HEAR Act operates by displacing individual American states' statutes of limitations with the new six-year deadline. The HEAR Act does not create a federal right to recover artwork, and does not create a uniform federal statute of limitations for all Holocaust art claims. Claimants must still allege a right to recovery under existing state law, based on theft or conversion. Although Congress's stated intention is for these disputes to be decided on the merits, because of an exception set forth in the law, the new law will not end quarrels about which state's law applies.

The New York statute of limitations has long been friendly to owners seeking to recover art. If stolen artwork is in the possession of a party that acquired it lawfully, the deadline to file a lawsuit in New York is three years from the time of a demand by the lawful owner and the refusal of that demand by the party in possession. In many other states, the deadline runs only a few years from the time of the original theft, regardless of when the theft was discovered. Accordingly, owners of stolen artwork often argue that New York law applies to their claims.

Ironically, as a result of the HEAR Act, claimants may now wish to demonstrate that New York law should *not* apply. That is because Section 5(e) of the HEAR Act contains an exception for certain cases that were *not* barred by a statute of limitations during a six-year period after 1999. Congress apparently intended to exclude owners who have been dilatory in asserting their rights,[2] but Congress may not have appreciated how difficult it can be to determine which law applies to a claim for artwork that may have been bought and sold multiple

[1] Public Law No. 114-308.

[2] This exception was discussed in connection with an earlier Senate version of the bill, S. 2763. *See* Senate Report 114-394, Dec. 6, 2016.

times since 1933. In the Second Circuit's 2010 decision in *Bakalar v. Vavra*, the court held that New York law applied based on a sale in New York in the 1960s. After the HEAR Act, an argument that New York law (and its owner-friendly statute of limitations) applies may be ***disadvantageous*** to owners, because claims governed by New York law, and found ***not*** to have been time barred for a six-year period between 1999 and 2016, could fall within the exception and outside the protection of the HEAR Act. This could happen if the claimant had knowledge of the claim and location of the artwork and failed to demand its return.

It remains to be seen how courts and claimants will distinguish between Holocaust-era and other stolen art claims, to serve both the public policy of New York to avoid becoming a haven for stolen artwork, and the legislative purpose of the HEAR Act to allow claims to Nazi-confiscated art to be decided on the merits. Even after the passage of the HEAR Act, the choice of law will continue to be critical to the success of art recovery claims.

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