Editor’s Note
This is Volume 4, Issue No. 3 of Spencer’s Art Law Journal. This Winter issue contains two essays, which will become available by posting on Artnet starting February 2014.

This first essay (Getting Good Title to Art You Purchase, As (a) Collector, or (b) an Art Dealer, or (c) a Bit of Both) addresses the title investigation required when there are “red flags” about good title.

The second essay (Sometimes It’s Not Too Late to Recover Your Art. Laches: the Stealth Defense Revisited) updates our analysis of the defense of laches available to a holder of art against a claim for return from the original owner.

Three times each year (since 2010), issues of this Journal address legal questions of practical significance for institutions, collectors, scholars, dealers and the general art-minded public.

— RDS
GETTING GOOD TITLE TO ART YOU PURCHASE, AS (A) COLLECTOR, OR (B) AN ART DEALER, OR (C) A BIT OF BOTH

Ronald D. Spencer

Of course, a dealer to whom art has been consigned for sale does not own the art, having only the contractual right to transfer the owner’s title. This essay is about the art dealer’s obligation to perform buyer-due-diligence in the face of “red flags” about the authority of a consignee/dealer to deliver good title. Where the consignee/dealer is selling to another dealer, and there are questions about the consignee/dealer’s authority to deliver good title, the dealer/buyer, will need to exercise real due diligence about these title questions to defeat a claim by the owner for return of the owner’s art. On the other hand, under the Uniform Commercial Code, a collector, who is not also a dealer, does not have a due diligence obligation. – RDS

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As one would confidently suppose, the art collector purchasing in the customary manner from an art dealer acquires good title to the art so long as the collector buys in good faith and without actual knowledge that the sale violates the rights of a third party. (Unless, of course, the art has been stolen, in which case, under American law, no subsequent buyer can get good title.) That is to say, the collector is under no obligation to exercise due diligence to determine that the selling dealer has authority from the owner, via a consignment agreement, to pass the owner’s title to the collector.

The essence of a typical art consignment agreement between a selling owner and an art dealer gives the dealer the right to transfer the owner’s title to one who buys from the dealer. These contractual terms are amplified by Uniform Commercial Code Section 2-403 which provides that a buyer from the dealer in the ordinary course of business will prevail over a claim of the owner who entrusted the art to the dealer. As a New York appellate court explained:

[The] “entruster provision” of the Uniform Commercial Code is designed to enhance the reliability of commercial sales by merchants (who deal with the kind of goods sold on a regular basis) while shifting the risk of loss through fraudulent transfer to the owner of the goods, who can select the merchant to whom he entrusts his property. It protects only those who purchase from the merchant to whom the property was entrusted in the ordinary course of the merchant’s business.

The drafters of the Uniform Commercial Code intended to enhance confidence in commercial transactions by protecting the innocent purchaser who buys from a “merchant” (the dealer) dealing in goods of that kind (even if the dealer acts unscrupulously, or indeed, contrary to the express limitations, say, a minimum sales price, imposed on the dealer by the owner). Of course, if the dealer has violated the consignment agreement limitation, the entrusting art owner would have a breach of contract claim against the dealer, but the entrusting owner has no claim against the dealer’s buyer for the return of his art.

A buyer “in the ordinary course of business” means a person who buys from a person in the business of selling goods of that kind “in good faith” without actual knowledge that the sale violates the rights of another. A person buys “in the ordinary course” if the sale comports with usual or customary practices of business in the art market.
Dealer Buying From Dealer

But if the buyer from the consignee/dealer is not a collector but another dealer, the Uniform Commercial Code applies a higher standard of “good faith” to the buyer. Buying art “in good faith” means something more when the buyer is an art dealer rather than a collector. In effect, the Code requires the dealer in “certain circumstances” to perform a due diligence investigation to confirm the selling dealer’s ownership (or right to transfer title under a consignment agreement with the owner). These “circumstances” or indications of title questions are usually referred to as “red flags”. The definition of “good faith” is modified for art dealers (“merchants”) to mean honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. Merchants are thus held to a higher standard of “good faith” than the non-dealer. “In other words, to prevent lackadaisical standards in the art business from affording a shield to either misconduct or fraud-conducive indifference, New York Courts will not allow a merchant buyer who conducts trivial due diligence to insist that failure to look into a [dealers] authority to sell a painting was consistent with the practice of the trade.” 3 “Thus, under New York law, compliance with custom is relevant, but not dispositive, because a customary practice might fall short of what a reasonable commercial standard would require for fair dealing.” 4 Rather, as Judge Oetken stated in year 2013 in Davis v. Carroll, a dealer might be required by the Uniform Commercial Code to take additional steps to verify that the selling dealer has authority to sell the art. This heightened duty of due diligence is triggered where there are warning signs about problems in a sale. 5 A measure of due diligence is a prerequisite to any claim of a dealer/buyer for ordinary-course-of-business status, and there is an escalating duty of inquiry when the dealer/buyer faces warning signs of foul play – often described as red flags.

Two Court Decisions with Numerous Red Flags – One, the Dealer/Buyer Was Denied Good Title and a Second, the Dealer/Buyer Obtained Good Title

Since a heightened duty of due diligence attaches where an art dealer as buyer is presented with reason to suspect foul play in a sale, it will be instructive to examine two recent court decisions in which the courts identified such warning signs (“red flags”) for art dealer/buyers in Davis v. Carroll and Lindholm v. Brandt. 7 Judge Oetken in Davis examined a number of “red flags” surrounding a 2006 sale of eight paintings by Salander O’Reilly Gallery to defendant, Joseph P. Carroll. The plaintiff, Earl Davis, son of the deceased artist Stuart Davis who created the eight works, claimed that Carroll as a dealer should have been alerted to signs of foul play on the part of Salander. A red flag may exist where the buyer is aware of the seller’s financial difficulties at the time of sale. But Carroll stated that he was unaware of Salander’s precarious financial position, and had no reason to be aware of Salander’s financial difficulties in 2006, and Judge Oetken assumed these two factual assertions to be true (for the procedural purpose of Davis’ summary judgment motion).

Judge Oetken found that the single most important warning or red flag consists of indications “the seller neither owns the work nor enjoys the authority to sell it.” For the judge it was “beyond doubt that Carroll should have been alerted by numerous signs to serious questions about [Salander’s] authority to sell.” Carroll insisted that he understood five (other) works he purchased in 2001 to have been owned by [Salander], notwithstanding provenance statements for many of these works that simply listed “Estate of Owner” and catalog citations listing the son, Earl Davis, as the owner. Thus, for Judge Oetken, it was clear that Carroll, no later than 2002, understood these five works were owned (italics in original) by the Davis Estate and sold through (italics in original) Salander. In 2006 Carroll raised the ownership question of the eight disputed works with a Salander employee, and, as a result, Carroll switched his own provenance statements for the eight paintings from, “owned by [Salander]” to: “acquired directly from [Earl Davis] through [Salander].” From this switch in provenance documentation the judge concluded that Carroll “encountered a scenario in which shifting claims to ownership of the Davis works – of [Salander], Davis and the Davis Estate – raised a red flag.” 88 The judge goes on to quote from the report of Davis’ expert on art market custom and practice, Debra Force, a New York City art dealer, who opined that these [Carroll] actions were “highly improper”, and added that the need to switch around owners in provenance documents constituted notice of questionable dealings. 9 Judge Oetken cites Debra Force, to the effect that “no reputable art dealer” would have proceeded with the 2006 exchanges after the events of April 2006 “without express confirmation that Earl Davis approved the sales.” 10
Another red flag recognized by New York law are “bargain basement prices.” Carroll purchased a number of works at bargain basement prices and then resold them within a short period of time at far greater prices. Judge Oetken states:

As a sophisticated market participant subject to a special duty imposed on merchants under the UCC, Carroll undoubtedly knew or should have known, that these prices were too low, even when set against the art market’s variable pricing norms.\textsuperscript{11} It seems worthwhile to quote Judge Oetken extensively (below) in light of the heavily factual content of his decision analyzing the nature and extent of dealer/buyer Carroll’s actual due diligence investigation, as compared to his due diligence obligation imposed by law:

Carroll’s Due Diligence in the 2006 Exchanges Was Insufficient Under the Applicable Duty of Further Investigation

Carroll conducted three forms of due diligence: inspection of the [Salander] provenance and cataloguing for each work, physical examination of each work, and a search of U.C.C. security filings. Rosenberg [Alex J. Rosenberg, Carroll’s expert on art market custom and practice] states that this amount of due diligence is more than usual in the field, though he offers no specific information about the level of due diligence that is customary, about how much added due diligence might be common in scenarios where red flags are present, or about why these forms of diligence would be expected to answer the questions raised by those red flags. Rather, Rosenberg merely summarizes Carroll’s due diligence and concludes that “Carroll performed more than the customary ‘due diligence’ that would be expected of an art dealer” in a scenario that did not present reason to question [Salander’s] ownership or right to sell. Rosenberg adds that it is “not the art industry norm” to contact the owner of a work on consignment to ascertain whether a seller enjoys the right to sell an artwork.

Force points out that is not the custom in the New York City art market to physically mark artworks with signs of ownership. She adds that U.C.C. security filings were rare in the art industry in the late 2005 and early 2006, a fact evidenced by Carroll’s admission that he only adopted this practice in late 2005. Further, although Carroll insists that he examined all documentation that accompanied these works, he somehow overlooked the fact that the Stuart Davis works he acquired in January/February 2006 were listed as “owned by” [Salander] in the exchange paperwork – even though the provenance and cataloguing materials unmistakably identified Davis or the Davis Estate as the owner. In Force’s view, Carroll’s due diligence was not reasonably calculated to clarify [Salander’s] rights of sale.

The parties do not dispute that Carroll conducted adequate due diligence in the absence of red flags. Given the presence of red flags, then, the controlling question is what form a heightened duty of inquiry would have assumed and whether Carroll satisfied that duty.

In contrast to Rosenberg, who declined to offer expert testimony on what forms of due diligence would be common in the art industry in the presence of red flags and whether Carroll satisfied those obligations, Force offered detailed expert analysis of this issue. She explains that, in the presence of such red flags, Carroll would have been expected under art industry custom to take some combination of the following steps: (1) inquire directly of Salander and insist upon a clear answer or documentation regarding its ownership or rights of sale; (2) consult with the authors and preparers of the forthcoming, definitive Stuart Davis Catalogue Raisonné; (3) consult with Earl Davis “as Stuart Davis scholar and publicly identified owner of many of the works”; (4) review the publications cited in the cataloguing materials before agreeing to purchase works in the 2006 Exchanges, instead of reviewing them after striking a deal; and (5) examine [Salander’s] list of retail prices for these works to more
accurately ascertain whether the prices were so low as to provide cause for concern. In sum, Force opines as follows:

“Carroll failed to carry out the reasonable and necessary diligence that would be expected of an experienced art dealer under the circumstances to assure himself that the proposed transactions were proper and authorized … [had] he carried out such proper diligence, he would have discovered that they were unauthorized and he should have abandoned entering into the Transactions.”

Although Rosenberg’s testimony creates a genuine issue of material fact regarding Force’s opinion that Carroll should have consulted with Davis, Force’s expert opinion otherwise stands unrefuted. Force is thus the only expert in this case who has offered detailed testimony on the norms of due diligence in the art industry when a sale is clouded by signs of foul play. Because Carroll did not undertake any of the forms of heightened inquiry that Force describes as normal and customary in the industry, any reasonable juror would conclude that Carroll did not meet the duty of heightened inquiry imposed upon him under New York law by virtue of the numerous red flags that he knew, or should have known about during the 2006 Exchanges.¹²

A Second Decision – Ownership Red Flags. Buyer/Dealer Gets Good Title.

Whereas the New York court in Davis, with red flags hanging about the sale, decided that the art dealer as buyer had not met his due diligence obligation, a Connecticut court, again seeing red flags fluttering over a sale decided that the dealer as buyer had met his investigatory obligation. In Lindholm v. Brant in 2007 the Supreme Court of Connecticut addressed a claim of Kerstin Lindholm for the return of her Andy Warhol painting, “Red Elvis” which had been fraudulently taken from her by her art dealer, Anders Malmberg, and then sold by him to art dealer, Peter Brant.¹³ (The Court treated Brant as a dealer under the U.C.C.’s Section 2-104 rather loose definition of “merchant”. This, of course, presents a risk to collectors who deal art as a side-line activity.)

The Brant case does not involve stolen art. It is a situation where the selling dealer had no authority to sell to buyer Brant. Brant is a situation in which, in the words of the entrustment section 2-403 of the U.C.C., “the delivery [by the owner of the painting, Kerstin Lindholm] was procured [by the selling dealer, Malmberg] through fraud punishable as larcenous under the criminal law”. Thus, we are not, here, discussing stolen art, to which under American law, the buyer, Brant, could have never gotten good title.

During the course of sale negotiations between Malmberg and Brant a letter was prepared (presumably by the lawyer for buyer, Brant) to be signed by seller, Kerstin Lindholm, stating that she had good title at the time she sold the painting to Malmberg, but Kerstin Lindholm never signed the letter (although an unsigned copy was shown to Brant). When Brant’s lawyer requested a copy of the signed letter Malmberg refused, saying that “it was none of [Brant’s] business.” In addition, Brant’s lawyer, in an effort to clarify that Malmberg owned the painting, requested a copy of the invoice from Kerstin Lindholm to Malmberg. Malmberg denied the request on the ground that such invoices are not normally and customarily disclosed in sales of art.

The Supreme Court of Connecticut described the expert testimony about customary art market practice presented by the expert for buyer/defendant Brant as follows:

… defendant presented expert testimony that the vast majority of art transactions, in which the buyer has no reason for concern about the seller’s ability to convey good title, are “completed on a handshake and an exchange of an invoice.” It is not customary for sophisticated buyers and sellers to obtain a signed invoice from the original seller to the dealer prior to a transaction, nor is it an ordinary or customary practice to request the underlying invoice or corroborating information as to a dealer’s authority to convey title. Moreover, it is not customary to approach the owner of an artwork if the owner regularly worked with a particular art dealer because any inquiries about an art transaction customarily are presented to the art dealer rather than directly to the principal. It is customary to rely upon representations made
by respected dealers regarding their authority to sell works of art. A dealer customarily is not required to present an invoice establishing when and from whom he bought the artwork or the conditions of the purchase.

However, the Connecticut Supreme Court stated that this customary art market practice will not suffice when the dealer/buyer has indications of red flags:

We are compelled to conclude, however, that the sale from Malmberg to the defendant was unlike the vast majority of art transactions. The defendant had good reason to be concerned that [Kerstin Lindholm’s husband] might have claims to the painting. Several courts have held that, under such circumstances, a handshake and an exchange of invoice is not sufficient to confer status as a buyer in the ordinary course.\(^{14}\)

\[\ldots\]

We agree with these courts that a merchant buyer has a heightened duty of inquiry when a reasonable merchant would have doubts or questions regarding the seller’s authority to sell. We further conclude that the steps that a merchant must take to conform to reasonable commercial standards before consummating a deal depend on all of the facts and circumstances surrounding the sale.\(^{15}\)

\[\ldots\]

Because of his concern that Lindholm (Kerstin Lindholm’s husband) might make a claim to Red Elvis, the defendant took the extraordinary step of hiring counsel to conduct an investigation and to negotiate a formal contract of sale on his behalf. He also insisted on and obtained a formal contract containing representations and warranties that Malmberg had title to the painting. In addition, during the course of the investigation, the defendant’s counsel conducted both a lien search and an Art Loss Register search that revealed no competing claims to Red Elvis. Although the defendant was cautioned that the searches provided only minimal assurance that Malmberg had good title to the painting, such searches typically are not conducted during the course of a normal art transaction and, therefore, provided the defendant with at least some assurance that Lindholm had no claims to the painting.\(^{16}\)

\[\ldots\]

Moreover, the evidence presented at trial established that the reason that documentary proof of ownership customarily is not required is to protect the confidentiality of the owner and the buyer. Requiring a merchant buyer to obtain an invoice or other supporting documentation proving the seller’s ownership would in every transaction destroy the privacy and confidentiality that buyers and sellers have come to desire and expect. Accordingly, only when circumstances surrounding the sale cast severe doubt on the ownership of the artwork are merchant buyers required to obtain documentary assurance that the seller has good title.\(^{17}\)

Critique of Connecticut Court’s Standard of Inquiry Imposed on Art Dealers in the Face of Warning Red Flags on Good Title

It is worthwhile to examine in detail the analysis by the Connecticut Supreme Court in Brant in arriving at “a heightened duty of inquiry when a reasonable merchant would have doubts or questions regarding the seller’s authority to sell”.

As the Court describes it, the art dealer “took the extraordinary step of hiring counsel to conduct an investigation” and negotiate a “formal contract of sale” … “containing representations that Malmberg had title to the painting,” and (2) conducted a lien search and an Art Loss Register search that revealed no competing claims. The Connecticut Court concluded that it is “only when circumstances surrounding the sale cast severe doubt [emphasis added] on the ownership of the artwork are merchant buyers required to obtain documentary assurance that the seller has good title.”
Although the Uniform Commercial Code makes a warranty of good title expressly part of an art sale between dealers, one might well ask why negotiating a written contract for a $4.6 million painting, is an “extraordinary step”. And, as to lien searches conducted by the art dealer/buyer, such searches are chiefly useful to discover publicly filed liens or claims against a named owner, not to discover whether the named owner has good title to the art.

In short, the duty of inquiry placed by the Connecticut court demanded not much (or, indeed any) more from the dealer/buyer than a dealer would have customarily undertaken in the complete absence of red flags raising concerns about ownership of the art being purchased.

It should be kept in mind, too, that Brant knew very well that Kerstin Lindholm was the owner (before her supposed sale to Malmberg), so that, had Brant received a letter signed by Kerstin confirming she had owned Red Elvis and a sale invoice from Kerstin to Malmberg, no confidential matters would have been disclosed. Malmberg’s explicit refusal to furnish the owner’s letter and invoice should have triggered more of an investigation on the part of Brant as dealer/buyer than the Connecticut court required.

**If Carroll Had Sold the Art to a Collector Before Earl Davis Could Recover It, He Could Not Recover His Art From the Collector.**

It would be interesting hypothetically, to follow the *Davis* transaction a little bit down a buyer chain. That is, suppose the dealer, Carroll, in the ordinary course of business, had sold the Davis-owned-art to a good faith purchaser, (non-dealer) and the owner, Earl Davis, had made a claim against this collector for return of his art. Article 2 of the New York Commercial Code which governs the right to transfer title in goods provides “A person with voidable title has power to transfer a good title to a good faith purchaser for value.” Salander had such a voidable title, that is, “… Salander possessed “voidable, as opposed to void title and [could] pass good title” to a buyer in the ordinary course of business.” Since Carroll was not held to be such an ordinary-course buyer, Carroll too, had voidable title with the result that, if Carroll, in turn, had sold to a good faith buyer (who was not a dealer), that *buyer/collector* would have gotten good title and the owner, Earl Davis, could not have recovered his art from the collector!

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**NOTES**

1 Article 2, New York Uniform Commercial Code.


5 *Davis*, slip op. at 53.

6 *Id.* at 55.


8 *Davis*, slip op. at 64.
9 Id. at 66.
10 Id. at 66.
11 Id. at 70.
12 Id. at 73-75. Both reports were filed under seal, and, unhappily, are not available on the public record, but Judge Oetken extensively quotes the two expert reports.
13 Lindholm v. Brant, 283 Conn. at 70, 925 A.2d at 1052.
14 Id., 283 Conn. at 80, 925 A.2d at 1057.
15 Id., 283 Conn. at 82, 925 A.2d at 1058.
16 Id., 283 Conn. at 83, 925 A.2d at 1058-59.
17 Id., 283 Conn. at 84-85, 925 A.2d at 1059.
18 Davis, slip op. at 50.
SOMETIMES IT’S NOT TOO LATE TO RECOVER YOUR ART.  
LACHES: THE STEALTH DEFENSE REVISITED.

Judith Wallace

This essay updates “When Is It Too Late to Recover Artwork You Own? Laches: the Stealth Defense,” published in the Winter 2012/2013 issue of this Journal. New York’s highest court addresses those attempting to recover long absent art and those defending claims from the distant past. – RDS

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When Is It Too Late to Recover Artwork You Own? Laches: the Stealth Defense, published in Volume 4, Issue No. issue of this Journal, examined the defense of “laches,” which 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.¹ In Matter of Riven Flamenbaum, the New York Court of Appeals, the State’s highest court, revisited laches.²

Significance of the Laches Defense in New York

As most readers are aware, a statute of limitations sets a deadline after which lawsuits are prohibited. The laches defense is not needed if the statute of limitations already bars a lawsuit. However, New York has a distinct statute of limitations for conversion in claims for artwork (i.e., acts excluding an owner’s rights, such as stealing or refusing to return artwork), which makes it a more hospitable forum for owners’ claims for lost or stolen art that can be decades old. Under the New York rule for claims by an owner to recover artwork possessed by someone else, the statute of limitations does not start to run until the possessor refuses a demand by the owner for the return of the artwork—the theory being that until the possessor has refused a lawful demand, she has done nothing wrong. (There are exceptions to this rule if the artwork no longer exists, has already been transferred to someone else, or was stolen and is in the hands of the thief). Furthermore, in New York the expiration of the statute of limitations against any person does not extinguish the owner’s title. As a result, under New York law, a demand for the return of artwork that had been stolen or converted decades earlier could be within the statute of limitations.³ Such lawsuits may raise questions about whether the owner slept on his or her rights to a degree that is unfair to the possessor, who may have purchased the artwork in good faith, and for market value. In his defense, the possessor may assert a laches defense -- i.e., that the owner unreasonably delayed making the claim, and this delay prejudiced the defendant.

New York Rule – Stringent Enforcement of Requirement to Show Prejudice to Defeat Claim by Original Owner

As discussed our earlier essay, Flamenbaum presented an unusual reversal of the usual Holocaust-claim scenario. A German museum was asserting a claim for an Assyrian gold tablet stolen during World War II, against the estate of a Holocaust survivor, Flamenbaum. Flamenbaum had told his children that he bartered the tablet from a Russian soldier for cigarettes. During the estate proceedings, Rivenbaum’s son objected to the inclusion of the tablet in the estate accounting because the tablet had been stolen from the Vorderasiatisches Museum in Berlin, and the son on his own initiative contacted the museum. At that point the family learned the tablet was worth $10 million.⁴ The museum claimed the tablet, and the estate asserted a laches defense.
The Surrogate’s Court, which deals with probate matters, initially ruled for the estate, holding that the museum had unreasonably delayed its recovery efforts, and that the estate was prejudiced by the fact that Riven 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 there was no prejudice to the estate from the museum’s delay – despite the fact that the estate’s principal witness, Flamenbaum, 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.

The New York State Court of Appeals, the state’s highest court, affirmed the Appellate Division’s award of the tablet to the museum, provided some helpful guidance on two key elements on the laches defense.5

The first element of the laches defense is to demonstrate that the owner failed to exercise reasonable diligence to locate the missing work. The Court of Appeals implicitly found it reasonable that the museum did little if anything to seek the return of the tablet. It did not report the theft to any law enforcement agency, or list it on any database of stolen artwork. The court noted, seemingly with approval, that “the Museum explained … it would have been difficult to report each individual object that was missing after the war.” The Court of Appeals also noted that under New York law, as a matter of public policy, placing the burden on owners to demonstrate due diligence in locating stolen artwork and to foreclose the rights of that owner to recover property if it did not meet that burden would encourage illicit trafficking in stolen art. This begs the question – why have this prong of the test if it is against public policy to require reasonable diligence from the owner?

Perhaps the answer is that the case involves admittedly looted art. (Indeed, the estate offered a separate “spoils of war defense” which was rejected as “fundamentally unjust”). The Estate argued that if the museum had been more diligent, the museum could have discovered Flamenbaum’s possession of the tablet. But what if it had tracked down the tablet? The Court pointed out that the family had notice during Riven Flamenbaum’s lifetime that the tablet belonged to the museum. Moreover, the Court held there was nothing Riven Flamenbaum could have done if he had been alive – the Court stated that “we can perceive of no scenario whereby the decedent could have shown that he held title to this antiquity.”

This is consistent with the decision by the Second Circuit Court of Appeals in 2012, applying New York law. In that case, Bakalar v. Vavra, the court held the death of a witness would be prejudicial because that witness could have testified on the transfer of title to the artwork.6 David Bakalar purchased a drawing by Egon Schiele entitled Seated Woman with Bent Left Leg (Torso). The painting had once been owned by Fritz Grunbaum, a musician and art collector who died in a concentration camp. After the war, Grunbaum’s sister-in-law claimed to own the drawing and sold it in 1956. Decades later, distant family members asserted that they were properly the heirs of Grunbaum and claimed to own the drawing. The Second Circuit Court of Appeals held that Bakalar was prejudiced by the death in 1979 of the sister-in-law, who was the only person who could have testified as to whether she had received the artwork as a gift and therefore could have supported Bakalar’s chain of title. In sum, it appears that unless the possessor has a plausible potential claim to have lawfully acquired good title, a sixty year delay in asserting a claim is permissible, even if the owner did almost nothing to locate the missing artwork. Conversely, it seems that unless a possessor can demonstrate that the original owner’s delay eliminated evidence that could have supported its claim of good title by the defendant, there is no viable laches defense.

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4 Kieran Crowley & Chuck Bennett, Holocaust Survivor’s Kin Can Keep $10M Relic, N.Y. Post, Apr. 6, 2010.
