

More Uncertainty On Nazi-Era Art Restitution Claims

By **Simon Frankel and Sari Sharoni**

October 4, 2017, 1:13 PM EDT

With an admirable purpose, a celebrity backer in Dame Helen Mirren, and unanimous support in Congress, the Holocaust Expropriated Art Recovery Act (or HEAR Act) should be a rare legislative success. Instead, the act's convoluted language has only raised more questions, left to be addressed in future litigation over Nazi-era art restitution claims.

As illustrated by the 2015 movie "Woman in Gold," starring Mirren and based on a true story, the Nazi's organized seizure of artworks from Jews and other persecuted groups left a trail of unfinished business long after World War II. The desire to right these wrongs led the United States to convene the Washington Conference in 1998, where 44 nations agreed to the Washington Conference Principles. In part, these principles declared "steps should be taken expeditiously" to achieve a just and fair solution to Holocaust victims' or their heirs' claims to looted and confiscated art.

One of the remaining obstacles is that for decades after the trauma of World War II many families did not even know the extent of their families' losses to the Nazis. It is only in the past two decades, after the fall of the Berlin Wall, that more records became available, allowing families to learn which works their relatives owned in the 1930s, and to locate the works' present whereabouts. It was also not until the Washington Conference that information about available remedies became more widely known.

Given these complications, many victims did not attempt to claim Nazi-seized artwork until decades after the fact. When they did, they often had to address difficult issues of whether domestic statutes of limitations barred their claims as untimely. Statutes of limitations are procedural deadlines by which claims must be brought in court in order to proceed. They are generally a matter of state law, with most lasting only three or four years. Some claims to recover Nazi-seized works were found to be time-barred, and the validity of the claims never directly addressed.

To address this issue, Congress last year enacted, and President Obama signed, the HEAR Act. The act establishes a national statute of limitations under which original owners or their heirs have six years to bring claims to artwork after discovering its origins. For owners or their heirs who already have knowledge of such works, they now have six years from the law's date of enactment, Jan. 1, 2017, to



Simon Frankel



Sari Sharoni

bring a claim. These provisions were intended to provide those who have been time-barred, or would be time-barred, under existing state statutes of limitations more time to identify, locate, and file claims for works taken by the Nazis and never returned.

While the HEAR Act had good intentions, the legislation contains ambiguous provisions that will only lead to more litigation and debates over timeliness of claims — the exact problem the legislation sought to address. As new cases have begun to be filed based on the longer limitations period in the HEAR Act, we pause to focus on several difficulties that courts will face in applying the statute.

First, it is unclear whether the legislation continues to allow for the defense of state law laches. Laches is an equitable doctrine — distinct from statutes of limitations) that allows judges to refuse to hear a claim where the person making the claim waited too long to bring that claim and the defendant (here, the person who now possesses the artwork) has been harmed by that delay. While being considered by Congress, the draft legislation was revised to remove language that would have explicitly restricted the use of laches as a defense against individuals seeking to reclaim Nazi-looted artworks — suggesting Congress did not mean to sweep aside laches in such cases. However, other language left in the act suggests laches are no longer a viable defense to covered claims. So, litigation will have to provide a clearer answer than Congress did.

Second, it is unclear how the law applies to those who already, before the HEAR Act, had knowledge of a claim to artwork earlier owned by their family. One section of the act purports to reopen the door to civil claims previously barred by statutes of limitations. Under another section, a person's claim would not be revived in certain cases where the individual did not act in a timely manner after the Washington Conference. This convoluted language is compounded by contradictory legislative histories that indicate both that the act was intended to significantly limit claims discovered after 1999 but before the act's 2016 enactment, and that the act was intended to give an opportunity for victims to resuscitate post-1999 claims that would have been barred by statutory limitations in the past. Again, only litigation will resolve the dueling language and legislative histories of these sections.

Third, it is unclear how the act applies in New York, which has a unique “demand and refusal” rule, under which the clock starts running on the limitations period when a person make a demand for return of the property to the current possessor and that demand is refused. Not surprisingly, given the central role of New York in the art market, a large proportion of the Nazi-era art restitution claims brought in the U.S. have been filed there. As written, the HEAR Act sheds no light on how its “actual discovery” standard interacts with New York's more claimant-friendly “demand and refusal” rule. Oddly, it is possible that under the HEAR Act fewer claims in New York will be considered timely — because courts will find that the Act preempts the demand and refusal rule. This result seems to be at odds with the purpose of the act to extend statutes of limitations. Only future litigation will tell us for sure.

In the HEAR Act, Congress understandably sought to reduce the litigation hurdles faced by Holocaust victims and their heirs in attempts to obtain lost or stolen art. But the ambiguities in the act's central provisions will likely have the opposite effect. At least in many cases, the uncertainties in the language of the HEAR Act will have to be litigated along with the merits of the claim itself. Whether this will ultimately lead to the rightful restitution of more works of arts stolen by the Nazis remain to be seen.

Simon J. Frankel is a partner in the San Francisco office of Covington & Burling LLP and teaches art law at Stanford Law School. Sari Sharoni is a law clerk on the United States Court of Appeals for the Third Circuit and a former associate at Covington in Washington, D.C.

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