California Dreaming: The Continuing Debate in California Over the Constitutionality of Eliminating the Statute of Limitations on Holocaust-Era Art Repatriation Claims

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I. Introduction

Last spring, the *Entertainment, Arts and Sports Law Journal* published "Is There Any Way Home? A History and Analysis of the Legal Issues Surrounding the Repatriation of Artwork Displaced During the Holocaust" (by this author).[1] The primary focus of that work was the consequences of technical defenses such as state statutes of limitations and the doctrine of laches on Holocaust-era art repatriation claims. More specifically, the article addressed the critical differences between courts applying the "discovery" rule and those applying the "demand and refusal" rule when determining the statute of limitations period for Holocaust-era repatriation claims. The article used a discussion of *Vineberg v. Bissonnette*[2] to provide an illustration of these differences. In *Vineberg*, the Rhode Island Court of Appeals was able to move beyond the aforementioned procedural legal barriers to restitution. That court ultimately ordered the return of artwork which had been sold through Nazi coercion in 1937.[3] The article concluded: "In sustaining the legal mechanisms precluding access to justiciability, the United States and its courts are blatantly ignoring reality and, more significantly, the rights of those who were subjected to the horrors and barbarism of the Holocaust."[4]

Since the time of that publication, the legislature and courts of California have engaged in what amounts to a "cat and mouse game" regarding the statutory limitations on Holocaust-era repatriation claims. The underlying issue in this debate is whether it is constitutionally permissible for the California legislature to expand, or suspend entirely, the statute of limitations for claims against museums and galleries that exhibit, display, or sell artworks that were confiscated or otherwise displaced as part of the Nazi program, thereby permitting cases to move forward on the merits. As perplexing as the repatriation issue has traditionally proven, new questions about whether such legislation infringes on the federal government's exclusive foreign affairs power add a new layer of complexity to this discussion. The resolution of this query will have a significant impact on other state legislatures that might similarly deem the statute of limitations an unnecessary and unreasonable obstacle to victims and heirs bringing action to recover artwork from a museum or gallery.

II. California Code of Civil Procedure § 354.3

On August 15, 2002, the California legislature passed Assembly Bill No. 1758.[5] This legislation was one of several bills that temporarily eliminated the statute of limitations for claims arising from the actions of the Nazi regime during World War II.[6] According to the California legislature, the impetus for this particular legislation was simple: "California has a moral and public policy interest in assuring that its residents and citizens are given a reasonable opportunity to commence an action in court for those pieces of artwork now located in museums and galleries."[7] In drafting the legislation, the legislature made several seemingly obvious, but also traditionally overlooked, observations regarding the inherent nature of most Holocaust-era repatriation claims.[8] First, "[d]ue to the unique circumstances surrounding the theft of Holocaust-era artwork, commencement of an action requires detailed investigation in several countries, involving numerous historical documents and the input of experts."[9] Second, and most significantly, "[t]he current three-year statute of limitation, after discovery of the whereabouts of the artwork, is an insufficient amount of time to finance, investigate, and commence an action."[10]

In an effort to alleviate the procedural constraints outlined above, the California legislature added California Code of Civil Procedure § 354.3 which provided, in pertinent part:

> (b) Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any [museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance.]
>
> (c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.[11]

By adding § 354.3 and its companion statutes to the California Code, the California Legislature expressly recognized the inadequacy of the three-year statute of limitations on Holocaust-related legal claims. In fact, by permitting all such claims to be brought within the prescribed period, the legislature was also making a noteworthy statement regarding the enforcement of *any* statute of limitations on such claims. More concretely, though, in temporarily eliminating the statute of limitations, the California legislature was able to relieve courts of the procedural restraints resulting from the application of California's "discovery rule."

Under the "discovery rule," applicable in a majority of states, the statute of limitations period begins to run when the potential plaintiff discovers, or should have discovered through reasonable diligence, the whereabouts of a work of art.[12] Such a standard presents obvious problems in that the definition of diligence may vary greatly based on the knowledge, resources, and expertise of a particular plaintiff. As the new laws temporarily eliminated the statute of limitations for certain Holocaust-related legal claims, courts would no longer be required to enter into a prolonged and extremely subjective analysis of when a particular plaintiff *should* have discovered the whereabouts of a work of art or, alternatively, the level of diligence a plaintiff *should* have exerted in seeking information on the displaced work.

Unfortunately, instead of § 354.3 and the other Holocaust-related statutes acting as national precedent for how to address the inherent procedural issues underlying a Holocaust-related legal claim, what followed was a series of attacks on the constitutionality of the legislative action. The first statute to be attacked was § 354.6,[13] which created a cause of action and temporarily eliminated the statute of limitations period for slave labor claims brought by Holocaust victims and their heirs. In *Deustch v. Turner*,[14] the Ninth Circuit Court of Appeals found § 354.6 unconstitutionally "impermissible because it intrude[d] on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims."[15] The court determined that by enacting § 354.6, the California Legislature was acting "with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies protection."[16] In doing so, "California sought to create its own resolution to a major issue arising out of wartime acts that California's legislature believed had never been fairly resolved."[17]

Later, in *Steinberg v. International Commission on Holocaust Era Insurance Claims*,[18] the California Court of Appeals evaluated the constitutionality of § 354.5,[19] which temporarily eliminated the statute of limitations period for insurance policy claims brought by Holocaust victims and their heirs. The question in *Steinberg* was whether § 354.5, which was being invoked as a statutory basis for bringing an insurance claim against the International Commission on Holocaust Era Insurance Claims, was preempted by foreign policy concerns of the federal government.[20] Using a similar rationale as that set forth in *Deustch*, the court found § 354.5 unconstitutional because any claims made possible under the statute would "express a lack of the respect due the Executive Branch."[21] The Supreme Court of the United States came to the same conclusion in *American Insurance Association v. Garamendi*,[22] finding the enactment of California's Holocaust Victim Insurance Relief Act of 1999, which required any insurer doing business in California to disclose information about policies sold in Europe between 1920 and 1945, to be an unconstitutional infringement on the Federal Government's foreign relations power.[23] Although the Court ultimately found the relevant statute unconstitutional, it openly supported the underlying intent of the California legislature, leaving open the possibility that some relevant action might be appropriate at the federal level:

> The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves. We have heard powerful arguments that the iron fist would work better, and it may be that if the matter of compensation were considered in isolation from all other issues involving the European allies, the iron fist would be the preferable policy. But our thoughts on the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the National Government's policy; dissatisfaction should be addressed to the President or, perhaps, Congress. The question relevant to preemption in this case is conflict, and the evidence here is "more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives."[24]

III. *Von Saher v. Norton Simon Museum of Art at Pasadena*

In August 2009, the Ninth Circuit Court of Appeals was presented the opportunity to ascertain the constitutionality of § 354.3. In *Von Saher v. Norton Simon Museum of Art at Pasadena*,[25] the court was asked to consider "whether § 354.3 infringes on the national government's exclusive foreign affairs powers."[26] The suit was brought by Marei von Saher (von Saher), a Greenwich, Connecticut resident and the daughter-in-law and only surviving heir of Jacques Goudstikker (Goudstikker), a prominent art dealer who was forced to flee the Netherlands during the Nazi invasion of May 1940.[27] The artwork at issue in *Von Saher* was a diptych entitled "Adam and Eve" that consisted of a pair of oil paintings by Lucas Cranach the Elder (1472-1553).[28] The paintings are currently on public display at the Norton Simon Museum of Art at Pasadena (Norton).[29]

The facts in *Von Saher* are relatively straightforward considering the traditionally questionable provenance of most works of art displaced during the Holocaust. There is no question that Goudstikker purchased the Cranach paintings at an art auction in Berlin some time in 1931, adding to an already substantial collection consisting of more than 1,200 works of art.[30] When Goudstikker and his family were forced to flee the Netherlands in 1940, Goudstikker took with him a small notebook containing a list of 1,113 works he was leaving behind in Amsterdam.[31] This notebook specifically listed the Cranach paintings and detailed the provenance of the work prior to Goud-

stikker's purchase.[32] Goudstikker died in flight from the German invasion.[33] He broke his neck after falling through an open shaft while aboard a ship crossing the English Channel.[34] At his death, the notebook documenting his art collection was found.[35]

Some time after the Goudstikkers fled the Netherlands, Nazi *Reischsmarschall* Herman Göring ordered the seizure of all works from Goudstikker's gallery.[36] The Cranach paintings were transported to Carinhall, Göring's country estate outside of Berlin, where many works of particular interest to Göring were sent, sorted, and prepared for his personal exhibition.[37] Following the Allied invasion of Germany, the Allied Forces discovered the treasure trove of artwork.[38] As policy dictated, the discovered works were sent to the Munich Central Collection Point where they were identified, documented, and ultimately returned to the Netherlands some time around 1946.[39]

In 1952, Goudstikker's widow entered into a settlement with the Dutch government to return part of the Goudstikker collection.[40] However, she did not pursue the rest of the collection because such pursuit would have required her to return certain restitution payments received from the German government.[41] In 1966, in the absence of any further claims, the Dutch government transferred title of the paintings to George Straganoff-Scherbatoff, an heir of a noble Russian family who claimed the paintings were confiscated from his family by the Bolsheviks during the Russian Revolution.[42] In 1971, Straganoff-Scherbatoff sold the paintings to the Norton Simon Art Foundation and, in 1979, the paintings went on public display at the Norton.[43] The estimated present value of the paintings is $24 million.[44]

In 2001, von Saher came forward to reclaim the two Cranach paintings from the Norton and, on May 1, 2007, filed suit in federal district court under § 354.3.[45] The district court granted the Norton's 12(b)(6) motion to dismiss, holding that § 354.3 was facially unconstitutional because it violated the foreign affairs doctrine as previously interpreted by the Ninth Circuit Court of Appeals in *Deutsch.*[46] The court explained: "As with Section 354.6, by enacting Section 354.3, 'California seeks to redress wrongs committed in the course of the Second World War'—a legislative act which 'intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims.'"[47] Although the "Court [was reluctant] in finding unconstitutional a statute which attempts to provide at least some measure of redress to those victims and their families…the Court [was] not only compelled to apply the foreign affairs doctrine, [but was] bound by the interpretation of that doctrine as set forth by the Ninth Circuit in *Deutsch.*"[48] After nullifying the claim under § 354.5, the district court dismissed the complaint with prejudice as untimely under the customary three-year statute of limitations for the recovery of stolen property in California.[49]

The Ninth Circuit Court of Appeals affirmed in part and reversed in part, agreeing with the district court that "§ 354.3 infringes on the national government's exclusive foreign affairs powers[,]" but disagreeing with the lower court determination that the case was time-barred under the standard three-year statute of limitations.[50] The court entered into a two-part analysis in regard to the constitutionality of § 354.3. First, the court analyzed whether § 354.3 directly conflicted with the Executive Branch's policy of external restitution following World War II—more specifically, the London Declaration of 1943 and the Art Objects in U.S. Zones Declaration of 1945.[51] After a short discussion of these efforts, the court concluded that because the United States stopped accepting claims for external restitution of artwork in 1948, § 354.3 "does not…conflict with any current foreign policy espoused by the Executive Branch."[52] The court did note, however, that "had the…statute been enacted immediately following WWII, it undoubtedly would have conflicted with the Executive Branch's policy of external restitution."[53]

Finding no direct conflict between § 354.3 and Executive Branch policy, the court then turned to the question of whether, in enacting § 354.3, the California legislature was addressing a "traditional state responsibility" or "a foreign affairs power reserved by the Constitution exclusively to the national government."[54] The court found such an inquiry critical because "[c]ourts have consistently struck down state laws which purport to regulate an area of traditional state competence, but in fact, affect foreign affairs."[55] The court began its analysis by recognizing the fact that § 354.3 "cannot be fairly categorized as a garden variety property regulation."[56] Instead, § 354.3 applied only to Holocaust victims and their heirs who were seeking repatriation specifically from museums and galleries.[57] Moreover, the court noted the legislative history of Assembly Bill No. 1758, which originally restricted the application of the new statute to claims against "museums and galleries in California" and was later expanded to include "*any* museum or gallery" (emphasis added).[58] The court interpreted this change as indicative of the intent of the legislature to create a "world-wide forum for the resolution of Holocaust restitution claims."[59] Although the court expressed its support of such a virtuous objective, it ultimately determined that the expansive applicability of the statute surpassed "traditional state responsibility" and would therefore be subject to a field preemption analysis.[60]

Regarding the preemption of § 354.3, the court found the determinative inquiry to be whether the statute intrudes on the federal government's "power to wage and resolve war."[61] Citing back to its opinion in *Deutsch*, the court noted that "'matters related to war are for the federal government alone to address,' and state statutes which infringe on this power will be preempted…. By enacting § 354.3, California 'seeks to redress wrongs committed in the course of the Second World War'—a motive that was fatal to § 354.6.'"[62] Notwithstanding a formal

authorization by the federal government to allow states to address these issues, the court found this power to remain exclusively with the federal government.[63] After a short survey of the admittedly inadequate efforts by the federal government to address the issues surrounding the repatriation of artwork displaced during the Holocaust, the court affirmed this aspect of the district court ruling, declaring § 354.3 an unconstitutional intrusion "into a field occupied exclusively by the federal government."[64]

In a powerful dissent on the constitutionality issue, Judge Pregerson disagreed with the majority's interpretation of the language and intent of § 354.3 and its reliance on *Deutsch*. Pregerson first attacked the court's presumption that because the legislature altered the language of § 354.3 to include "any museum or gallery[,]" the statute was intended to establish "a world-wide forum for the resolution of Holocaust restitution claims."[65] Instead, Pregerson interpreted the statute narrowly, limiting its application to "entities subject to the jurisdiction of the State of California."[66] Pregerson also disagreed with the majority's reliance on *Deutsch*. As noted earlier, in *Deutsch*, the court was asked to determine the constitutionality of § 354.6, a statute that permitted recovery for slave labor performed "[for] the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under the control of the Nazi regime or its allies and sympathizers."[67] The *Deutsch* court concluded that the legislature passed § 354.6 "with the aim of rectifying wartime wrongs *committed by our enemies* or by parties operating under our enemies' protection" (emphasis added).[68] However, Pregerson found "significant differences" between § 354.3 and § 354.6.[69] First, by enacting § 354.3, the legislature was acting within "its traditional competence to regulate property over which it has jurisdiction."[70] Second, § 354.3 does not target "enemies" of the United States or provide access to reparations for harms endured during the war.[71] As such, Pregerson came to the following conclusion: "Here, Appellee, a museum located in California, acquired stolen property in 1971. Appellant now seeks to recover that property. I fail to see how a California statute allowing such recovery intrudes on the federal government's power to make and resolve war."[72]

In a final gesture, the Court of Appeals reversed the district court's prejudicial dismissal of the claim, noting that von Saher might still be able to bring the claim under § 338, the standard three-year statute of limitations for claims to recover stolen property.[73] Such a claim would be based on the application of the often fatal "discovery" rule used to determine when the statute of limitations begins to run on the claim. As noted, under the "discovery rule," the statute of limitations period began to run when von Saher discovered, or should have discovered through reasonable diligence, the whereabouts of the Cranach paintings. Although the court seemed to indicate that von Saher may be able to satisfy the statute of limitations period, it seems unlikely, given the facts of this case, particularly the amount of detailed history and documentation relating to the stolen works, that von Saher would have been able to establish that she was unaware of her claim until May 2006. Furthermore, under the three-year statute of limitations, the fact that von Saher came forward to reclaim the works in 2001 should completely preclude her from bringing the claim.

On April 12, 2010, von Saher filed a petition for a writ of certiorari with the Supreme Court of the United States. In the petition, she attempted to outline the basic rationale of her arguments:

> Not only is it clear that § 354.3 does not implicate or intrude upon federal power, but, quite the contrary, it is plain that the enactment of the statute is consistent with the Federal Government's policy. It has long been the express position of the United States that property looted during the Holocaust era should be returned to its rightful owners and the possessors of such artworks should be discouraged from asserting technical defenses, such as the statue of limitations, so that claims to these artworks may be judged on their merits.[74]

Von Saher's argument then moved to distinguish the cases used by the Court of Appeals in making its determination, ultimately finding "no basis…to support a finding that California did not have a strong interest in enacting § 354.3, much less a finding that in enacting the statute, California was not acting within 'an area of traditional state responsibility.'"[75] Furthermore, von Saher was unable to find any evidence that § 354.3 in any way "target[s] former enemies of the United States [because] [t]he Federal Government does not make or resolve war with museums and galleries, the only entities at issue under § 354.3."[76]

Several amicus briefs were filed in support of von Saher's petition. California Attorney General Edmund G. Brown argued that "[t]he Ninth Circuit erred in determining that Section 354.3 seeks to regulate in an area reserved exclusively to the federal government and, therefore, in invalidating Section 354.3 on field preemption grounds."[77] Brown argued that by declaring § 354.3 unconstitutional, "the court erased the line between legitimate state authority and exclusive deferral foreign affairs power, invalidating a state law that facially addresses property claims and that manifestly does not conflict with federal foreign policy."[78] The American Jewish Committee (AJC) focused its brief in support of von Saher on the aforementioned characteristics of a Holocaust-era repatriation claim: "[The statute of limitations extension], which implicitly recognizes the difficulty inherent in identifying, locating, and making claims on such artwork, is consistent with the federal government's policy that such artwork should be returned to their rightful owners, through litigation if necessary."[79] The AJC went further, warning the Supreme

Court that "[u]nless checked, *Von Saher* threatens to preempt virtually any state regulation dealing with a matter that might be thought to have foreign implications, even where the federal government has not spoken (or, as here, where the federal government has expressed support for the state action)."[80] Such preemption would not be limited to Holocaust era art repatriation, but would include "countless other socially-motivated state laws that have been or may be enacted, including laws aimed at promoting human rights or environmental interests."[81]

In perhaps the most aggressive of the amicus briefs, the Commission for Art Recovery (CAR) accused the Ninth Circuit of "[m]aking an unwarranted connection between pursuit of converted property under state law and the power of the federal government concerning foreign policy [thereby extinguishing] a realistic and practical approach to resolve questions of title to property acquired through atrocity."[82] Along with the general legal arguments set forth in other briefs, CAR discussed the "devastating impact" of the *Von Saher* ruling on the thousands of Holocaust survivors in the United States attempting to locate and retrieve their displaced artwork.[83] More specifically, CAR discussed the various difficulties in locating and securing Holocaust-era displaced artwork, the failings of various federal programs seeking to address these issues, and the injustice resulting from allowing technical defenses such as the statute of limitations against Holocaust victims and their heirs.[84]

On October 4, 2010, the Supreme Court asked the administrative lawyers of the Office of the United States Solicitor General for an advisory opinion on the issue of whether a state legislature can expand, or suspend entirely, statutory limitations periods on certain Holocaust-related claims when such action allegedly conflicts with the federal government's exclusive foreign affairs power. The contents of that opinion will assist the Court in determining whether it should review the *Von Saher* appeal.

IV. Amended California Code of Civil Procedure § 338

In 2010, the California legislature made its next move in the ongoing conflict with the courts over the statute of limitations for Holocaust-era art repatriation claims. On September 20, 2010, then-California Governor Arnold Schwarzenegger signed Assembly Bill No. 2765,[85] legislation amending California Civil Procedure § 338 in regard to the statute of limitations for claims relating to "fine art…unlawfully taken or stolen."[86] The preamble of the legislation discussed the inherent difficulties resulting from the application of the three-year statute of limitations to stolen art claims:

> Because objects of fine art often circulate in the private marketplace for many years before entering the collections of museums or galleries, existing statutes of limitations, which are solely the creatures of the Legislature, often present an inequitable procedural obstacle to recovery of these objects by parties that claim to be their rightful owner.[87]

There is little doubt that Assembly Bill No. 2765 was passed in direct response to the Ninth Circuit Court of Appeals ruling in *Von Saher*. This assertion was confirmed by California Assemblyman Mike Feuer (D-Los Angeles), who, despite being uncertain as to how the new law would affect the *Von Saher* case, did note the intent of the legislature: "The key thing is that people who have claims that works of art have been stolen should have those claims heard on the merits whenever possible, and not have artificial barriers in the way."[88] Furthermore, the absence of any reference to the Holocaust, World War II, or other language that may be interpreted as infringing on the powers of the federal government, illustrates an acute awareness by the California legislature of any potential arguments that might be made as to the constitutionality of the amended statute.

Assembly Bill No. 2765 made several noteworthy changes to § 338. The amended statute reads, in pertinent part:

> (3)(A) Notwithstanding paragraphs (1) and (2), an action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer, in the case of an unlawful taking or theft… of a work of fine art, *including a taking or theft by means of fraud or duress, shall be commenced within six years of the actual discovery* by the claimant or his or her agent….
>
> (3)(B) The provisions of this paragraph shall apply to all pending and future actions commenced on or before December 31, 2017, including any action dismissed based on the expiration of the statute of limitations in effect prior to the date of enactment of this statute if the judgment in that action is not yet final or if the time for filing appeal from a decision on that action has not expired, provided that the action concerns a work of fine art that was taken within 100 years prior to the date of enactment of this statute. (Emphasis added.)[89]

The most obvious change resulting from this new statutory language was the extension of the statute of limitations for initiating a claim for stolen art against a museum or related entity from three to six years. Although this change may have an impact on claims for stolen artwork generally, the three-year extension likely maintains little significance to individuals who failed to bring a timely Holocaust-era claim in accordance with the "discovery" rule in California.

Of far greater significance to potential Holocaust-era art claimants is the language of the new statute dictating the application of an "actual discovery" standard, rather than the aforementioned "discovery rule," when determining the date that the statute of limitations begins to accrue on a stolen art claim. As noted, Holocaust-era repatriation claims are unique, in that often survivors and heirs, particularly those whose relatives lost their lives during the Holocaust, may be entirely unaware that they have rightful claims to works of art. Information regarding stolen art has, in many cases, only recently become available through greater disclosure and developing technologies and databases. Furthermore, those individuals who are aware of their potential claims may lack the knowledge, resources, and expertise necessary to actually discover the whereabouts of the displaced artwork for many years. The California legislature clearly recognized these issues, noting that "[m]useums and galleries have…increasingly and voluntarily made archives, databases, and other resources available…thereby assisting the rightful owners of works of fine art who may have a claim for the recovery of these works."[90]

Under the new language of § 338, the discovery inquiry shall no longer "include any constructive notice imputed by law."[91] Instead, the statute of limitations period does not begin to run until the potential claimant has knowledge of both "[t]he identity and whereabouts of the work of fine art" and "[i]nformation or facts that are sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art that was unlawfully taken or stolen."[92] Such a standard will afford potential claimants greater flexibility in satisfying the six-year statute of limitations while, at the same time, limiting subjective arguments as to when they should have known the whereabouts of works or on which date they should have become aware of potential causes of action. In an effort to avoid a flood of litigation in this field, however, the legislature did note that "all equitable affirmative defenses and doctrines are available to the parties, including, without limitation, laches and unclean hands, in order to permit the courts to take all equitable considerations in either party's favor into account."[93]

There are two additional aspects of the amended statute worth noting. First, the statute applies to the "unlawful taking or theft…of a work of fine art, including a taking or theft by means of fraud or duress."[94] This language is significant in that it clarifies a growing trend to classify works displaced by fraud or duress as theft. Such inclusion is critical in Holocaust-era art cases because often times the displaced art was not actually seized from a victim as was the case in *Von Saher*, but was the result of a forced sale or coercion by the Nazi party. For example, in *Vineberg v. Bissonette*,[95] gallery owner Dr. Max Stern was ordered to sell his entire inventory and private collection to a Nazi-approved art dealer.[96] In response, Stern consigned the majority of his artwork to the Lempertz Auction House in Cologne, Germany where it was sold as part of the infamous "Jew auctions" to benefit the Third Reich.[97] In *Vineberg*, the District Court of Rhode Island granted summary judgment for the plaintiffs (the Stern Estate), accepting evidence that the artwork now in consignment was previously sold at the Lempertz Auction for "well below market value" as indicative that the art was sold under duress.[98]

There is a wide range of circumstances under which artwork and cultural property was displaced as a consequence of the policies and coercion of the Nazi party rather than traditional methods of seizure. In some cases, artwork may have been sold to help pay the high cost of taxes the Reich had added to secure exit papers from occupied territories. In other cases, the artwork may have been abandoned or sold in fear of the consequences of creating, storing, or displaying artwork that the Reich deemed "degenerate" art.[99] Although not explicitly stating so, by including "fraud or duress" in the language of the statute, the California legislature seems to be accepting the notion that all such claims should be considered "taking" or "theft" for purposes of determining whether a claim may be brought under § 338. Such language is critical for potential claimants who may have refrained from bringing an otherwise meritorious claim because a work of art was not actually "seized" by the Nazi party in the traditional sense of the word. Similarly, because the new language of § 338 seemingly equates "fraud" and "duress" with "theft" in regard to the actions of the Nazi regime during World War II, California courts will have less difficulty determining the justiciability of such claims.

The final aspect of the amended statute worth noting is the retroactive application of the law. This is significant for two reasons. First, the statute applies to claims relating to artwork "taken within 100 years prior to the date of enactment…."[100] Setting aside the state statute of limitations problem for a moment, there have been some international efforts to expand the rights of individuals to bring a cause of action for the repatriation of displaced cultural property and artwork. For example, under the 1995 Convention on Stolen or Illegally Exported Cultural Objects (the Convention), potential claimants were permitted to bring individual claims for displaced cultural property "within a period of [50] years from the time of theft."[101] However, given the 50-year time lapse between the end of World War II and the signing of the Convention, those individuals seeking repatriation of art displaced during World War II did not have a claim under the Convention. Under the language of the new statute, however, there should be no question as to the applicability of § 338 to claims arising out of actions taken by the Nazi party from 1937-1945, or claims relating to any remedial efforts taken by the Allied forces during, and immediately following, the war.

Second, the scope of § 338 expressly includes "any action dismissed based on the expiration of the statute of limitations in effect prior to the date of enactment of

[the] statute if the judgment in that action is not yet final or if the time for filing appeal from a decision on that action has not expired."[102] While such language clearly restricts the re-opening of most cases that have already fallen victim to the three-year statute of limitations and the application of the "discovery rule," it does provide a new opportunity for any case currently in the judicial system, at the trial level, or on appeal. Section 338 would therefore provide an additional opportunity in *Von Saher* should the Supreme Court decline to hear the case or, alternatively, affirm the Court of Appeals ruling regarding the constitutionality of § 354.3. Similarly, the expanded coverage afforded by the "actual discovery" rule may assist von Saher in successfully arguing that the six-year statute of limitations had not expired at the time the suit was brought. However, as noted, there is evidence that von Saher came forward as early as 2001 to claim ownership of the Cranach paintings. As such, she may be barred from bringing the suit under § 338 regardless of the expanded scope of the new statute.

There exists one major limitation to the application of § 338 to Holocaust-era art repatriation claims. As cited earlier, the amended statute only applies to "an action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer."[103] As such, any claim against a private owner would not be permissible under § 338. It would therefore be prudent, if possible, for claimants to bring any potential claims for displaced artwork prior to that work being sold by a museum, gallery, auctioneer, or dealer, to a private individual. Although there is no guidance as to whether a claim might exist against a museum, gallery, auctioneer, or dealer that previously sold a work of art to a private individual, it is unlikely that the courts will expand the scope of § 338 to include all works of art once owned or possessed by such an entity. One reason for this limitation would be the fact that the majority of artwork recovered by the Allied forces following World War II was returned to the country of origin and, in many cases, was held or displayed in public museums. This was the agreed-upon policy of the Allied powers and, more importantly, the Executive branch of the United States Government. Furthermore, expanding the scope of § 338 in such a manner would require the courts to inquire as to the legitimacy of the "Jew auctions" and other methods used by the Nazi regime in confiscating and redistributing artwork during this period. Such considerations would once again connect the statute to the actions of the Nazi party during the war, and the policies of Allied governments following the war, in a manner that would undoubtedly leave § 338 vulnerable for attack on constitutionality grounds.

V. Conclusion

"In sustaining the legal mechanisms precluding access to justiciability, the United States and its courts are blatantly ignoring reality and, more significantly, the rights of those who were subjected to the horrors and barbarism of the Holocaust."[104] There is little indication that such ignorance is waning in respect to the impact of state statute of limitations on Holocaust-era art repatriation claims. For example, in the most recent case addressing the subject, the United States Court of Appeals for the First Circuit barred any meritorious argument in a Holocaust-era art repatriation case because the court found the claim to be untimely under the three-year year statute of limitations and corresponding "discovery rule" in Massachusetts.[105] The court wrote, in pertinent part:

> Statute of limitations defenses, even when tempered by a discovery rule, may preclude otherwise meritorious claims. Inescapably, statutes of limitations are somewhat arbitrary in their choice of a particular time period for asserting a claim. Yet statutes of limitations cannot be fairly characterized as technicalities, and they serve important interests…. Precisely because they do not address the merits of a claim, statutes of limitations do not vindicate the conduct of parties who successfully invoke them.[106]

However one "categorizes" the statute of limitations, it is clear that the courts of the various states continue to be bound by "arbitrary" statutory limitations enumerated by their respective legislatures. In analyzing its own statutes, the California legislature seemed to weigh the "important interests" protected by the statute of limitations for stolen property against the interests of victims and heirs of the Holocaust who, for a variety of reasons, may not have brought suit to recover their artwork within the traditional statutory period. In doing so, the California legislature has found, as others have before it, that "there is no justified 'statute of limitation' for an eternal injustice that didn't have any limits."[107] Although the initial legislative attempt to provide an adequate opportunity for victims and heirs to be heard on the merits of their cases was successfully thwarted on constitutional grounds, it appears that the California legislature feels compelled to persevere until an adequate resolution is achieved. This commitment to justice should be commended, and, more importantly, serve as a precedent to other states where procedural barriers continue to prolong the pain and suffering of victims of one of the greatest atrocities in history.

Endnotes

1. David Gold, *Is There Any Way Home? A History and Analysis of the Legal Issues Surrounding the Repatriation of Artwork Displaced During the Holocaust*, 21 Ent. Arts & Sports L. J. 12 (Spring 2010) [hereinafter *Is There Any Way Home?*].
2. 548 F.3d 50 (1st Cir. 2008).
3. *Id.* at 58-59.
4. Gold, *supra* note 1, at 22.
5. 2002 Cal. Legis. Serv. Ch. 332 (A.B. 1758) (West).
6. *See* 1999 Cal. Legis. Serv. Ch. 827 (A.B. 600) (West) (temporarily eliminating the statute of limitations for Holocaust victims and

heirs seeking proceeds of insurance policies in effect prior to 1945); 1999 Cal. Legis. Serv. Ch. 216 (S.B. 1245) (West) (creating a cause of action and temporarily eliminating the statute of limitations for Holocaust victims and heirs seeking to recover compensation for forced labor endured under the Nazi regime during World War II).

7. 2002 Cal. Legis. Serv. Ch. 332 (A.B. 1758) (West).
8. Such observations were discussed in greater depth in *Is There Any Way Home?*: "The United States and the courts of its various states have failed to recognize the underlying characteristics of a Holocaust-era repatriation claim. Most individuals lack the knowledge, resources, and expertise necessary to locate displaced art. Expecting a survivor or heir to conduct an exhaustive and expensive search for Nazi-looted art, much of which is still unaccounted for, imposes too arduous a duty for those with little expertise in such matters. In some cases, survivors and heirs, particularly descendents of those who lost their lives during the Holocaust, may be entirely unaware that they have a rightful claim to a work of art. Information regarding stolen art is, in many cases, only recently becoming available through greater discovery, disclosure, and developing technologies and databases. Finally, and most importantly, there is historical evidence that the atmosphere in post-War Europe was such that claimants justifiably feared the adverse results of making such claims. Still today, some individuals may not be prepared to confront the atrocities of their past." Gold, *supra* note 1, at 21.
9. 2002 Cal. Legis. Serv. Ch. 332 (A.B. 1758) (West).
10. *Id.*
11. Cal. Civ. Proc. Code § 354.3 (West 2006).
12. *See, e.g.*, O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980); Naftzger v. Am. Numismatic Soc'y, 49 Cal. Rptr. 2d 784 (Ct. App. 1996); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990), *cert. denied*, 112 S. Ct. 377 (1991); Charash v. Oberlin Coll., 14 F.3d 291 (6th Cir. 1994); Erisoty v. Rizik, No. 93-6215, 1995 U.S. Dist. LEXIS 2096 (E.D. Pa. Feb. 23, 1995), *aff'd*, No. 95-1807, 1996 U.S. App. LEXIS 14999 (3d Cir. May 7, 1996). For a discussion of these cases, *see* Ralph E. Lerner & Judith Bresler, Art Law: The Guide for Collectors, Investors, Dealers, and Artists 236–40 (1998).
13. Cal. Civ. Proc. Code § 354.6 (West 2006).
14. 324 F.3d 692 (9th Cir. 2003).
15. *Id.* at 712.
16. *Id.* at 708.
17. *Id.* at 712.
18. 34 Cal.Rptr.3d 944 (App. Div. 2005).
19. Cal. Civ. Proc. Code § 354.5 (West 2006).
20. *Steinberg*, 34 Cal.Rptr.3d at 947.
21. *Id.* at 951-52.
22. 539 U.S. 396 (2003).
23. *Id.* at 401.
24. *Id.* at 427.
25. 578 F.3d 1016 (9th Cir. 2009).
26. *Id.* at 1019.
27. *Id.* at 1020–21; Michael Kirkland, *Goering, a Museum and Nazi-Looted Art*, St. Louis Globe-Democrat, Oct. 10, 2010, *available at* http://groups.google.com/group/museum_security_network/msg/4005ea665fec31ea.
28. *Von Saher*, 578 F.3d at 1020.
29. *Id.*
30. *Id.* at 1020-21.
31. *Id.* at 1021.
32. *Id.*
33. Kirkland, *supra* note 27.
34. *Id.*; *See also* Marilyn Bauer, *Jacques Goudstikker Art Collection On Display at Norton*, TCPalm, Feb. 18, 2010, http://www.tcpalm.com/news/2010/feb/18/art-with-a-history-jacques-goudstikker-art-on-at.
35. Bauer, *supra* note 34.
36. *Von Saher*, 578 F.3d at 1021.
37. *Id.*
38. *Id.*
39. *Id.*
40. Suzanne Muchnic, *Norton Simon To Keep Pair of Paintings*, L.A. Times, Oct. 19, 2007, http://articles.latimes.com/2007/oct/19/entertainment/et-simon19; *see also Restitutions To-Date*, The Rape of Europa, http://www.rapeofeuropa.com/stolenRestitutions.asp.
41. Muchnic, *supra* note 40.
42. *Id.* Although the Straganoff-Scherbatoff claim appears to be the substantive basis of the Norton's argument, the court does not go into further detail regarding the merits of these claims. Instead, the court mentions the claim in passing: "The Cranachs were never restituted to the Goudstikker family. Instead, after restitution proceedings in the Netherlands, the Dutch government delivered the two paintings to George Stroganoff, one of the claimants, and he sold them, through an art dealer, to the museum." *Von Saher*, 578 F.3d at 1021.
43. Von Saher v. Norton Simon Museum of Art at Pasadena, No. CV-2866-JFW, 2007 WL 4302726, *1 (C.D. Cal. Oct. 18, 2007).
44. Mike Boehm, *Norton Simon's Disputed 'Adam and Eve' Getting Closer Look From Supreme Court*, L.A. Times, Oct. 4, 2010, http://latimesblogs.latimes.com/culturemonster/2010/10/art-adam-eve-holocaust-norton-simon-.html.
45. *Von Saher*, 2007 WL 4302726, at *1.
46. *Id.* at *2.
47. *Id.* at *3 (citing *Deutsch*, 324 F.3d at 712).
48. *Id.*
49. *Id.*
50. *Von Saher*, 578 F.3d at 1019, 1031.
51. *Id.* at 1023-24.
52. *Id.* at 1025.
53. *Id.*
54. *Id.*
55. *Id.* at 1026.
56. *Id.* at 1025.
57. *Id.*
58. *Id.* at 1026-27.
59. *Id.* at 1027.
60. *Id.*
61. *Id.* at 1028.
62. *Id* at 1027 (citing *Deutsch*, 324 F.3d at 712).
63. *Id.* at 1029.
64. *Id.* at 1028-29.
65. *Id.* at 1032 (Pregerson, J., dissenting).
66. *Id.*
67. Cal. Civ. Proc. Code § 354.6.
68. *Deutsch*, 324 F.3d at 708.
69. *Von Saher*, 578 F.3d at 1032 (Pregerson, J., dissenting).
70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 1031.

74. Petition for Writ of Certiorari at 3, Von Saher v. Norton Museum of Art At Pasadena, No. 09-1254 (Apr. 12, 2010).

75. *Id.* at 16.

76. *Id.* at 21.

77. Brief for the State of California as Amici Curiae Supporting Petitioner at 10, Von Saher v. Norton Museum of Art At Pasadena, No. 09-1254 (May 17, 2010).

78. *Id.* at 9.

79. Brief for American Jewish Committee as Amici Curiae Supporting Petitioner at 14, Von Saher v. Norton Museum of Art At Pasadena, No. 09-1254 (May 11, 2010).

80. *Id.* at 19.

81. *Id.* at 25.

82. Brief for Commission for Art Recovery as Amici Curiae Supporting Petitioner ay 1, Von Saher v. Norton Museum of Art At Pasadena, No. 09-1254 (May 17, 2010).

83. *Id.* at 8.

84. *Id.* at 8-10.

85. 2010 Cal. Legis. Serv. Ch. 691 (A.B. 2765) (West).

86. *Id.*

87. *Id.*

88. Mike Boehm, *Schwarzenegger Decision Could Have An Impact On Looted-Art Claim Against Norton Simon Museum*, L.A. Times, Sept. 30, 2010, http://latimesblogs.latimes.com/culturemonster/2010/09/schwarzenegger-norton-simon-museum-holocaust-art.html.

89. 2010 Cal. Legis. Serv. Ch. 691 (A.B. 2765).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. 548 F.3d 50 (1st Cir. 2008).

96. *Id.* at 53.

97. Vineberg v. Bissonnette, 529 F. Supp. 2d 300, 303 (D.C. R.I. 2007).

98. *Id.* at 303–04, 307. In 2010, the United States Court of Appeals for the First Circuit was presented with the question of whether the sale of a painting by a Jewish doctor during World War II was voluntary or the result of Nazi coercion. Although finding that the artwork in question was sold under coercion, the case was dismissed under the three-year statute of limitations and corresponding "discovery rule" in Massachusetts. Museum of Fine Arts, Boston v. Seger-Thomschitz, No. 09-1922, slip op. at 7–9, 28–30 (1st Cir. Oct. 14, 2010).

99. For further discussion on the Nazi program of confiscation, see Gold, *supra* note 1, at 22.

100. 2010 Cal. Legis. Serv. Ch. 691 (A.B. 2765).

101. UNDROIT Convention on Stolen or Illegally Exported Cultural Objects art. 3(3), June 24, 1995, 34 I.L.M. 1322.

102. 2010 Cal. Legis. Serv. Ch. 691 (A.B. 2765).

103. *Id.*

104. Gold, *supra* note 1, at 22.

105. Museum of Fine Arts, Boston v. Seger-Thomschitz, No. 09-1922, slip op. (1st Cir. Oct. 14, 2010).

106. *Id.* at 28-29.

107. Carla Schulz-Hoffman, Deputy General Director, Bavarian State Paintings Collection, Address at the Washington Conference on Holocaust-Era Assets: Break-out Session on Nazi Confiscated Art Issues: Principles to Address Nazi-Confiscated Art (April 1999).

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In The Arena

The EASL Section's Publications Committee is seeking authors for its upcoming book about sports law—*In The Arena*.

Chapters will focus on the following issues and topics: NCAA and college/university athletic rules; arena football; right of publicity and privacy of athletes; doping; eminent domain; Pete Rose/gambling and the Baseball Hall of Fame; Title IX; Insurance; and Medical safety issues (i.e., concussions and helmets). We are also accepting other suggestions regarding topics. Please note that this topic list is preliminary and subject to change. The target date for publication is 2013.

The book's editors are Elissa D. Hecker and David Krell.

Elissa is Chair of EASL's Publications Committee and Editor of the *EASL Journal* and Blog. Elissa also co-edited the popular NYSBA books *Entertainment Litigation: Know the Issues and Avoid the Courtroom* and *Counseling Content Providers in the Digital Age*.

David is The Writing Guy™. He is the writer of *Krell's Korner*, an article series in the *EASL Journal*. David has also written more than 60 articles and 100 commentaries about popular culture.

Please email Elissa at eheckeresq@yahoo.com if you are interested in contributing to this book.