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Private Bank Art Loans:
Consignments Pose Additional Risks

By Stephen Brodie and Julie Albinsky

The Fall 2009 issue of *Art & Advocacy* presented the first installment in a series examining the potential hazards faced by private banks that accept artwork as collateral for loans but do not take possession of the artwork. That article examined a straightforward sale of art collateral by a private bank client to another collector without the bank's consent, and concluded that there are commonly occurring scenarios in which a bank that does not take possession of its collateral may find that its security interest in the artwork has been extinguished. In this installment, we examine the private bank's position when a client places artwork used as collateral on consignment with a third party.

A typical consignment takes place when an owner of goods (the consignor) delivers those goods to a third party (the consignee) so that the third party can sell the goods on behalf of the owner. The consignor retains title until a sale is completed, but the items to be sold are physically turned over to the consignee. Assume that a private bank (PB) has made a loan to a client (C), accepted as collateral a painting owned by C, perfected PB's security interest by filing a financing statement, obtained a security agreement from C prohibiting the sale of any collateral without PB's consent, and left the painting in the possession of C. Further assume that C subsequently decides to sell the painting, but instead of arranging a sale directly with a buyer, C consigns it to an art dealer (AD) without advising PB. In addition to placing C (and, therefore, PB) one step away from the ultimate buyer, a consignment introduces AD's creditors as parties with potentially competing interests in PB's collateral. Future articles will examine issues that can arise with respect to PB's security interest when AD sells the painting. This article addresses the rights of PB and AD's creditors if AD defaults to its own lender or files for bankruptcy while the painting is on its premises.

With consignments, the threshold inquiry is whether the business arrangement meets the special criteria for a consignment under Article 9 of the U.C.C. If it does, Article 9 provides a procedure whereby a consignor can protect its property from the consignee's creditors. If it doesn't, the consignment falls into a legal twilight zone, where the conflicting rights of C (and PB) and AD's creditors will be determined either under Article 2 of the U.C.C. or by common-law rules pertaining to bailments.

In order for a consignment between C and AD to fall within the purview of Article 9, several elements must be satisfied, the most significant of which are as follows:

1. Immediately before delivery to AD, the artwork must not be "consumer goods," that is, goods used or bought primarily for personal, family, or household purposes. This means that C must not be a mere private collector of art, but must sell or trade art from time to time. (In this regard, note that there is a legal question as to whether artwork, even if owned by a collector who rarely, if ever, trades, is more of an investment than it is consumer goods.)

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Private Bank Art Loans *(continued from page 1)*

2. AD must be an art dealer who is not an auctioneer.
3. AD must not be generally known by its creditors to be substantially in the business of selling the goods of others. In other words, for this consignment to qualify as an Article 9 consignment, AD's creditors must believe that AD's main business is to sell inventory owned by AD itself.

If C is a collector, his artwork may well be considered "consumer goods." In addition, many, if not most, art dealers *are* known to be substantially in the business of selling works on consignment. Thus, there is a strong probability that a court would find that Article 9 does not govern the situation. If that happens, a court might then find that the consignment qualifies as a "sale or return" transaction under Section 2-326 of the U.C.C., which would specifically allow the claims of AD's creditors to attach to C's artwork while in AD's possession. The other possible outcome from a non-Article 9 consignment is that the transaction would be seen as a bailment under common law. In such case, the artwork would be returned to C with title intact, albeit after a long and expensive legal battle for C and PB.

Even if the consignment between C and AD were somehow found to be an Article 9 consignment, PB's vulnerability to the claims of AD's creditors would by no means be eliminated. As noted above, Article 9 provides a procedure whereby C can protect itself (and PB) from such claims by filing a U.C.C. financing statement against AD, and by sending notice of the consignment to AD's existing creditors that have filed financing statements covering AD's inventory, including after-acquired property such as C's artwork. Such notices must be received by creditors within five years of delivery of the artwork to AD. It seems clear from the nature of the foregoing requirements, and from the conventions and common practices in the art world, that consignors of art are unlikely to file the U.C.C. financing statement, run the lien searches and send the notices required to fully protect themselves (and their lenders, such as PB) from AD's creditors. Even where there is a true Article 9 consignment, if these steps are not taken, the artwork could well be treated as AD's asset and be lost (by C and PB) to AD's creditors. At a minimum, PB's challenge to AD's creditors' priority would be costly, and its outcome uncertain. Thus, even where the facts surrounding a consignment afford C and PB a viable means of protection from AD's creditors under Article 9 of the U.C.C., AD's creditors would not necessarily lose their priority.

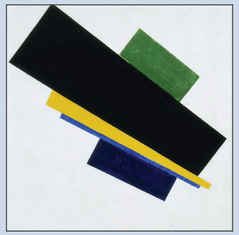
All of the foregoing points to the same conclusion: A private bank that lends against art collateral, without taking possession of the artwork, can find its position as a secured lender placed in jeopardy if its clients consign collateral without its approval. Taking possession of art collateral is generally not a realistic option for a private bank. If a private bank's client is having liquidity problems, however, or is otherwise under a significant financial strain, the risks are sufficient enough that the bank may want to reconsider taking possession. In fact, in any kind of distress situation, the pitfalls seem sufficient to warrant regular, perhaps quarterly, monitoring of art collateral to verify its location.

Kazimir Malevich — Agreement & Exhibit

On February 8, 2010, the heirs of the late Russian artist, Kazimir Malevich, and the Solomon R. Guggenheim Museum in New York announced that an amicable settlement regarding the ownership of the artist's work *Untitled*, a painting that Peggy Guggenheim acquired in 1942, had been reached. Though the terms of the settlement are confidential, part of the agreement is that the painting will remain in the Peggy Guggenheim Collection.

Beginning February 19, 2010, the Guggenheim will present *Malevich in Focus: 1912–1922*, an exhibition of six Malevich works, including *Untitled*, four of the five paintings that were recovered by the heirs of Kazimir Malevich from Amsterdam following a settlement between the heirs and the city in 2008, which resolved claims asserted by the heirs, and a sixth work from the Guggenheim collection.

Herrick, Feinstein LLP represented the heirs in the Guggenheim settlement, the Amsterdam settlement, and the loan for the upcoming exhibition.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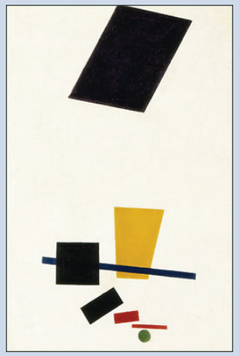
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{ 1 } Kazimir Malevich, *Suprematism, 18th Construction, 1915, Oil on canvas 53 x 53 cm.*
{ 2 } Kazimir Malevich, *Desk and Room, 1913, Oil on canvas 79.5 x 79.5 cm.*
{ 3 } Kazimir Malevich, *Painterly Realism of a Football Player, 1915, Oil on canvas 70 x 44 cm.*
{ 4 } Kazimir Malevich, *Mystic Suprematism, 1920–1927, Oil on canvas 100.5 x 60 cm.*

Holocaust Art Restitution Litigation in 2009

By Yael Weitz

Introduction

Several Holocaust-era art restitution cases decided in 2009 brought to the forefront the myriad of issues that drive such litigation, including the Act of State doctrine, international comity, laches, choice-of-law and the Foreign Sovereign Immunities Act. Although not all the cases present a favorable outcome for the plaintiff, each provides an important addition to the field as a whole. This article highlights some of the year's most significant art restitution cases and their outcomes.

Sotheby's, Inc. v. Shene

In *Sotheby's, Inc. v. Shene*, 2009 U.S. Dist. LEXIS 23596 (S.D.N.Y. 2009),[1] a dispute arose about the title to a volume of drawings and etchings known as the *Augsburger Geschlechterbuch*, which was created in Germany in the sixteenth century. From at least 1858 to 1945, the book was stored in the collections of the Staatsgalerie Stuttgart, located in Germany. After World War II, the Staatsgalerie discovered that the book was missing and assumed that it had been destroyed. In 2001, however, Shene purchased the volume at a private auction, and then gave it to Sotheby's to sell. During its investigation of the book's provenance, Sotheby's discovered that the book had likely been stolen by a United States Army Captain during World War II. Sotheby's brought an interpleader action against Shene and the German state of Baden-Wurttemberg, which came to possess the Staatsgalerie, to determine the book's proper title.

With few exceptions, courts in the United States adhere to the proposition that "[a] good-faith purchaser of a stolen object is not considered to have valid title to the object, because a purchaser cannot acquire good title from a thief."[2] Even if an individual purchases an object without knowing it was stolen, the title to the object remains with the true owner and does not transfer to the good-faith purchaser. Baden-Wurttemberg presented considerable evidence demonstrating its ownership of the book. For example, each page of the book was stamped with the Staatsgalerie's insignia, and evidence demonstrated that the Captain who had likely taken the book was stationed in Waldenburg, where the book was stored. Also, the Captain had told his family that although soldiers often burned books and other objects, he had "rescued" some of the books. Based on this evidence, the court determined that Baden-Wurttemberg owned the book at the time it was taken by the Captain, and because the Captain could not pass valid title of the book to any subsequent purchaser, Baden-Wurttemberg was the legal owner.

Von Saher v. Norton Simon Museum of Art at Pasadena

In 2002, the California legislature enacted a law extending the statute of limitations for claims for the recovery of Nazi-looted artwork brought in the state of California against museums and galleries. In *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016 (9th Cir. 2009),[3] that statute was held an unconstitutional violation of the federal government's foreign affairs power. The Ninth Circuit concluded that by enacting legislation extending the statute of limitations for claims for the recovery of Nazi-looted art, without limiting its scope solely to museums and galleries actually located in California, the state legislature had enacted legislation that does not address a traditional state interest and that conflicts with the federal government's exclusive power to resolve war.

Von Saher, heir of the noted Jewish art dealer Jacques Goudstikker, brought an action against the Norton Simon Museum of Art and the Norton Simon Art Foundation to recover a pair of life-size paintings of Adam and Eve by Cranach the Elder that were looted from Goudstikker's gallery by Hermann Göring when the Nazis invaded the Netherlands. The Norton Simon Museum of Art and/or the Norton Simon Art Foundation had come into possession of the paintings around 1971. The defendants moved to dismiss the complaint, arguing that the statute is unconstitutional, and the district court granted the defendants' motion on the grounds that the statute is facially unconstitutional under the foreign affairs doctrine. The Ninth Circuit affirmed, and denied rehearing and rehearing en banc.[4] The matter has been stayed pending a petition for writ of certiorari in the Supreme Court.

The Ninth Circuit determined that even though the California statute does not conflict with any specific federal statute, treaty or policy, and thus conflict preemption is inapplicable, because it could apply to museums and galleries outside of California, the legislature's interest in enacting the statute was not to protect its residents and regulate its art trade, but to create a "worldwide forum for the resolution of Holocaust restitution claims," which the court held was not a "traditional state function." Having found that California was not exercising a traditional state function, the panel went on to analyze whether the statute conflicts with the field of foreign affairs and determined that it does, because its intent was to rectify wartime wrongs. The court, however, did not rule out the possibility that the plaintiff could bring her case under the California Civil Practice Code, which provides a three-year statute of limitation for such claims. Accordingly, the court granted the plaintiff leave to amend her complaint, giving her a second chance to bring her claim.

Dunbar v. Seger-Thomschitz

In *Dunbar v. Seger-Thomschitz*, 638 F.Supp.2d 659 (E.D. La. 2009), the plaintiff had been in possession of an Oskar Kokoschka painting for ten uninterrupted years. Under Louisiana prescription laws, a party in possession of movable property for ten years becomes the owner of that property, even where the possession was acquired in bad faith. Where the injury relates to stolen art, however, the court must consider whether the claimant diligently tried to recover her art. In this case, the plaintiff sought to preempt the defendant's claim that the painting was looted by the Nazis and should be returned to her by seeking a judgment declaring the plaintiff to be the owner.

The court held that the plaintiff had acquired valid title to the work under Louisiana law and rejected the defendant's argument that Louisiana prescription laws should be supplanted to ensure better compliance with the goals of the Holocaust Victims Redress Act, § 202, 112 Stat. at 17-18. The Act provides that "all governments should undertake good faith efforts to facilitate the return of the private…property, such as works of art, to their rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule."

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Museum of Fine Arts, Boston v. Seger-Thomschitz

At issue in *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 2009 U.S. Dist. LEXIS 58826 (D. Mass. 2009), is the title to another painting by Oskar Kokoschka. The defendant, who is the same defendant in *Dunbar*, made a demand for the painting on the Museum of Fine Arts, Boston, claiming that she was the sole heir of the true owner, who lost the painting to Nazi looting. The Museum responded by bringing an action seeking a declaratory judgment affirming its ownership, as did the plaintiff in *Dunbar*.

In a motion for summary judgment, the Museum argued that the defendant's claim should be time barred under the Massachusetts statute of limitations, which provides that where circumstances exist so that the plaintiff could not have reasonably known that she has been harmed by another, the three-year statute of limitations begins to run only when the first event occurs that would put a reasonable person on notice to inquire into the possible injury. The court granted summary judgment, finding that the defendant's family had sufficient notice of possible injury since the 1940s, and the action was, therefore, not timely.

Bakalar v. Vavra

Bakalar v. Vavra, 2008 U.S. Dist. LEXIS 66689 (S.D.N.Y. 2008), is a New York case currently on appeal before the Second Circuit. In *Bakalar*, the court held that Swiss law, not New York law, should govern the case. Pursuant to Switzerland's laws, where a person purchases art in good faith, the purchaser acquires valid title to the art even if it was stolen at the time of the transfer.

The plaintiff in *Bakalar* brought an action seeking judgment declaring that he was the rightful owner of an Egon Schiele drawing in order to stave off the defendants' claim that they were the heirs of the true owner, a Jewish art collector who was arrested by the Nazis. New York's choice-of-law analysis provides that the validity of a transfer is governed by the law of the state where the property is located at the time of the transfer. The drawing had been sold by a Swiss gallery to a New York gallery in 1956. Upon that fact, the court determined that Swiss law should apply. The fact that the artwork's presence in Switzerland was fleeting before its ultimate transfer to New York was not dispositive for the court. Since the New York gallery had purchased the drawing in good faith in Switzerland, it had obtained good title; and the plaintiff, who had purchased the drawing from the New York gallery, prevailed.

Schoeps v. The Museum of Modern Art

The court's decision in *Bakalar* stands in direct contrast to a later decision, *Schoeps v. The Museum of Modern Art*, 2009 U.S. Dist. LEXIS 5647 (S.D.N.Y. 2009). The dispute in *Schoeps* centered around two Picasso paintings that were in the possession of the Museum of Modern Art and the Solomon R. Guggenheim Foundation. The claimants alleged that the paintings were transferred by their ancestor as a direct result of Nazi duress, and that the subsequent transfer of one of the paintings, which was being held in Switzerland at the time of the transfer, should be governed by New York law since New York was the location of the ultimate purchaser. Under New York law, this transfer could not pass valid title to the purchaser because the painting was stolen property at the time of the transfer.

To determine choice of law in a contract dispute, New York courts apply an interest analysis, which includes the following five factors: 1) the place of contracting, 2) the place of negotiation, 3) the place of performance, 4) the location of the subject matter of the contract, and 5) the domicile or place of business of the contracting parties. Using this analysis, the court determined that New York law should apply. The court made this determination even though the transfer occurred in Switzerland, a fact that would normally cause the court to apply Switzerland's laws. The court found that New York had a more significant relationship to the matter than Switzerland did, and denied the museum's summary judgment motion. The case did not, however, proceed to trial. The parties settled the case in a private agreement, despite the court's request that the terms of the settlement be made public.

Vineberg v. Bissonnette

Vineberg v. Bissonnette, 548 F.3d 50 (1st Cir. 2008), involved the disputed ownership of a painting looted by the Nazis from a Jewish gallery owner. In the years following World War II, the gallery owner and his heirs had taken a variety of measures to attempt to locate lost works. Unbeknownst to the gallery owner or his successors, since being purchased from the Nazis in the 1930s, the painting had remained in a private collection and was publicly exhibited only once. In 2005, when the defendant, who had inherited the painting from the purchaser, proposed to auction the painting, the heirs of the gallery owner learned of the painting's whereabouts and demanded its return.

{ The Augsburger Geschlechterbuch, likely stolen by a U.S. Army Captain during World War II, is the 16th-century volume of drawings and etchings at subject in the *Sotheby's, Inc. v. Shene case* }

In the litigation that followed, the lower court granted summary judgment in favor of the heirs, finding that they had pursued their claim to the painting diligently, and that the defendant had failed to demonstrate any evidence of prejudice as a result of a delay in bringing the claim. The appellate court easily affirmed the lower court's finding in favor of the plaintiffs.

Cassirer v. Kingdom of Spain

Art restitution cases often involve litigation against foreign governments or museums owned by such governments. Consequently, the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605, often becomes key to a case's outcome. Under the FSIA, foreign states are immune from the jurisdiction of United States courts. There are, however, exceptions. One such exception, called the "expropriation exception," provides that where property has been taken in violation of international law, a foreign state will not be immune where the rights to such property are at issue.

In *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009), the court considered for the first time whether the expropriation exception should apply where the foreign state involved in the litigation was not the entity that expropriated the property in violation of international law.[5] *Cassirer* involved a dispute over the ownership of a painting that the plaintiff alleged was taken from his grandmother by the Nazis in violation of international law in 1939. After a series of transfers, some documented and others not, the painting was sold to Baron Hans-Heinrich Thyssen-Bornemisza, whose art collection was purchased by Spain in 1993.

The court held that the expropriation exception applied to the transfer despite the fact that Germany, not Spain, was responsible for the looting. The court also held that the FSIA does not require exhaustion of domestic remedies in every case; rather, exhaustion should be considered on a case-by-case basis. Accordingly, the appellate court remanded the case to the lower court to determine whether an exhaustion requirement should be applied.

Chabad v. Russian Federation

Chabad v. Russian Federation, 528 F.3d 394 (D.C. Cir. 2008), which was decided in late 2008, involved the allegedly unlawful taking by the Soviet Union of religious books, manuscripts and documents that comprise the textual basis for the teachings and traditions of Agudas Chasidei Chabad of the United States. The materials at issue were taken from Chabad on two occasions. The first occurred when the Russian government seized a portion of the materials during the October Revolution in 1917. The second occurred when Nazi forces seized another portion of the materials during the German invasion of Poland. In 1945, the Soviet military commandeered the materials and brought them to Moscow. In the years after World War II, Chabad leaders made several efforts to recover the materials and eventually brought suit.

Chabad argued that the expropriation exception to the FSIA precluded the defendant's immunity from suit under the FSIA. Chabad also argued that under the circumstances of the case, it was not required to exhaust Russian domestic remedies before bringing the action in the United States. The court agreed with the plaintiff on both grounds and added that the remedy provided under Russian law would be inadequate. Under Russian law, a successful claimant gets the right to buy its own property back from Russia, but the law provides no rules for calculating the property's value. Thus, the court held that Russia would not be shielded from suit under the FSIA.

Freund v. Republic of France

In the third case to tackle the issue of sovereign immunity, *Freund v. Republic of France*, 2008 U.S. Dist. LEXIS 105432 (S.D.N.Y. 2008), Holocaust survivors and their heirs sued for compensation for the expropriation of their property that occurred during their deportation from France to Nazi concentration camps. The plaintiffs sued three defendants: 1) the agents that operated the trains during the deportation, 2) the Republic of France for providing civil servants to run the holding camps, and 3) the bank where the proceeds of the confiscations were allegedly deposited.

In its examination of the defendants' FSIA defense, the court had to determine whether the expropriation exception should apply. The exception, in addition to requiring the property to have been taken in contravention of international law, provides that the property has to be present in the United States in connection with a commercial activity, carried on in the United States by the foreign state. 28 U.S.C. §1605(a)(3).

The court determined that neither of the agencies fell under the scope of the exception because either they were not engaged in a commercial activity in the United States or the expropriated property was not present in the United States. Since neither agency was covered by the exception to the FSIA, the court held that France was outside the scope of the exception as well. Based on this analysis, the FSIA applied and the court lacked jurisdiction to hear the matter.

Westfield v. Federal Republic of Germany

The final case to discuss the issue of foreign sovereign immunity is *Westfield v. Federal Republic of Germany*, 2009 U.S. Dist. LEXIS 65133 (M.D. Tenn. 2009). *Westfield* involved the alleged looting of an art and tapestry collection by the Nazi regime. The plaintiff argued that Germany should be considered a successor to the Nazi government, and therefore should be held liable for the theft. Germany argued that the FSIA should apply.

Central to the dispute was whether the seizure of the art collection constituted "commercial activity" within the meaning of the expropriation exception. The plaintiff argued that Germany's act of converting the artwork was done in furtherance of the "commercial activity" of selling the art on the private art market, and that this act had a "direct effect in the United States" because the owner had intended to transfer the art to the United States. The court rejected the plaintiff's argument, stating that although the theft was "ineffably horrendous," no commercial activity was involved. An act that is unique to a sovereign power cannot be considered a commercial act. Thus, the court determined that it lacked jurisdiction to hear the case under the FSIA.

Conclusion

The year 2009 was a noteworthy year for cases involving the restitution of Nazi-looted art. Despite the amount of time that has passed since World War II, the restoration of Holocaust-era artwork remains important to the individuals who lost their works. The cases above demonstrate this continued effort and present an overview of some of the more significant issues in the field as a whole.

1 Later proceeding at *Sotheby's, Inc. v. Shene*, 2009 U.S. Dist. LEXIS 30714 (S.D.N.Y. Apr. 9, 2009).

2 *See Sotheby's, Inc. v. Shene*, 2009 U.S. Dist. LEXIS 23596, *7 (S.D.N.Y. 2009).

3 Herrick, Feinstein LLP represents the plaintiff in this action.

4 Affirmed in part and reversed in part by *Von Saher v. Norton Simon Museum of Art at Pasadena*, 2010 U.S. App. LEXIS 1019 (9th Cir. Cal. 2010).

5 Rehearing en banc granted by *Cassirer v. Kingdom of Spain*, 2009 U.S. App. LEXIS 28751 (9th Cir. Dec. 30, 2009).

Arbiters of Authenticity

By Darlene Fairman

Two cases decided by New York courts in 2009 highlight the pressures and pitfalls of the burgeoning role of art authentication and/or catalogue raisonné committees.[1] The two seemingly similar cases produced vastly different outcomes, and teach important lessons to authentication committees and those seeking authentication. In *Thome v. The Alexander and Laura Calder Foundation*, 70 A.D.2d 88, 890 N.Y.S.2d 16 (1st Dep't 2009), decided on December 1, 2009, New York's Appellate Division, First Department affirmed the dismissal of all of the plaintiff's causes of action against the Calder Foundation and related defendants arising from the Foundation's refusal to authenticate a work alleged to have been created by Calder. In contrast, in *Simon-Whelan v. The Andy Warhol Foundation for the Visual Arts, Inc.*, 2009 WL 1457177 (S.D.N.Y. 2009), decided on May 26, 2009, the U.S. District Court for the Southern District of New York permitted claims for declaratory relief, anti-trust violations, false advertising, fraud and unjust enrichment to proceed against the Warhol Foundation and related defendants upon its refusal to authenticate an alleged Warhol artwork.

Authentication Committees

Buyers and sellers of art traditionally rely upon the skilled examination of artworks by experts, proof of a chain of title (provenance), and, more recently, scientific testing, to authenticate artwork as by a particular artist. More and more, however, the art market has come to rely upon committees formed with the express purpose of either providing authentication for a particular artist's works or producing the artist's catalogue raisonné. Sometimes, the authentication committee and the publisher of the catalogue raisonné are one and the same or are closely related, or inclusion in the catalogue raisonné serves as *de facto* authentication.

While historically, owners turned to art historians and others with art expertise, and catalogues raisonnés have been published by academic institutions, museums, and galleries, now many authentication committees and catalogue publishers are related to the artist or the artist's estate. This may be the result of the model set by France's "droit moral," the French law that bestows upon an artist, among other things, the right to authenticate his or her own works.[2] Upon the artist's death, this right passes to an heir or designee. Certainly, this "droit moral" sets a precedent within the art market for an artist's estate to assume the role of arbiter of authenticity.

Thome v. Calder Foundation

In this case, the plaintiff alleged that in 1975, he personally contacted the artist, Alexander Calder, to re-create a stage set that he had originally created in 1936, along with a second set for smaller venues, and a maquette (a small-scale model). Thome claimed that the new works were then executed as per the artist's instruction, but that Calder died in 1976, before he could see the completed works. Wishing to sell the sets, in 1997, Thome submitted the necessary documentation to the Calder Foundation for authentication and inclusion in the catalogue raisonné. Without explanation, the Foundation, which is comprised mainly of the artist's relatives, did not include the sets in the catalogue raisonné and issued no opinion regarding authenticity. In 2005, a potential purchaser of the sets resubmitted them to the Foundation, to no avail. Thome commenced an action in 2007 seeking a judgment declaring the sets to be authentic Calder artworks; an order compelling the inclusion of the sets in the Calder catalogue raisonné; and for damages for breach of contract, tortious interference with prospective business advantage, and product disparagement. The defendants immediately sought to dismiss all claims and the trial court granted their motion.

According to the appellate court, the case boiled down to a question of whether the defendants owed any duty to Thome. The court concluded they did not, finding that the publisher of a catalogue raisonné has no legal duty to include any work of art and cannot be compelled to do so, absent some independent legal duty such as a contractual promise. The court also concluded that it was in no position to issue a judgment of authenticity, as the plaintiff sought a declaration of fact rather than a declaration of legal rights based upon findings of fact. Indeed, the court believed that any finding on authenticity would be meaningless in the art market, which would look to the art experts' pronouncements on authenticity, rather than the court's.[3]

The court also found that no contract was formed between Thome and the Foundation, that the Foundation did not act with the sole purpose of harming Thome, that the Foundation's Board owed no duty to Thome, and that claims regarding anti-competitive content were merely speculation. Thome's claim for product disparagement did give the court some pause, reasoning that the failure to include the sets in the catalogue raisonné may be a sufficient publication of an allegedly false statement. The court determined, however, that it need not reach the issue because the claim was barred by the statute of limitations.

Simon-Whelan v. Warhol Foundation

The plaintiff in this case alleged that he purchased a Warhol work that had previously been authenticated both by the Warhol Estate and the Warhol Foundation, but when Simon-Whelan sought to sell the work, the Warhol Authentication Board disavowed any prior authentication and claimed that the work would have to be resubmitted. When Simon-Whelan thereafter submitted the work to the Authentication Board, authentication was denied. The Board encouraged him to resubmit with additional documentation. He did so, but authentication was denied again. According to the plaintiff, he was thereafter unable to sell that work or any Warhol pieces he owned without submitting them to the Authentication Board. Prior to submitting the work, Simon-Whelan had signed a submission agreement indemnifying the Board from any claims based on its determination regarding authenticity.

Simon-Whelan commenced an action against the Warhol Estate, the Foundation, and the Authentication Board for a judgment declaring the submission agreement unenforceable and seeking antitrust damages under federal and state law, damages for false advertisement under the Lanham Act, and damages for fraud and unjust enrichment. The defendants moved for immediate dismissal.

Submission agreements such as the one in this case have met with some favor in the courts and have been given effect to support dismissal of claims against authentication boards.[4] In this case, however, the court found that such an exculpatory agreement could not protect a party from its own intentional wrongdoing. The court concluded that the plaintiff adequately alleged that he was fraudulently induced into signing the submission agreement, which was being used to protect the defendant from liability for their intentionally illegal acts.

The court also found that Simon-Whelan adequately alleged that the Warhol Foundation and Authentication Board conspired to restrict competition in Warhol works by removing works not owned by the Foundation from the market and consequently driving up the prices of Foundation-owned works. Although the plaintiff adequately pled damages related to monopolization and market restraint, he did not adequately plead damages as to price inflation, and that part of the claim was dismissed. The court also sustained the plaintiff's claim for false or misleading facts likely to cause confusion in commerce or advertising, finding that what the defendants argued were merely opinions as to authenticity could reasonably be seen as implying provable facts. Finally, the court upheld the fraud claim based on allegations that the defendants induced Simon-Whelan to submit the work knowing it would be denied, and also sustained the unjust enrichment claims.

{ The art market is relying more and more on committees formed with the express purpose of either providing authentication for a particular artist's works or producing the artist's catalogue raisonné. }

Lessons Learned

What lessons can be learned from these two cases, both for the owner of artworks and for an authentication or catalogue committee?

Unless the *Thome* decision is overturned by New York's Court of Appeals, a case seeking a declaratory judgment of authenticity is unlikely to be successful. Indeed, courts, which decide matters based upon a preponderance of the evidence put before them by the parties, are ill-suited to making a determination of fact on an issue that will affect parties not before the court. There is also some validity to the Appellate Division's prediction that a pronouncement on authenticity from the court may have little effect on the art market if an art expert labels the work inauthentic.

The *Thome* case is also a reminder that owners of artworks should be mindful of the passage of time. *Thome* is not the first case in which claims against an authentication committee were dismissed because they were brought after the applicable statute of limitations had run.[5] And, while the *Simon-Whelan* case shows that authentication committees are susceptible to well-pled claims for monopolization and product disparagement – indeed, even the *Thome* case suggests that a product disparagement case could be sustained – such claims are hardly sure winners.[6] In fact, such claims are highly fact-intensive and Simon-Whelan may not prevail in the end. Undoubtedly, an owner could benefit from a review by legal counsel of his or her rights and options, not only after a work is denied authentication, but also before ever submitting a piece to an authentication committee.

Though the weight of precedent favors authentication committees, the *Simon-Whelan* case makes clear that authentication committees are not immune from legal challenge. One very important lesson learned is that indemnification agreements, though very useful, will not shield wrongdoing. Also, an authentication committee with a large stock (or relationship to an entity with such stock) in the artist's works is plainly more susceptible to claims such as those raised in *Simon-Whelan*. Authentication committees could also benefit from legal advice in determining issues such as the legal form the committee should take, board membership and independence, and the written agreements it should require.

1 A catalogue raisonné is a definitive catalogue of the works of a particular artist. Inclusion of a work in the catalogue serves to authenticate the work. Non-inclusion suggests a work is not by the artist. *Kirby v. Wildenstein*, 784 F. Supp. 1112 (S.D.N.Y. 1992).

2 French Law No. 57-298 of Mar. 11, 1957. *See Greenwood v. Koven*, 880 F. Supp. 186 (S.D.N.Y. 1995).

3 The court cited *Greenberg Gallery, Inc. v. Bauman*, 817 F. Supp. 167 (D. D.C. 1996) aff'd, 36 F.3d 127 (D.C. Cir. 1994) in which a court dismissed a case for rescission of a sale of, coincidentally, a Calder sculpture. The court found, based on expert evidence, that the plaintiff had not shown that the work was inauthentic. Nevertheless, the art market relied upon the opinion of the expert rejected by the court, and the work remains shunned.

4 *See Larivierer Thaw*, 2000 WL 33965732 (Sup. Ct. N.Y. County 2000).

5 *See Vitale v. Marlborough Gallery*, 1994 WL 654 494 (S.D.N.Y. 1994).

6 Such claims were dismissed in *Vitale* and in *Kramer v. Pollock-Krasner Foundation*, 890 F. Supp. 250 (S.D.N.Y. 1995)

Art Law Events

Herrick in the News

December 2009
Lawrence Kaye was featured in the *Art & Auction* article entitled "2009 Art & Auction Power List."

Upcoming Events Involving Herrick's Art Law Group

May 11, 2010
Howard Spiegler will speak on a panel entitled "Reclaiming Holocaust Art: Past, Present and Future" at the Maltz Museum of Jewish Heritage in Beachwood, Ohio.

Recent Events Involving Herrick's Art Law Group

November 20, 2009
Charles Goldstein spoke at the NYCLA's Second Annual Art Litigation and Dispute Resolution Institute on the panel "Holocaust Restitution Claims: Courtrooms, ADR or a U.S. Restitution Commission?"

November 30, 2009
Howard Spiegler guest lectured for Amy Adler's Art Law class at NYU Law School.

February 2010
Mari-Claudia Jiménez's article, "Restituting Looted Cuban Art" was published as part of the complete proceedings of the 19th Annual Meeting of the Association for the Study of the Cuban Economy conference. To read the article, visit www.herrick.com/restitutinglootedcubanart.

February 2010
St. John's University honored Lawrence Kaye as its alumnus of the month. The law school featured Larry in an article that highlighted his career as an art law attorney. Larry's involvement in the "Portrait of Wally" case, as well as his representation of Marei von Saher, the sole heir to Jacques Goudstikker, and the heirs of avant garde artist Kazimir Malevich are all mentioned in the article. The article also mentions Herrick's representation of the Turkish government in a case involving the fabled Lydian Hoard artifacts from the Metropolitan Museum of Art, thought to be the first lawsuit a foreign government has brought against a major American cultural icon. To read more, visit www.herrick.com/lawrencekayest.johnsalumnusofthemonth.

February 12, 2010
Lawrence Kaye spoke at the Norton Museum of Art in Palm Beach, Florida, on "Restituting the Goudstikker Collection" for the opening of the museum's Goudstikker exhibition.

March 11, 2010
Howard Spiegler was a guest lecturer on art restitution at an event entitled "Recent Developments in Art Restitution" at the Sotheby's Institute.

March 12, 2010
Herrick hosted the Volunteer Lawyers for the Arts' Legal and Business Bootcamp for Arts Professionals. The program discussed the legal and business issues that affect individual artists and individuals within arts cultural institutions who make and work in film, music and interactive media. For more information, visit www.vlany.org.

For questions about upcoming events and other art law matters, please contact:

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Additional information on Herrick's Art Law Group, including biographical information, news, and articles, can be found at www.herrick.com/artlaw.

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