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The HEAR Act and Laches After Three Years

Simon J. Frankel[†]

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I. Introduction

In late 2016, Congress enacted the Holocaust Expropriated Art Recovery Act of 2016 (HEAR Act), a rare piece of bipartisan legislation in a time of growing political division. The statute was meant to address a straightforward issue—the perception that U.S. courts were unfairly applying time-based defenses to bar claims to recover art lost during the Nazi regime. The Act’s goal was simple: to provide victims of Holocaust-era persecution and their heirs a fair opportunity to bring suit to recover works of art confiscated or misappropriated by the Nazis. The mechanism through which to achieve this goal also seemed simple. The HEAR Act temporarily (through 2026) replaces state and federal statutes of limitations pertaining to art recovery claims with a uniform six-year limitations period after actual knowledge of a claim arises.¹ In light of systemic barriers to justice and a number of inconsistencies between

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¹ Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526–28 (2016).

jurisdictions, the legislation sought to ensure that worthy claimants would have their day in court.

One can quibble as to whether the HEAR Act was really needed or justified. I have elsewhere suggested that existing U.S. law was operating appropriately.² At a minimum, the argument that U.S. museums were improperly asserting statutes of limitations and laches (an equitable doctrine barring claims brought after delay, where the delay caused prejudice to the defendant) appears flawed.³ As I have argued, museums have important duties to safeguard their collections, and a claim that a museum has a work in its collection that was taken by the Nazis and should be returned implicates several of these duties.⁴ Specifically, a museum faced with such a claim has an obligation to investigate the claims carefully. If the claim is found meritorious after a diligent investigation, meaning the work appears from all the available facts to belong to the claimant as a legal matter, the museum has a duty to return the work to the claimant. But if the claim does not appear well-founded—and we have to be honest, some asserted claims have not been factually well-supported—a museum has a corresponding duty *not* to turn the work over to the claimant. In fact, the museum has a duty to safeguard the integrity of its collection. That duty includes, where appropriate, litigating to retain the work, including interposing any potentially meritorious defenses that may efficiently end the litigation in the museum's favor, to prevent unnecessary dissipation of trust assets. Such defenses include statutes of limitations and laches.⁵

Even if the HEAR Act was a solution in search of a problem, it is now the law of the land, so we have to understand what it means and how it should be applied. However, the Act is not a model of clarity. On one level, it is very simple; as noted, it provides for a nationwide six-year limitations period for a claimant to bring a lawsuit to recover a work lost during the period of Nazi persecution after “actual knowledge” of the claim.⁶ As explained in a prior

² See Simon J. Frankel & Ethan Forrest, *Museums' Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-Era Art Restitution Claims—A Defense*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 279 (2013).

³ *Id.* at 307–36.

⁴ *Id.* at 287–302.

⁵ Frankel & Forrest, *supra* note 2, at 302–07.

⁶ Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308,

article, the scope of the Act, its actual operation, and how certain statutory exceptions apply are areas fraught with confusion, either because the statute is poorly drafted or because courts or commentators have not applied the Act faithfully or fairly.⁷ More generally, where the HEAR Act allows a claim to proceed timely (without regard to otherwise applicable limitations periods), courts seem confused about the application of the laches doctrine.

After a brief review of the HEAR Act and the doctrine of laches, this Article focuses on several recent Nazi era art restitution cases to consider how courts are faring in applying the HEAR Act and laches.⁸

II. The HEAR Act

As noted, the key operative provision of the HEAR Act sets a nationwide statute of limitations for any claims to recover art lost to the Nazis. It provides:

Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of— (1) the identity and location of the artwork or other property; and (2) a possessory interest of the claimant in the artwork or other property.⁹

The “covered period” runs from 1933 to 1945,¹⁰ and “Nazi persecution” is defined as “any persecution of a specific group of

§ 5(a), 130 Stat. 1524, 1526 (2016).

⁷ See Simon J. Frankel & Sari Sharoni, *Navigating the Ambiguities and Uncertainties of the Holocaust Expropriated Art Recovery Act of 2016*, 42 COLUM. J.L. & ARTS 157 (2019).

⁸ This Article focuses on recent court decisions concerning the HEAR Act and laches in cases involving Nazi-looted art. For a broader discussion of issues involved in Nazi-looted art, see generally Donald S. Burris, *Restoration of a Culture: A California Lawyer's Lengthy Quest to Restitute Nazi-Looted Art*, 45 N.C. J. INT'L L. 277 (2020) (providing an overview of Nazi looting and a chronology of relevant American legal cases); Marc Masurovsky, *A Comparative Look at Nazi Plundered Art, Looted Antiquities, & Stolen Indigenous Objects*, 45 N.C. J. INT'L L. 497 (2020) (discussing looted indigenous art and Nazi plunder, as well as related sociological implications).

⁹ HEAR Act § 5(a).

¹⁰ *Id.* § 4(3).

individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party, or their agents or associates, during the covered period.”¹¹ Notably, “actual discovery” is defined as “knowledge,”¹² which in turn is defined as “having actual knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to actual knowledge thereof.”¹³

Once a claimant has actual knowledge (not constructive knowledge—the “knew or should have known” standard common under many state limitations periods) of the location of the artwork and the basis for a claim to it, the claimant has six years to file suit,¹⁴ even if the otherwise applicable state limitations period would be shorter. This is the rule through 2026, when the HEAR Act sunsets.¹⁵

III. Recent Cases Grappling with the HEAR Act and Laches

As the HEAR Act swept aside, in most instances, application of statutes of limitation, it is perhaps not surprising that some recent cases have focused more on the equitable defense of laches. Under this doctrine, a claim will be barred at equity where the plaintiff has delayed unreasonably in asserting a claim and that delay causes prejudice to the defendant.¹⁶ Such prejudice can be in the form of lost evidence, lost witnesses, or other detriment.¹⁷ Three notable recent cases have grappled with aspects of the HEAR Act and laches.

A. *Zuckerman v. Metropolitan Museum of Art*

Zuckerman involved a claim to recover a Picasso painting currently in the possession of the Metropolitan Museum of Art.¹⁸ The plaintiff’s grand-uncle, Paul Leffmann, had fled Germany for Italy in the late 1930s with his wife Alice.¹⁹ After a period of

¹¹ *Id.* § 4(5).

¹² *Id.* § 4(1).

¹³ *Id.* § 4(4).

¹⁴ *Id.* §§ 4(1)–5(a).

¹⁵ HEAR Act § 5(d).

¹⁶ Frankel & Forrest, *supra* note 2, at 305.

¹⁷ *Id.*

¹⁸ *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304 (S.D.N.Y. 2018).

¹⁹ *Id.* at 307.

negotiations, they sold the painting, which had been kept in Switzerland, to procure funds to flee persecution in Fascist Italy.²⁰ They eventually escaped to Brazil and, after the war, settled in Switzerland.²¹ They made claims after the war to a number of works that had been taken from them in Germany, but never pursued the Picasso painting.²² Meanwhile, the painting surfaced in New York in 1939 and was donated to the Metropolitan Museum in 1952, where it has since been on view.²³

At the trial court level, the plaintiffs argued the claim was timely under the HEAR Act, but the district court did not reach the Act. Rather, the district court held on the museum's motion to dismiss that the plaintiff had not adequately alleged that the Leffmanns had sold the work only as a result of duress.²⁴ Under both Italian and New York law, the district court held that duress cannot be based on "a general state of fear arising from political circumstances."²⁵ The threat to the party entering into the agreement must be sufficiently specific and, in New York, the threat must also be made by the defendant.²⁶ The plaintiff had not sufficiently alleged that the work was lost due to duress, rather than sold, by the Leffmanns.²⁷

By disposing of the case on duress, the trial court also did not address an interesting issue under the HEAR Act: whether the painting was, in the words of the HEAR Act, "lost . . . because of" Nazi persecution.²⁸ Of course, according to the complaint, the Leffmanns had left Germany due to persecution, and were seeking to leave Italy for the same reason—and sold the painting to obtain funds for passage.²⁹ However, there are indications in the text of the Act (although not so much in its legislative history) that the "lost

²⁰ *Id.* at 312.

²¹ *Id.* at 314.

²² *Id.*

²³ *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 191–92 (2d Cir. 2019).

²⁴ *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304, 314 (S.D.N.Y. 2018).

²⁵ *Id.* at 317.

²⁶ *Id.* at 318.

²⁷ *Id.* at 319–20.

²⁸ Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, § 5(a), 130 Stat. 1524, 1526 (2016).

²⁹ Complaint at 1–2, *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304 (S.D.N.Y. 2018) (No. 16-cv-7665).

because of” language is best interpreted as “lost *to*” the Nazis.³⁰ That was not true for the Leffmanns, so did the HEAR Act necessarily apply to extend the time for bringing the claim? Future cases will have to grapple with this issue.

On appeal, the Second Circuit approached the case differently. Its opinion did not address duress or the “lost because of” language. Instead, looking at the complaint, the court held that the claim was barred by laches.³¹ The court found unreasonable delay by the plaintiff in bringing suit, since the Leffmanns knew who they sold the painting to in 1938; the painting was acquired by a well-known public institution in 1952; and it could have easily been located before Alice Leffmann died in 1966.³² As noted by the court, the Leffmanns made post-war restitution claims for other works they lost in Germany, but made no efforts to recover the Picasso.³³ The court also found that there was plausibly prejudice to the museum from this delay in filing, as many witnesses to the transactions that took the painting from the Leffmanns to the museum were long gone by the time the Leffmanns’ heir made a claim in 2010.³⁴

Although the Second Circuit marshalled facts supporting unreasonable delay and prejudice, the result is somewhat odd. As the Second Circuit acknowledged, application of the equitable doctrine of laches is “ordinarily fact-intensive.”³⁵ It is very rarely addressed on the pleadings.³⁶ Here, the Second Circuit found

³⁰ See Frankel & Sharoni, *supra* note 7, at 179–82.

³¹ *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 193–97 (2d Cir. 2019).

³² *Id.* at 193–94.

³³ *Id.* at 191–92.

³⁴ *Id.* at 194–95.

³⁵ *Id.* at 194.

³⁶ See, e.g., *United States v. Portrait of Wally, A Painting By Egon Schiele*, No. 99 CIV. 9940 (MBM), 2002 WL 553532, at *22 (S.D.N.Y. Apr. 12, 2002) (“To show laches here, the Leopold would have to show that Bondi and her heirs unreasonably delayed in starting an action and that the Leopold suffered undue prejudice as a result. This would involve a fact-intensive inquiry into the conduct and background of both parties in order to determine the relative equities. Such issues are often not amenable to resolution on a motion for summary judgment, let alone a motion to dismiss.”) (internal citations omitted); *Greek Orthodox Patriarchate of Jerusalem v. Christie’s, Inc.*, No. 98 CIV. 7664 (KMW), 1999 WL 673347, at *9 (S.D.N.Y. Aug. 30, 1999) (“In many cases, the application of the laches defense is an issue for trial In some cases, however, the record is sufficiently clear on summary judgment to establish whether or not a particular search was diligent.”); *cf. Solow Bldg. Co., LLC v. Nine West Group, Inc.*, No. 00–7685 (DC), 2001 WL 736794, at *3 (S.D.N.Y. June 29, 2001) (“[W]hen the defense of laches is clear on the face of the

prejudice largely from the fact that several witnesses to the 1938 transaction had died.³⁷ There is some logic in this reasoning, but one might expect more detailed consideration of what information was lost by these deaths, rather than simply an appellate court's assertion that the loss of witnesses must prejudice the defendant.³⁸ Notably, the dates of death implicated by the court were not in the plaintiff's complaint; the Second Circuit apparently took them from outside the record.³⁹ The court also referred in passing to "the *likely* disappearance of documentary evidence"⁴⁰—not a convincing showing where the defendant bears the burden of proof on the defense of laches. Indeed, the Supreme Court has noted that a laches defense should not be applied in reference to a mechanical application of a statute of limitations, but that courts must consider the equity to all parties involved.⁴¹ The *Zuckerman* court did not dwell on equities. To be sure, further facts and further consideration might have driven the court to the same result at a later stage; but it was an unusual ruling at the motion to dismiss stage.

More generally, the Second Circuit's conclusion that prejudice flowed from the "more than six decades that have elapsed since the end of World War II"⁴² would potentially apply to most *any* claim to recover art lost under the Nazis. It will be interesting to see if other courts addressing claims to Nazi-looted art pick up on this language and apply it in other cases at the pleading stage. Will all such claims now be dismissed on the pleadings based on laches?

On a second issue, the Second Circuit was on firmer footing.

complaint, and where it is clear that the plaintiff can prove no set of facts to avoid the insuperable bar, a court may consider the defense on a motion to dismiss."); *see generally* *Espino v. Ocean Cargo Line, Ltd.*, 382 F.2d 67, 70 (9th Cir. 1967) ("[T]he factual issues involved in a laches defense can rarely be resolved without some preliminary evidentiary inquiry.") (citing additional cases).

³⁷ *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 194–95 (2d Cir. 2019).

³⁸ *See* *McDaniel v. Gulf & S. Am. S.S. Co.*, 228 F.2d 189, 193 (5th Cir. 1955) ("There has been an extraordinary delay. The libel was filed more than four years after the collision, which occurred nearly ten years ago. In spite of the absence of any explanation, we cannot see that the delay ipso facto should defeat the claim. Although one of the claimant's witnesses died before trial, this was misfortune whose consequences cannot be pressed so far.") (Learned Hand, J.).

³⁹ *See generally* Complaint, *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304 (S.D.N.Y. 2018) (No. 16-cv-7665).

⁴⁰ *Zuckerman*, 928 F.3d at 194.

⁴¹ *See* *Gardner v. Panama R. Co.*, 342 U.S. 29, 30–31 (1951).

⁴² *Zuckerman*, 928 F.3d at 194.

This was its holding that the HEAR Act does not abrogate laches as a defense.⁴³ That is, while a restitution claim will not be barred as untimely by a statute of limitations unless brought more than six years after actual knowledge, such a claim may still be barred by laches if the state law requirements of that doctrine are met.⁴⁴ Notably, some commentators and courts, including the *Reif* trial decision discussed below, had concluded that the HEAR Act preempts laches, as well as statutes of limitations.⁴⁵ As explained previously, laches had an interesting ride in the legislative history of the HEAR Act.⁴⁶ An early version of the statute would have explicitly preempted both statutes of limitations and laches.⁴⁷ But the references to laches and defenses “at equity” were removed from the bill in Congress and, as enacted, the statute only refers to sweeping aside “any defense at law relating to the passage of time.”⁴⁸ Given this text and history, the sensible conclusion is that the HEAR Act addresses only statutes of limitations—as the Second Circuit held in *Zuckerman*.⁴⁹

⁴³ *See id.* at 195–97.

⁴⁴ *See id.*

⁴⁵ Frankel & Sharoni, *supra* note 7, at 176 nn. 104–06.

⁴⁶ *See id.* at 175.

⁴⁷ 162 CONG. REC. S1813 (daily ed. Apr. 7, 2016) (“SEC. 5. Statute of Limitations. (a) In General.—Notwithstanding any other provision of Federal law, any provision of State law, or any defense at law or equity relating to the passage of time (including the doctrine of laches), a civil claim or cause of action against a defendant to recover any artwork or other cultural property unlawfully lost because of persecution during the Nazi era or for damages for the taking or detaining of any artwork or other cultural property unlawfully lost because of persecution during the Nazi era may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of— (1) the identity and location of the artwork or cultural property; and (2) information or facts sufficient to indicate that the claimant has a claim for a possessory interest in the artwork or cultural property that was unlawfully lost.”).

⁴⁸ Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, § 5(a), 130 Stat. 1524, 1526 (2016).; *see* S. REP. NO. 114-394, at 7 (2016).

⁴⁹ *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 197 (2d Cir. 2019) (citing Frankel & Sharoni, *supra* note 7, at 175–76). The plaintiff in *Zuckerman* has argued that laches cannot apply under the Supreme Court’s decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014), where the Court stated that “in [the] face of a statute of limitations enacted by Congress, laches cannot be involved to bar legal relief.” *Petrella*, 572 U.S. at 679. *See* Memorandum of Law in Opposition to Defendant’s Motion to Dismiss, *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304 (2018) (No. 16-cv-07665), 2017 WL 2472009, at *14. But *Petrella* applied the federal statute of limitations in a federal statute—the Copyright Act. It would be an odd result to say that by providing for a minimum of six years to bring a covered claim, Congress otherwise abrogated state

B. Reif v. Nagy

Reif v. Nagy, decided by New York's Appellate Division in July 2019,⁵⁰ also has its troubling aspects. The claimants sued an art dealer to recover two works by Egon Schiele.⁵¹ Franz Freidrich Grunbaum, a Jewish cabaret performer in Austria, owned the works as part of a collection before he was captured by the Nazis in 1938 and murdered in the Dachau concentration camp in 1941.⁵² The dealer, Nagy, contended that he, not the plaintiffs, had good title to the works.⁵³ Although the plaintiffs were heirs to Grunbaum, the dealer asserted that Mr. Grunbaum's sister-in-law had sold the two works (among others) to a gallery in Switzerland in a legitimate sale.⁵⁴

A twist in the case was that the same plaintiffs had previously litigated in federal court over ownership of a work that came from the very same collection and had the same provenance as the work at issue in *Reif*. In this prior case, *Bakalar v. Vavra*, the Second Circuit ultimately affirmed the district court's findings after a bench trial that the work had not been stolen by the Nazis and that any claim to the work was barred by laches.⁵⁵

In an earlier interlocutory appeal in the new case, the Appellate Division held that the plaintiffs were not collaterally estopped by the judgment in *Bakalar* from litigating ownership and laches because the three works at issue in the two cases "are not part of a collection unified in legal interest such to impute the status of one to another."⁵⁶ This cursory holding was itself a bit surprising, as the Schiele work at issue in *Bakalar* did have a shared provenance with

law for state law claims, including laches, particularly where Congress considered doing so in the HEAR Act and then decided not to include laches in the preemptive language of the Act. Indeed, in a footnote, the *Petrella* opinion acknowledged that "[w]hen state law was the reference, federal courts sometimes applied laches as further control." *Petrella*, 572 U.S. at 680 n.16.

⁵⁰ *Reif v. Nagy*, 106 N.Y.S.3d 5, 175 A.D.3d 107 (N.Y. App. Div. 2019).

⁵¹ *Id.* at 109.

⁵² *Id.* at 109–10.

⁵³ *Id.* at 120.

⁵⁴ *Id.* at 114.

⁵⁵ *Bakalar v. Vavra*, 819 F. Supp. 2d 293 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012).

⁵⁶ *Reif v. Nagy*, 52 N.Y.S.3d 100, 102, 149 A.D.3d 532, 533 (N.Y. App. Div. 2017).

the two works at issue in *Reif v. Nagy*.⁵⁷

In any event, on remand and at summary judgment, the New York trial court ruled in favor of the *Reif* plaintiffs.⁵⁸ As I have written elsewhere, that decision was troubling in two respects.⁵⁹ First, the court, with no analysis, concluded that the HEAR Act abrogates any laches defense “where Nazi-looted art is at issue.”⁶⁰ The defendants pointed out that the draft HEAR Act had been amended to omit mention of laches and referred only to statutes of limitations and defenses of law, but the trial court would have none of it, saying: “[t]he statute of limitations and laches defenses fail.”⁶¹ As discussed, and as the Second Circuit held in *Zuckerman*, there is no way to square this simplistic conclusion as to laches with the text and legislative history of the HEAR Act. Laches is (or at least should be) alive and well post-HEAR Act.

The *Reif* trial court’s second error was more subtle, but in some ways more significant. In essence, the court treated the HEAR Act as not just a new rule for timeliness, but as an interpretive lens that must substantively shape how a court looks at claims to Nazi-looted art. At summary judgment, with contested issues of fact, the trial court swept factual issues aside, asserting that Congress “adopted the Washington Conference Principles on Nazi-Confiscated Art (Principles) in the HEAR Act” and that “[t]he HEAR Act compels us to help return Nazi-looted art to its heirs.”⁶² This is odd because the HEAR Act does not contain any operative language adopting any particular aspect of the Washington Conference Principles, aside from the specific provision providing for a nationwide limitations period.⁶³

The *Reif* trial court went on to declare that the HEAR Act and related policy instruct courts “to be mindful of the difficulty of tracing artwork provenance due to the atrocities of the Holocaust

⁵⁷ See *Reif v. Nagy*, 175 A.D.3d 107, 111 (N.Y. App. Div. 2019).

⁵⁸ *Id.*

⁵⁹ See Frankel & Sharoni, *supra* note 7, at 176–77, 182–83.

⁶⁰ *Reif v. Nagy*, No. 161799/2015, 2018 N.Y. Misc. LEXIS 3234, at *14 (N.Y. Sup. Ct. Apr. 4, 2018).

⁶¹ *Id.*; see Defendants’ Memorandum of Law in Opposition to Plaintiffs’ Motion for Summary Judgment and in Support of Defendants’ Cross-Motion for Summary Judgment at 23, *Reif v. Nagy*, 52 N.Y.S.3d 100, 149 A.D.3d 532 (2017) (No. 240).

⁶² *Reif*, 2018 N.Y. Misc. LEXIS 3234, at *6–7.

⁶³ See Frankel & Sharoni, *supra* note 7, at 182–86.

era, and to facilitate the return of property where there is reasonable proof that the rightful owner is before us.”⁶⁴ Notably, the only citation provided for this sentence was the provision in the Holocaust Victims Redress Act setting out the “sense of the Congress” that “governments should undertake good faith efforts to facilitate the return” of Nazi-looted property to rightful owners.⁶⁵ Based on this, the court simply stated, “[w]e accept that the Artworks were the property of Mr. Grunbaum, and that the entirety of Mr. Grunbaum’s property was looted by the Nazis.”⁶⁶ The judge seemed to find it sufficient to grant summary judgment to the plaintiffs that “[they] made a threshold showing that they have an arguable claim of a superior right of possession to the Artworks.”⁶⁷

As I have written previously, it is not appropriate statutory interpretation to give some broad inchoate effect to the “sense of Congress” that “governments should undertake good faith efforts to facilitate the return” of Nazi-looted property to rightful owners.⁶⁸ A basic canon of interpretation holds that prefatory statements of purpose should not be understood to add to the specific operations of a statute’s text.⁶⁹ The HEAR Act’s operative provisions all focus on protecting those seeking to bring claims to recover artwork lost due to Nazi persecution from statutes of limitations or “any defense at law relating to the passage of time.”⁷⁰ No provisions specifically provide for anything other than a nationwide statute of limitations of six years from actual knowledge.⁷¹ Thus, it is not proper to read the HEAR Act to place a broad thumb on the scale in favor of plaintiffs seeking to recover art lost in the Holocaust, as the *Reif* trial

⁶⁴ *Reif*, 2018 N.Y. Misc. LEXIS 3234, at *9.

⁶⁵ *Id.* at *7 (citing Holocaust Victims Redress Act, Pub. L. No. 105-158, § 202, 112 Stat. 15 (1998)).

⁶⁶ *Id.* at *9.

⁶⁷ *Id.* at *9–10.

⁶⁸ *Id.* at *7 (citing Holocaust Victims Redress Act § 202). See Frankel & Sharoni, *supra* note 7, at 182–86.

⁶⁹ Frankel & Sharoni, *supra* note 7, at 185; see ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 219 (1st ed. 2012); see also *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (noting that broad interpretations purporting to “advanc[e]” a statute’s purpose are usually disfavored because “no law pursues its purpose at all costs.”).

⁷⁰ Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, § 5(a), 130 Stat. 1524, 1526 (2016).; Frankel & Sharoni, *supra* note 7, at 185.

⁷¹ *Id.*

court did. The HEAR Act allows a plaintiff to bring a claim that might otherwise be untimely; it does not loosen the burden the plaintiff must meet to succeed on the claim.⁷²

On appeal, the Appellate Division avoided the mistake of assuming the HEAR Act abrogates laches, but took its own odd turns. On the merits, it found that the plaintiffs had established a claim of ownership in the works, and that the defendant, Nagy, had not rebutted that claim.⁷³ This is a different result than *Bakalar* on effectively the same facts.⁷⁴ But *if* one accepts that collateral estoppel does not apply, then one might accept the Appellate Division's holding—except for what that court then said in its conclusion: “We are informed by the intent and provisions of the HEAR Act which highlights the context in which plaintiffs, who lost their rightful property during World War II, bear the burden of proving superior title to specific property in an action under the traditional principles of New York law.”⁷⁵

What are we to make of this statement? The court does not explain how its decision was “informed by the intent and provisions of the HEAR Act,”⁷⁶ so we are left to wonder if the appellate court, like the trial court, viewed the HEAR Act as an interpretive thumb on the scale in favor of any claimant to recover art lost under the Nazis, rather than only a lengthened statutory period for bringing the claim. That suspicion is fueled by what the court remarked next in closing:

It is important to note that we are not making a declaration as a matter of law that plaintiffs established the estate's absolute title to the Artworks. Rather, we are adjudicating the parties' respective superior ownership and possessory interests. We find the plaintiffs have met their burden of proving superior title to the Artworks.⁷⁷

Again, this is puzzling. Does the court mean the plaintiffs did not establish ownership, but simply failed less than the defendants in showing ownership, and so prevailed? In such a situation, does the HEAR Act, in the view of the Appellate Division, give the tie to

⁷² HEAR Act § 3(2).

⁷³ *Reif v. Nagy*, 175 A.D.3d 107, 109–10 (N.Y. App. Div. 2019).

⁷⁴ *Id.* at 115–16.

⁷⁵ *Id.* at 132.

⁷⁶ *Id.*

⁷⁷ *Id.*

the claimant? It should not, as explained above, but the appellate court did not explain further.

The second odd aspect to this decision is the Appellate Division's rejection of laches because it reasoned that, since Nagy had purchased the work in 2013, he could not claim any prejudice, due to the claimants' failure to bring the claim decades earlier: "Nagy acquired both pieces in 2013. He suffered no change in position. Nor was any evidence lost between defendants' acquisition and plaintiffs' demand for the return of the Artworks."⁷⁸ Now, to be clear, this was an unusual situation: Nagy had known of the plaintiffs' claims to the Grunbaum collection before he purchased the two Schiele works at issue.⁷⁹ He had filed an amicus brief in the earlier *Bakalar v. Vavra* litigation.⁸⁰ And in fact, he had purchased title insurance for the very purpose of insuring against plaintiffs' claims (so perhaps the court viewed its holding as not unfair).⁸¹

But the Appellate Division's reasoning—and the rule its decision establishes—is troubling. In effect, this decision restarts the laches clock whenever the personal property changes hands. Historically, as noted, courts considering laches looked at the plaintiffs' unreasonable delay and the prejudice to the defendant from that delay. This has often included evidence lost even before the defendant acquired the property, because had the plaintiff asserted a claim for the work earlier, the ownership issue as between the plaintiff, or predecessor-in-interest, and the then-possessor would have been resolved long ago—and at a time when any evidence would have been available. So the defendant, now the possessor, would not have been prejudiced.

Interestingly, there appears to be little law on this precise issue—whether the clock starts over on laches prejudice when property changes hands from one good-faith possessor to another. A few courts appear to have assumed that prejudice arises during any time of the claimants' undue delay, not only during the defendant's period of ownership.⁸² One court, in a Nazi-looted art

⁷⁸ *Id.* at 130.

⁷⁹ *Reif v. Nagy*, 175 A.D.3d 107, 117–18 (N.Y. App. Div. 2019).

⁸⁰ *Id.* at 130–31.

⁸¹ *Id.* at 118.

⁸² *See, e.g., Bakalar v. Vavra*, 500 F. App'x 6, 8 (2d Cir. 2012) (finding undue prejudice as "[t]here can be no serious dispute that the deaths of family members—Lukacs

restitution case, held that, under California law, the statute of limitations begins anew where a new possessor acquires the work on the theory that the new possession is a new tort.⁸³ Before *Reif*, no court appears to have applied that rule to laches. On the other hand, courts have held that that a new limitations period does not spring into life with each new *claimant*. For example, where an original owner dies after knowing of her claim for many years and not bringing suit, her heir does not have a new chance to bring suit against the current possessor within the limitations period following the death.⁸⁴

As a matter of policy, it appears that once the standard for an unreasonable delay and prejudice is met for a particular claimant with respect to a particular piece of art, that delay should apply to each subsequent owner of that art. If a potential claimant, or her predecessor-in-interest, unreasonably slept on her rights, that claimant should not get another bite at the apple simply because the current possessor of the work sold the piece. The law on this point is unclear, and we will have to see if future courts follow the rule set out in *Reif v. Nagy*.

C. *Cassirer v. Thyssen-Bornemisza Collection Foundation*

In *Cassirer v. Thyssen-Bornemisza Collection Foundation*,⁸⁵ claimants sued a Spanish art foundation, seeking to recover a painting Nazis apparently extorted from their great-grandmother as a condition to issuing her an exit visa out of Germany during World War II.⁸⁶ On appeal, the Ninth Circuit held that the HEAR Act applied to the claim and rendered it timely, even if it might be time-barred under otherwise applicable California law.⁸⁷ This was

and others of her generation, and the next—have deprived Bakalar of key witnesses”) (citations omitted); *In re Flamenbaum*, 22 N.Y. 3d 962, 966 (2013); *Werthheimer v. Cirkar’s Hayes Storage Warehouse*, 300 A.D.2d 117, 118 (N.Y. App. Div. 2002).

⁸³ See *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. CV 07-2866-JFW(JTLx), 2015 WL 12910626, at *24 (C.D. Cal. Apr. 2, 2015).

⁸⁴ See, e.g., *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 808 (N.D. Ohio 2006) (noting heirs could not seek painting where claim had lapsed during lifetime of predecessor-in-interest); see generally *Whiting v. Bank of the United States*, 38 U.S. 6, 15 (1839) (“the heirs of [an ancestor] cannot be entitled to be put in a better predicament than [the ancestor] himself”).

⁸⁵ *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951 (9th Cir. 2017).

⁸⁶ *Id.* at 951.

⁸⁷ *Id.* at 960.

consistent with the terms of the Act, which apply to any claim pending in state or federal court as of December 2016.⁸⁸

But the *Cassirer* court then addressed a more interesting problem: Did the HEAR Act foreclose defenses otherwise provided under Spanish law, which the district court had found governed the dispute? Specifically, the defendant foundation claimed that it had acquired title to the painting through prescriptive acquisition under Spanish law—by possessing the work without challenge for a certain period of time.⁸⁹ The Ninth Circuit reasoned that this was a defense on the merits.⁹⁰ While the HEAR Act bars defenses based on the passage of time, it did not provide new substantive law, and so did not bar the foundation's defense that it acquired title to the painting under Spanish property laws.⁹¹ Ultimately, on remand, the foundation prevailed in establishing prescriptive acquisition under Spanish law.⁹²

This outcome—just or unjust—is consistent with the very clear but narrow purpose of the HEAR Act. The *Cassirer* claim was timely under the Act, but the claim could still fail on the merits under governing law. The claimants were entitled to litigate their claim, but not to have it subject to any different rules of decision than would otherwise govern.

IV. Conclusion

There is none, and that is pretty much the point. Courts have to keep addressing cases with a greater focus on the facts and equities of individual cases. The HEAR Act simplifies Nazi-era art restitution cases, but only a little. In many cases, it will make timely a claim that would otherwise have been time-barred under state law. But the Act does no more. It does not sweep aside laches. It also does not create an interpretive framework for resolving these claims—it is no thumb on the scale in favor of a claimant. Once the timeliness of a claim under an otherwise applicable statute of

⁸⁸ Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, § 5(d), 130 Stat. 1526–27 (2016).

⁸⁹ *Cassirer*, 862 F.3d at 960–64.

⁹⁰ *Id.* at 965.

⁹¹ *Id.*

⁹² Finding of Fact and Conclusions of Law, *Cassirer v. Thyssen-Bornemisza Collection Foundation*, No. 2:05-cv-03459-JFW-E (C.D. Cal. Apr. 30, 2019), ECF No. 621, at 26.

limitations is determined, the work of the HEAR Act is done. But the work of the courts is not done; they must remain focused on facts and law, to determine if a laches defense, if asserted, is valid, and if a substantive claim has been established by a claimant under applicable law.