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California AB 2765 Stops the Clock for Recovery of Wrongfully Appropriated Works: The Ramifications for Museums, Owners, Collectors and the Art Trade

For over three decades California courts and lawmakers have attempted to achieve an equitable balance between the rights of former owners and good faith purchasers of stolen works of art. In true Hollywood fashion, the thief has played his part and left the stage. Only the original owner and the good faith purchaser remain, and the legal question California has struggled with is how to allocate the risk of loss between them. In late September, 2010, California presented its latest resolution when Governor Arnold Schwarzenegger signed Assembly Bill 2765 into law, effectively doubling the time an aggrieved party can recover an object of "historical, interpretive, scientific, cultural, or artistic significance" that has been stolen or taken by fraud or duress.

This is not the first time the California Legislature has tangled with stolen art-related cases. In 1983, California amended Code of Civil Procedure § 338(c) so that the discovery rule would include stolen art. However, the short three year statute of limitations coupled with the courts' inclination to adopt the heightened standard of constructive notice presented a major obstacle to California owners of works appropriated during the Holocaust. In 2002, to address this problem, California lawmakers enacted C.C.P. § 354.3, which effectively barred the statute of limitations from applying against any owner or heir of an owner of an art work that was appropriated during the Holocaust, provided the action was brought on or before December 31, 2010. But the pendulum swung back in favor of good faith purchasers in January 2010, when the Ninth Circuit in *Von Saher v. Norton Simon Museum* 592 F.3d 954 (9th Cir. 2010) held that Marei Von Saher could not recover Lucas Cranach the Elder's diptych *Adam and Eve* from the Norton Simon Museum, originally looted by the Nazis, because § 354.3 was preempted by the federal government's exclusive foreign affairs power to legislate restitution and reparation claims. In response, the California Legislature has now drafted and unanimously passed Assembly Bill 2765 which attempts to establish a middle road with: (a) the standard of "actual discovery," (b) a six year statute of limitations, and (c) a retroactive application.

What does this mean for museums, owners, collectors and the art trade?

For The Original Owners:

Statutes of limitations can be thought of as setting forth an obligation of due diligence. One who fails to exercise her cause of action within the statutory period loses it for lack of diligence. It seems unfair, however, to penalize an owner for lack of diligence in pursuing a cause of action

she does not know she has. That is why in California, under AB 2765, the limitation period does not begin to run until the owner discovers that the object has been stolen or until she discovers who possesses it – this is the "actual discovery rule." This means that the six year "clock" only begins to run upon the original owner's *actual discovery* ofthe whereabouts of the appropriated work. Unlike California, in New York, time does not begin to run until the owner demands return of her property and the possessor refuses – this is the "demand and refusal rule."

Moreover it is important to note that AB 2765 is retrospective, applying to all pending and future actions commenced by the end of 2017, and it revives certain claims that were dismissed due to the statute of limitations. However, the revival is somewhat limited. AB 2765 only applies to dismissals where the judgment is not yet final, or where the time for filing an appeal has not yet passed. Unfortunately for owners, there is no reprieve for cases long since adjudicated, but for courts this eliminates any ex post facto problem.

For Museums and Art Institutions:

AB 2765 provides potential deendant institutions with the major concession of both legal and equitable defenses, including unclean hands and laches. Laches is equity's way of dealing with those who "slept on their rights" or in terms of stolen art, were not duly diligent in pursuing those rights. If a court can be persuaded that the plaintiff has failed to be duly diligent and that her lack of diligence has adversely affected defendant's interests, the court may bar the plaintiff from pursuing her legal remedy. Thus, a museum and/or a gallery can claim the owner had failed to be duly diligent by failing to check archives, databases and other resources increasingly made available to the public. Once the institution has made such a showing, the inquiry would move to the next question: when did the owner or her heirs know, or when should they have known, that the defendant or her predecessors in title possessed the piece? That might depend on a variety of facts: whether the defendant – say a museum – prominently hung the painting in its public rooms, whether the picture traveled to major exhibitions, whether it was included in *catalogues raisonnées* or otherwise published, and so on.

Art Trade:

In a boon to individuals, it is important to note that the bill only applies to museums, galleries, auctioneers or dealers and *not* private individual purchasers. The legislature specifically recognized the fact that institutions are better able to protect themselves through extensive access to records and research. However, this bill should serve as a strong cautionary warning to purchasers of art, as the preference for owners over good faith purchasers is solidly built into popular legal culture in the U.S.

How can the individual who collects or deals in art protect herself against the possibility that the owner of a work will turn up and demand it back, claiming that it was stolen? The best insurance is to buy from an established, responsible dealer or equivalent source. If something turns out to be wrong with the title, an individual can recover from the one who sold it (when the dealer sells a painting the law implies a warranty of title. U.C.C. § 2-312). Warranties aside, any good dealer will refund the money without a struggle. Suppose someone who is not an established, responsible dealer offers a work at an attractive price. Is there any way to investigate the

title? An individual buyer should insist that the seller furnish the provenance (*i.e*., where he got it, who the prior owners were, etc.), but a provenance can be faked. A buyer should check with one or more collectors and dealers listed on the provenance. Moreover, a buyer should consult the Art Loss Register (ALR) at www.artloss.com.

In conclusion, AB 2765 will likely impact the outcome of Marei Von Saher's efforts to move forward on her claim to recover *Adam and Eve* from the Norton Simon Museum, and indeed it is clear the law will have far-reaching applications for the California art community.

For more information see:

AB 2765 Assembly Bill—Amended

AB 2765 Assembly Bill—Bill Analysis

AB 2765 Assembly Bill—Chaptered