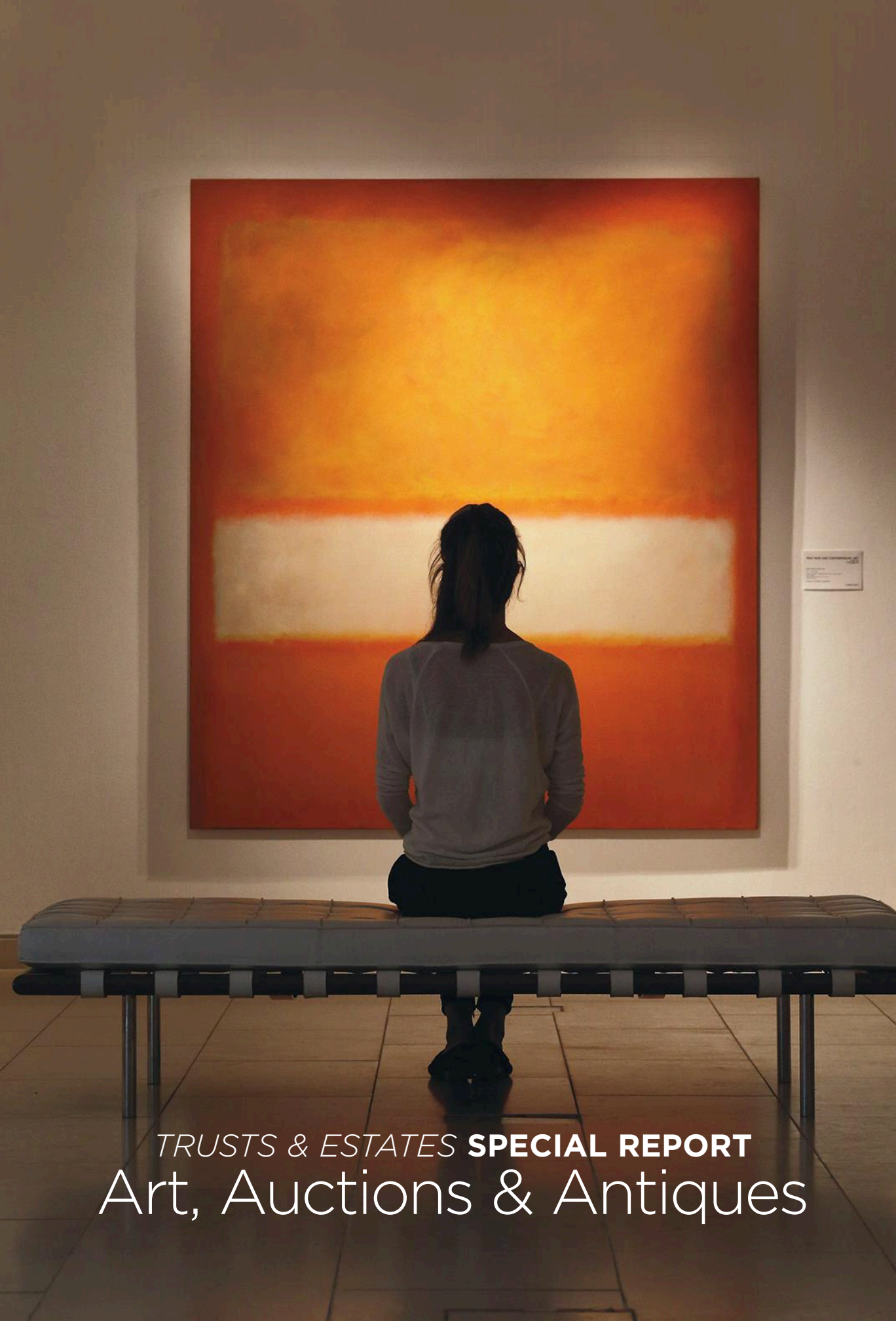

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On the Cover
Mark Rothko's "No 11 (Untitled)" (pictured here in London) was part of Christie's Post-war and Contemporary Evening Sale in New York City on Nov. 12, 2013. The artwork sold for an astounding $46.085 million.

Cover photo: Peter Macdiarmid/Getty Images

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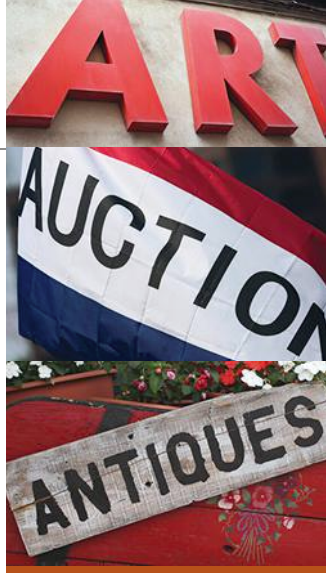


Heightened Scrutiny of Art Transactions

Do you owe New York money?

By **Diana Wierbicki** & **Bee-Seon Keum**

The rising value of art and the increasing mobility of wealth haven't gone unnoticed by New York State's regulatory authorities. In 2016, tax settlements with several key art industry figures for alleged New York sales and use tax noncompliance surprised many in the art world.

Those buying, selling or lending art in a transaction involving a New York connection should be aware that such activities may fall under the jurisdiction of not only the New York Department of Taxation and Finance (the Department) but also the New York Attorney General (AG), who's recently been enforcing the state's tax laws under the New York State False Claims Act (FCA). The FCA is a civil anti-fraud statute that allows the AG to investigate and prosecute fraudulent claims. Any person who "knowingly" makes a false or fraudulent claim to the state government is liable under the FCA. Although as initially enacted in 2007, the FCA didn't apply to tax matters, the law was subsequently amended in 2010 to explicitly include tax claims and has since been used by the AG to justify investigations of art transactions.

Diana Wierbicki, far left, is a partner and global head of the art law practice and **Bee-Seon Keum** is an associate, both at the New York City office of Withers Bergman LLP

The AG's use of the FCA to investigate tax compliance exposes a greater range of art transactions to scrutiny. The FCA has a statute of limitations of 10 years, a stark contrast to New York's general 3-year statute of limitations for asserting additional tax due on a return and 6-year statute of limitations for abusive tax avoidance transactions. Violators can also face up to treble damages. As a result, noncompliance with the New York sales and use tax laws has harsher consequences than ever before.

To avoid an unwanted tax notice or investigation, it's prudent for those who buy, sell or lend art in a transaction involving any New York connection to be aware of how the Department and the AG are applying the New York sales and use tax rules to art transactions. The New York sales and use tax statutes don't directly address art transactions, and the case law is limited. To anticipate how the Department or the AG may evaluate an art transaction, look to guidance issued by the Department and press releases issued by the AG. These sources provide guidance for those involved in art transactions on: (1) tax considerations for exhibiting art in New York, (2) the proper use of resale certificates, and (3) the characterization of fine art shippers for sales and use tax purposes.

Practitioners outside of New York should be aware of the direct impact that the New York sales and use tax laws have on art collectors around the world. As the largest art market with a significant number of auctions, private gallery sales and art fairs, New York attracts collectors from all states

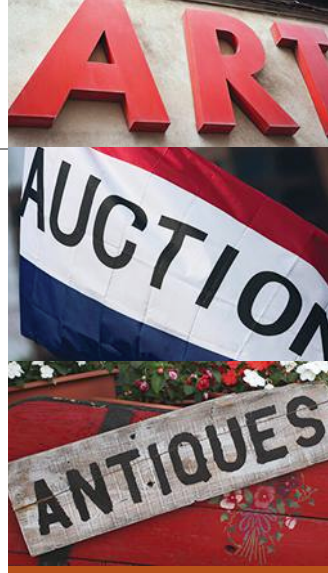
For New York sales tax purposes, the point at which possession is transferred by the seller to the "purchaser or the purchaser's designee" determines the rate and incidence of tax.

and all over the world who buy art in New York and have the art shipped outside of the state. A number of collectors from outside New York are also likely, at some point, to lend art they own for display in New York in one of many museum or gallery exhibitions. It should also be noted that, with New York's successful tax investigations, other states may follow New York's example in investigating collectors, art galleries and others with art connections for additional sources of tax revenue.

Exhibition of Art

A 2008 advisory opinion from the Department applied the New York use tax rules to the exhibition of art at a New York museum.[1] A Delaware limited liability company (LLC) that wasn't conducting business in New York purchased art outside New York and agreed to loan it to a New York museum for exhibition. The LLC received no monetary compensation for the loan, but the museum was responsible for shipping the art to and from the LLC's Delaware warehouse for the exhibition. Despite the museum's assumption of shipping responsibilities, the Department found the arrangement to be a no-fee loan, which meant that the display of the art in New York was a use of the art by the LLC lending it. In this case, no use tax was owed by the LLC because the LLC wasn't a New York resident for use tax purposes at the time that the art was purchased. However, the Department suggested that the New York activities of the LLC's management company may be imputed to the LLC to create New York residency for the LLC if the two entities were dominated and controlled by the other or their activities were commingled, in which case the display of the art in New York may have been subject to New York use tax. Therefore, before lending art for exhibition in New York, an entity owner should review its New York residency status at the time of the purchase of such art, taking into account all of its connections to New York, including any employees, agents, representatives, managers, members or others whose New York activities may be attributable to the owner, to make sure that the owner is, in fact, a nonresident lending the art.

In 2016, the Department again considered the sales and use tax implications of a museum loan, but the analysis of whether the loan was a no-fee loan differed from the 2008 advisory opinion.[2] According to the facts in the 2016 advisory opinion, a Florida LLC agreed to purchase a sculpture being fabricated in Germany. Subsequently, the LLC entered into a loan agreement with a New York museum. The museum arranged and paid for a fine art shipper to pick up the sculpture in Germany and ship it to the museum's premises in New York for the exhibition. The museum arranged and paid for insurance coverage on the sculpture from the moment it was picked up until its delivery to the LLC's location in Florida. In a departure from the 2008 advisory opinion, the Department



stated that the museum's coverage of shipping and insurance expenses was consideration, and therefore, the LLC's loan of the sculpture wasn't a no-fee loan but a loan for consideration, and the value of the consideration was subject to sales tax.[3] No sales tax was due in this case because the museum was a sales tax-exempt non-profit organization, but the Department's analysis is troubling when considering loans to companies within a family structure. Although not binding, this 2016 advisory opinion should be considered when determining the appropriate structure for art being loaned to an entity or individual in New York.

Resale Exception to Tax

In a 2011 advisory opinion, the Department examined the purchase of a sculpture in New York that was shipped outside of New York for display at a museum.[4] An individual purchased the sculpture from Christie's and subsequently entered into a loan agreement with a Florida museum for display in an exhibition. The individual provided a resale certificate to Christie's. After the auction purchase, Christie's arranged for and paid for the sculpture to be delivered to and stored in a warehouse in the Bronx prior to being picked up by a fine art shipper hired by the museum for transport to Florida. The Department determined that the purchase was subject to New York sales tax. The Department stated that the museum was acting as the buyer's "designee" and deemed that the buyer took delivery of the sculpture when the museum's fine art shipper picked up the sculpture at the Bronx warehouse. The Department rejected the argument that the sculpture was purchased for resale and therefore exempt from New York sales tax. The Department stated that the resale exemption from sales tax only applies to purchases made exclusively for resale and, in this case, the individual "made use of the sculpture" by entering into a loan agreement with the Florida museum and, accordingly, the sculpture wasn't purchased exclusively for resale.

The AG has also addressed resale certificate misuse for art purchases. On May 3, 2016, the AG announced that New York reached a settlement with a major New York contemporary art collector for failure to pay New York sales and use tax on art acquisitions made by his companies. Beginning in 2002, the art collector's companies purchased more than $80 million worth of contemporary art. At the time of the purchases, the companies presented the sellers with New York resale certificates and claimed exemptions from New York sales tax. The AG alleged that the use of the New York resale certificates was improper. Instead of being purchased in the course of the companies' business operations exclusively for the purpose of resale, the AG alleged that the art was used by the collector for personal enjoyment and the enhancement of his real estate business brand by display of the art in his residences in New York and throughout his real estate business offices and properties. The AG stated that: (1) the companies should have paid New York sales tax at the time the artwork was purchased to the extent the companies didn't intend exclusively to resell the art; and (2) if the companies initially intended exclusively to resell the art, they should have paid New York use tax when the art was diverted to a taxable use. The art collector agreed to pay $7 million to New York State to settle the claim.

Possession Transfer Point

For New York sales tax purposes, the point at which possession is transferred by the seller to the "purchaser or the purchaser's designee" determines the rate and incidence of tax.[5] A common carrier isn't considered a "purchaser's designee" regardless of who hires the

Currently, the term "common carrier" isn't defined in the New York sales and use tax statutes, and thus, its meaning is a question of statutory interpretation.

common carrier; thus, if an out-of-state buyer purchases art in New York and arranges for a common carrier to pick up the art and deliver it outside of New York, such purchase wouldn't be subject to New York sales tax. However, a private carrier will be considered a "purchaser's designee" if it's hired by the purchaser; thus, if an out-of-state buyer purchases art in New York and arranges for a private carrier to pick up the art and deliver it outside of New York, such purchase would be subject to New York sales tax. Currently, the term "common carrier" isn't defined in the New York sales and use tax statutes, and thus, its meaning is a question of statutory interpretation. So far, we've seen at least three different interpretations of the term from the Department, the AG and the Division of Tax Appeals, and there's little authoritative guidance on whether the term "common carrier" applies to fine art shippers. In August 2015, the Department issued a bulletin, a non-binding source of guidance, which provided a narrow definition of the term "common carrier." The bulletin stated that a common carrier doesn't operate under a private arrangement

or contract with negotiated terms, holds itself out to the public as one that will agree to carry property for all who apply, is required to carry for all who apply, agrees to carry for a specific and standard rate of compensation and makes deliveries under standard delivery schedules. This definition sparked a number of questions from auction houses and galleries regarding whether fine art shipping companies would be classified as private or contract carriers. The Department then removed the tax bulletin from its website, and its agents have been addressing the question of whether fine art shippers are common or private carriers on a case-by-case basis, which created further uncertainty.

Subsequently, the AG picked up the fine art shippers' question. On July 19, 2016, the AG announced that New York reached a settlement with a leading New York-based art gallery and its California affiliate for the failure to collect and remit New York sales tax. The AG asserted two claims: (1) the California affiliate had sufficient "nexus" with New York to require it to collect and remit New York sales tax on art delivered to purchasers in New York; and (2) the New York-based art gallery was required to collect and remit New York sales tax when buyers arranged for fine art shippers to deliver purchased art outside of New York. Without any underlying analysis, the AG stated that fine art shipping companies (shipping companies other than UPS, FedEx or the U.S. Postal Service) aren't considered to be "common carriers," thereby placing fine art shipping companies in the private or contract carrier category. The AG took the position that purchasers who arranged for fine art shippers to

pick up art from the New York gallery for delivery to a location outside of New York were deemed to have taken possession of the art in New York, and therefore, the New York gallery was obligated to collect and remit New York sales tax on such transactions. The owner of the New York gallery and its California affiliate agreed to pay $4.28 million to New York State to settle both claims.

A third interpretation of the meaning of the term "common carrier" was provided in a 2005 decision from the New York Division of Tax Appeals.[6] In this decision, the determination of whether New York use tax was owed depended on whether the companies used "common carriers" to deliver promotional material. In reaching his determination, the administrative law judge analyzed case law discussing contract carriers. The judge stated that the primary factor that distinguishes a common carrier from a private carrier is "whether the carrier makes carriage of goods for others a business, where it holds itself out to serve the public for all that see fit to employ such company up to the capacity of the company's facilities." The common carrier makes the carriage of goods a business and not an occasional undertaking; it doesn't matter that a company specializes in a specific class or type of merchandise, so long as it holds itself out as serving the public for anyone who wants to hire the company to carry such merchandise. The judge concluded that the delivery companies used were common carriers because they held themselves out to serve the public for any company choosing to hire them to distribute promotional material, and such carriage was their business and not an occasional undertaking.

With such differing interpretations of the term "common carrier" and in the absence of definitive authority on whether fine art shippers are private or common carriers, those in the art world seeking to be tax compliant have been left with little choice but to take the conservative approach of assuming that fine art shippers aren't characterized as common carriers. Following this position, if buyers wish to have art purchased from New York sellers delivered to them outside New York and not have the purchases be subject to New York sales tax, the sellers should arrange the shipping through the fine art shippers. We await further developments on this discussion to better understand how the Department and the AG are interpreting and applying the sales and use tax rules to art transactions.

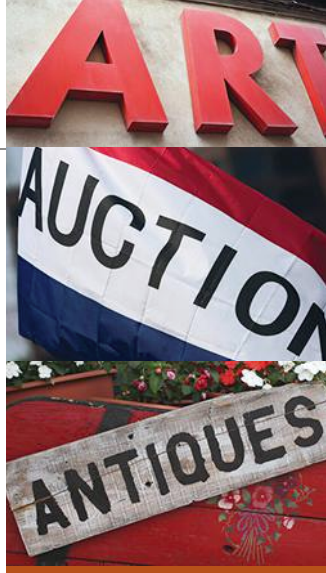
Endnotes

1. TSB-A-08(7)S (Feb. 14, 2008).
2. TSB-A-16(17)S (May 2, 2016).
3. Note that previous advisory opinions didn't treat loan expenses covered by the borrower in an art loan as compensation. *See supra* note 1; TSB-A-11(10)S (April 8, 2011).
4. TSB-A-11(10)S (April 8, 2011).
5. NYCRR 525.2(a)(3).
6. *Matter of the Petition of Verizon Yellow Pages Company f/k/a Bell Atlantic Yellow Pages Company*, DTA No. 819215 (NYS Div. of Tax App. April 7, 2005).

SPOTLIGHT

Two Left Feet

A Mae West pair of platform heels, circa 1930s, sold for $35,000 at Heritage Auctions' Entertainment & Music Memorabilia Signature Auction on June 24-25, 2016 in Beverly Hills, Calif. Mae West was famously jailed for "corrupting the morals of youth" because New York City officials disapproved of her highly risqué Broadway production.



The Reality of Handling an Art Portfolio for Growth

How to successfully combine the principles of advisory and wealth management

By **Annelien Bruins**

Art is now firmly established as an asset class, albeit a non-traditional one. High-net-worth (HNW) collectors buy art and collectibles (antiques, jewelry, classic cars) for enjoyment but with a strong secondary motive: They hope that their collection will prove to be a store of value and ideally even appreciate over time. Additionally, collectors increasingly use their art as a financial tool, for example as collateral for a loan. As a result, most private banks now offer art loans, either in-house or through third-party boutique lenders.

According to Deloitte's *Art & Finance Report* (2016) (*Report*), only 10 percent of wealth managers interviewed believe that the art investment industry will expand in the next couple of years.[1] This makes sense. Art has been recognized as a financial asset; a potential inflation hedge due to its relatively low correlation to the financial markets. That said, it isn't necessarily a great investment asset. Works of art are highly illiquid and traded in an opaque, unregulated market. They don't generate an income, but they do generate high transaction and ownership costs. Lastly, artwork is a risky investment from a title and authenticity perspective.

The New Collector

Today's art collectors are savvy. They use art indices and quality research to understand not only the overall art market but also the performance of individual artists. Collectors increasingly ask their wealth managers to include their art assets in financial reporting to get a better picture of their overall wealth. Lastly, collectors understand, better than ever, the importance of independent advice in art transactions so that they don't lose money as a result of undisclosed commissions.

According to the *Report,* 78 percent of wealth managers interviewed feel that art and collectibles should be a part of their service offering.[2] To my mind, there's certainly a role for wealth management firms and private banks. That role is: (1) acting on behalf of their clients in transactions as a neutral fiduciary, and (2) providing collection management, wealth reporting and estate-planning services. As of yet, however, the opacity and unregulated nature of the art market have been obstacles to successfully incorporating passion assets into traditional wealth management models.

While private banks and wealth managers are investigating how to offer art-related services to their collector clients, auction houses Sotheby's and Christie's have recognized the changing demands of their own client base. In the last couple of years, both houses have moved towards diversifying their services by purchasing several art support companies. In 2016, for example, Sotheby's bought the Mei Moses indices (a database of repeat auction sales)[3] and Orion Analytical, a high tech scientific

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Regular appraisals allow for sufficient insurance coverage in the case of loss or damage.

research firm that investigates forgeries.[4] In the same year, Sotheby's also acquired Art Agency Partners, the art advisory firm set up by Amy Cappellazzo. Christie's purchased Collectrium, the online collection management tool founded by Boris Pevzner, in 2015.[5]

Art Asset Management

Like other financial assets, art collections should be monitored and managed proactively, particularly when a collection has significant value. There are many components to a successful art management strategy. For example, due diligence before acquisitions reduces the risk of overpaying or buying problem works (title, authenticity, condition). Regular appraisals allow the collector to understand the make-up of his collection and monitor his exposure to the various segments of the art market he's invested in, each with their own risk profile and market cycle. Regular appraisals also allow for sufficient insurance coverage in the case of loss or damage. Lastly, a well-protected, diligently documented art collection enables the collector's financial advisors to create a better wealth management strategy and estate plan to protect the collector's wealth during his lifetime and to pass on his legacy after his death.

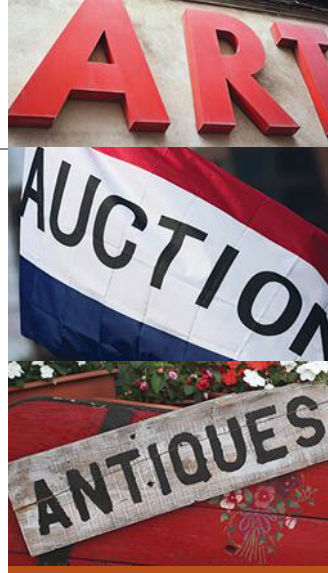
Whereas art and wealth management professionals acknowledge the benefits of a proactive collection management strategy, the execution of such a strategy is invariably more complex. In contrast to other financial assets, artwork doesn't just lose money as a result of market fluctuations. Physical deterioration and a lack of documentation are real risks to a collector's investment but, unfortunately, they're also very common. A damaged painting has the potential to lose a large percentage of its market value. A sculpture without provenance documentation, such as a sales invoice or certificate of authenticity from the artist, may be impossible to use as collateral for a loan, let alone sell successfully. Therefore, in addition to proactively monitoring the financial value of the collection, it's paramount to protect the artwork itself and to safeguard the archives related to the collection. This isn't always an easy task.

Unique challenges come up in the management of a wealthy family's art collection. Historically, most privately owned art collections weren't managed at all because: (1) art values weren't yet sky-high, (2) collectors didn't view their art as financial assets, and (3) there was a need for discretion to protect the privacy and safety of wealthy families. The third reason is still the case today, with good reason. As a result, a lack of information sharing among those working for the family in different capacities may make it difficult to obtain a complete overview of the family's art collection.

At the moment, no recognized methodology exists for managing the financial, physical and data components of an art collection in a cohesive fashion. That said, in response to the changing demands of HNW collectors, and aided by rapid technological advances and increasingly innovative art support business models, such a methodology will no doubt be developed within the next couple of years, particularly if driven by private banks and wealth managers.

Financial Reporting

Until such time, collectors and their financial advisors do have options. When a collector has an extensive and valuable art portfolio, it's a good idea



to invest in a collection management system. I've worked with custom-made and off-the-shelf databases for years. Although the benefit of custom-made databases is that they're tailored exactly to the collector's requirements, they're also expensive to build and maintain. Off-the-shelf databases have improved tremendously over the past five years. They're generally easy to use, have extensive reporting capabilities and aren't costly. As of yet, there's no system available that facilitates the incorporation of art and collectibles into wealth reporting. That said, most collection management systems allow data to be exported into Excel, which can be added manually to financial reports.

Before choosing a system, it's good practice for a collector and his advisors to determine their most important pain points in terms of data capture and reporting. Is the main goal of acquiring the database to keep track of the actual artwork? To report to the insurance company on a regular basis? Schedule conservation treatments? Monitor maintenance costs? Determining these factors in advance ensures that a collector buys the system most suitable for his requirements. Lastly, the key decision that needs to be made before buying a system is whether a collector will hire a collection manager to maintain the database or allocate this responsibility to an existing staff member. This is of paramount importance. A database is only as good as the information it's being fed. That is, if the database isn't kept up to date at all times, the collector and his advisors will rapidly lose confidence in the system, effectively rendering it useless.

HNW Families

Most wealthy families have multiple homes around the globe. Often, therefore, the care for the art collection is fragmented: divided between local domestic staff who care for the objects and the (family) office staff who pay the bills and keep the insurance schedules up to date. As mentioned before, many families have collected art for decades before the need for an up-to-date inventory arose. As a result, there's simply no complete overview of what artwork they own, what the objects are worth and where they're located. At the same time, incomplete archives inevitably result in missing artwork (for example, a painting that was sold or gifted years ago but is still incorrectly listed on the insurance schedule). Unfortunately, the more time passes, the more difficult it will be to retrieve such information.

Individuals working for wealthy families know from experience that managing the family's art collection isn't necessarily straightforward. Requirements to protect the art must be balanced with the lifestyle needs of the family. For example, the ideal environmental conditions (temperature and humidity) for an Old Master may not be comfortable for a dining room where the family spends a lot of time, and so compromises have to be made. Additionally, the way in which the art collection is managed is very much dependent on the family members themselves, who may be involved in the art collection or have different priorities. Both scenarios come with their own challenges.

Whereas domestic employees are experts at running large and complex households, caring for art is a highly specialized skill set. It's worth hiring a collection manager or curator, particularly for large and valuable collections. An individual trained in the issues that come up with the ownership of art will be able to oversee the physical protection of the artwork, maintain the archives to a high standard and consistently feed data into the collection management system. This individual will be able to

Knowing the value of his artwork in relation to the costs associated with maintaining it allows a collector to make smart cost-benefit decisions.

cost-effectively manage the collection and will have the knowledge to hire the right conservators, shippers and insurance brokers. Most importantly perhaps, the collection manager can act as the information hub for all stakeholders tangentially involved in the art collection, liaising on all art-related matters with the insurance broker, domestic and office staff, the family's wealth manager and the family members themselves so that no valuable information gets lost.

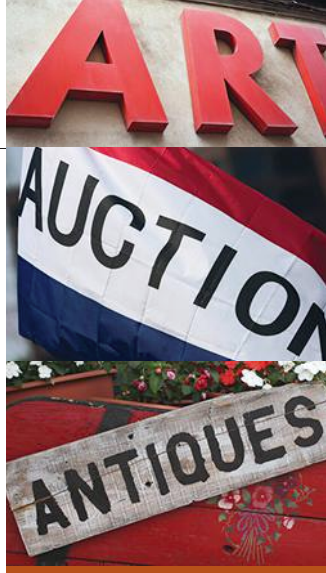
Maintaining the Archives

The most efficient way to maintain collection archives is to store them in one physical location (for example, the family office or the office of the estate manager) and to allocate responsibility for their safekeeping to the collection manager. What should be kept in the archives? First, any paperwork related to the provenance, value and condition of the artwork, such as sales invoices, certificates of authenticity, appraisal documents and condition reports. It's worth digitizing the paperwork, that is, scanning to a computer, to reduce the chances of losing valuable documentation that can be the difference between being able to sell or not sell a painting 20 years from now. Second, as ownership costs for art are high, it's helpful to have an overview of the annual maintenance costs of the collection. Archiving invoices for conservation treatments, appraisals, transports and insurance premiums, among others, will allow the collection manager to collate this information on an annual basis, set next year's budget and reduce maintenance costs when possible.

There's another benefit to a collector understanding the maintenance costs related to a collection or a particular work of art. Knowing the value of his artwork in relation to the costs associated with maintaining it allows a collector to make smart cost-benefit decisions. For example, it's generally accepted knowledge that lending an artwork to a museum exhibition enhances the work's résumé and as a result, hopefully, increases its value. It's hard to guarantee such an increase, let alone put an exact dollar amount on it. Therefore, if the cost of lending a work is prohibitive (collectors usually pay for transport and insurance) and the museum exhibition isn't of the caliber that would likely add value to the artwork, the collector may decide to decline the offer.

Protecting the Artwork

To better protect the physical artwork, it's worth creating a collection management manual. This document should contain, among other items, checklists for domestic staff to use in case of emergencies or last-minute requests from the family. It should contain a list of pre-approved transport companies, both local and international, and instructions on how to condition-check and photograph an artwork before it's handed to a transport company or conservator. Maintenance guidelines for different categories of art (painting, sculpture, silverware, antique furniture) are helpful to have. Yearly inventory and condition checks by the collection manager will ensure that damages or deterioration in condition can be dealt with immediately.



To successfully execute an art management strategy, a collector needs to know what he owns, what it's worth and where it's located.

Where to Start?

To successfully execute an art management strategy, a collector needs to know what he owns, what it's worth and where it's located. Cataloging an existing art collection and reconciling the artwork with the archives—complete or not—is a huge undertaking. It can take months or years to accomplish, particularly if the collection has been amassed over the course of decades. The only way to approach this task successfully is to be highly systematic.

Three sources of information about an art collection exist: (1) the actual physical objects found in the residences and offices of the family (sometimes in storage facilities); (2) the paperwork related to the collection (sales invoices, condition reports), and (3) (old) inventory lists, insurance schedules and appraisal documents. Often, before a collection manager is hired, there have been several attempts to inventory the collection, which are more often than not abandoned as it's so easy to lose track half-way through a cataloging project. Nevertheless, these inventory lists can form helpful snapshots of the whereabouts of particular artwork at a certain point in time.

Cataloging the collection (describing, condition checking and photographing each object) will result in a master inventory list (either on paper or digital) that can be cross-checked against the paperwork in the archives and the (old) inventory lists, appraisal documents and insurance schedules. It's good practice to allocate a unique inventory number to every object found (collection management systems generate these numbers automatically when a new entry is made) so that paperwork and photographs can be easily tied to the object they belong to. High quality photographs are an essential tool to recognize objects that have previously been cataloged incorrectly and to record damages and condition issues.

Collectors often combine such a cataloging exercise with the purchase of a collection management system. This step is smart as it allows data to be entered as and when the cataloging process takes place. The resulting inventory list with images can be used as the basis for an updated appraisal of the collection further down the line. Needless to say, new collectors would benefit from staying on top of their collection and archives from the get-go, particularly if they intend to use their art assets to diversify their financial portfolio or use them as collateral for loans.

Endnotes

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2. *Ibid.*
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Congress Passes Important Law Governing Nazi-Looted Art Claims

Uniform statute of limitations period imposed

By **Amelia K. Brankov** & **Lily Landsman-Roos**

A new law signed by former President Obama on Dec. 16, 2016 addresses the Nazis' theft of hundreds of thousands of artworks, an event that Congress has called "the 'greatest displacement of art in human history.'"[1] That law, the Holocaust Expropriated Art Recovery (HEAR) Act of 2016, establishes a uniform, federal statute of limitations (SOL) for claims seeking the recovery of artwork and certain other objects that were confiscated by the Nazis. Now, these claims may be brought within six years of the claimant's actual discovery of facts giving rise to the claim (including the whereabouts of the object). Before the HEAR Act, the timeliness of such claims was governed by generally more restrictive state laws, which varied from state to state, leading to costly choice-of-law battles, unpredictability and rulings barring meritorious claims. The new statute, which is a sea change in the law applying to Holocaust recovery claims, is expected to alleviate these concerns in ongoing and future disputes.

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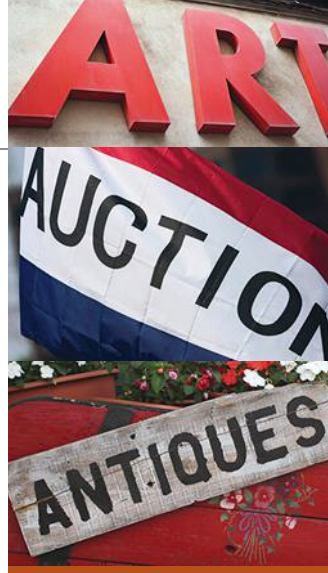
WW II Cultural Appropriation of Artwork

The Nazis' confiscation and destruction of art belonging to Jews and other persecuted groups is well documented. Hitler's systematic effort to purge Germany of "degenerate art" began with the passage of Nuremberg Laws requiring that Jews and certain others declare and inventory their assets.[2] The creation of a special task force to appropriate cultural property followed.[3] In some instances, the government coerced the sale or conveyance of valuable art in exchange for the promise of safe passage out of Nazi-controlled territories.[4] On top of this, individual soldiers—fighting not only for the Nazis but also for the Soviet Union and other nations—are believed to have stolen ad-hoc works of art that they came across in their war travels.[5] These thefts are even harder to trace and were almost certainly never documented.

That this plunder occurred isn't readily disputed. Nonetheless, efforts to return these works to their rightful owners have met only limited success. After the end of WW II, the Allies endeavored to restitute the Nazis' cultural pillage by returning the looted art to its country of origin, with the understanding that each country would internally work to return the properties to their individual owners.[6] The Allies' efforts included creating the Monuments, Fine Arts and Archives program—informally known as the "Monuments Men" and popularized through the major motion picture by the same name. And, since the end of



The thrust of the HEAR Act is that it sets a 6-year SOL running from actual discovery of the claim.

the war, various nations have expressed commitment to the goal of returning Nazi-looted art to its rightful owners.

Despite these restitution efforts, many works stolen by the Nazis were never returned to their rightful owners.[7] The provenance of these works is nearly impossible to track, given that many transfers of ownership weren't documented, and most transactions occurred on the black market.[8]

The federal government has continued to take action to address the recovery of this artwork, including by enacting legislation to establish a presidential advisory commission on Holocaust-era assets and convening a conference with many other nations concerning recovery efforts (the Washington Conference).[9] But, as Congress announced in its report on the HEAR Act, "[d]espite the[] representations and commitments" to fair and just resolution of claims to Nazi-confiscated art, "the United States has not fulfilled its promise to ensure that claims to art lost in the Holocaust are resolved on their merits."[10] As discussed below, the HEAR Act is designed to honor this promise.

Patchwork of State Laws

Previously, claims to recover Nazi-confiscated art faced significant procedural obstacles due in part to the rules governing the timeliness of the claims. Each state treated the most common causes of action for these cases (that is, conversion, replevin, theft and others) differently, applying an assortment of SOL periods and idiosyncratic variations on equitable doctrines related to the passage of time.

Although the laws differed from state to state, they typically barred claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered.[11] In Michigan, for example, a claim for conversion accrues when the "wrong upon which the claim is based was done regardless of the time when damage results."[12] Thus, in *Detroit Institute of Art v. Ullin*, an action to recover a Vincent Van Gogh painting sold in 1938 was barred by the SOL, which accrued and began running on the date of the sale.[13]

In other states, like Ohio and California, the applicable SOL for claims brought to return Nazi-looted art ran from the time the claimant reasonably should have discovered facts giving rise to her claim. In *Toledo Museum of Art v. Ullin*, the plaintiff's claim to recover a Paul Gauguin painting that was conveyed in a forced sale in 1938 was barred by Ohio's SOL.[14] The original owner had sought general restitution immediately following the war. Therefore, the court reasoned, she reasonably should have discovered the facts giving rise to her claim to the Gauguin at that time.[15]

By contrast, New York applied a "demand and refusal" rule, under which the 3-year SOL for claims seeking the return of looted art from a good faith purchaser didn't begin until the claimant made a demand for return of the object, which was refused. To counterbalance this seemingly generous limitations period, New York law gave defendants a laches defense (an equitable doctrine that bars claims based on the claimant's unreasonable delay that unfairly prejudices the defendant), which presented formidable hurdles to plaintiffs' claims under New York law.[16]

The HEAR Act views "art" broadly, offering its benefits to claims to recover a variety of objects.

Holocaust-Specific SOL Ruled Unconstitutional

In *Von Saher v. Norton Simon Museum of Art*, Marei von Saher sought the recovery of a 16th century diptych that was misappropriated from Marei's predecessor-in-interest, a Dutch Jewish art dealer whose firm was coerced into selling it to the Nazis.[17] The diptych later was purchased by collector Norton Simon and is in the collection of the museum in Pasadena, Calif. that's named after him.[18] Marei brought her claim in 2007 under a California statute that extended the SOL until 2010 for actions for the recovery of Holocaust-era art.[19] The museum filed a motion to dismiss the case on the grounds that it was barred by the SOL, arguing that the California statute was an unconstitutional infringement on the federal government's exclusive foreign affairs powers. The trial court agreed, finding that the claim over the painting was a war-related dispute, which was a matter of foreign affairs that only federal, not state, law could address.

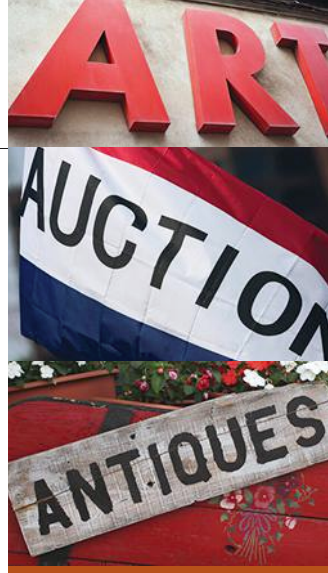
Marei appealed that decision. The U.S. Court of Appeals for the Ninth Circuit agreed that the state statute extending the SOL for Holocaust-era artwork was unconstitutional, but remanded her case to allow her to amend her claim so it might be timely under California's general 3-year SOL for the recovery of personal property.[20] Meanwhile, in light of the Ninth Circuit's decision, the California state legislature amended its general 3-year statute of limitations for personal property such that: (1) the 3-year period would be extended to six years for claims concerning works of fine art, brought against museums, galleries, auctioneers or dealers; and (2) the SOL period wouldn't accrue until "actual discovery" rather than "constructive discovery" of the information supporting a claim of ownership, including the identity and whereabouts of the work. Those amendments also included a retroactivity provision. Although Congress hasn't explicitly connected the HEAR Act to these provisions, the similarities between the two are striking.[21]

The HEAR Act

In light of the *Von Saher* decision, Congress felt that the passage of a federal law governing the timeliness of Nazi-era art restitution claims was necessary. The HEAR Act thus wipes away the patchwork of state laws, adding predictability and uniformity to the law governing these claims. It can be boiled down to five main takeaway points.

1. Six-year SOL. The thrust of the law is that it sets a 6-year SOL running from actual discovery of the claim. Specifically, the HEAR Act provides that all claims to recover art that was lost as a result of Nazi persecution must be commenced within six years of discovery by the plaintiff (or her agent) of: (1) the identity and location of the stolen property, and (2) her possessory interest in the work.[22]

2. Wide net. The HEAR Act casts a wide temporal net, applying to all claims filed through 2026, including future (not-yet-filed) claims, as well as those pending at the time of the law's enactment. For claims currently pending, the HEAR Act resets the SOL clock, so that these claims are deemed to have accrued on Dec. 16, 2016, the date the HEAR Act was signed. If a claimant had knowledge of: (1) the identity and location of the stolen property, and (2) her possessory interest before Dec. 16, 2016, the HEAR Act nonetheless deems



The HEAR Act contains a sunset provision that sets its own expiration date as Jan. 1, 2027—except that it will continue to apply to any case pending on that date.

her claim to have been actually "discovered" (kicking off the 6-year limitations period) on Dec. 16, 2016—regardless of whether the claim would have been time-barred under previously applicable law.

However, there's one important exception to this rule. The HEAR Act won't receive time-barred claims that were actually discovered on or after Jan. 1, 1999 and would have been timely under previously applicable law, but nonetheless weren't asserted for a period of at least six years.

3. Broad definition of "art." The HEAR Act views "art" broadly, offering its benefits to claims to recover a variety of objects. In addition to works of visual art, it defines the covered category of "artwork and other property" as including books, archives, musical objects and manuscripts, sound, photographic and cinematographic archives and media, sacred and ceremonial objects and Judaica.

4. Sunset provision. The HEAR Act won't last forever. It contains a sunset provision that sets its own expiration date as Jan. 1, 2027—except that it will continue to apply to any case pending on that date. Any claims filed on or after Jan. 1, 2027 will be subject to the various laws covering the passage of time that are then in effect.

5. Alternative dispute resolution encouraged. Although the HEAR Act primarily relates to the timeliness of litigation, it also recognizes and encourages other ways to try to resolve art ownership disputes. The last introductory clause of the HEAR Act provides:

> While litigation may be used to resolve claims to recover Nazi-confiscated art, it is the sense of Congress that the private resolution of claims by parties involved, on the merits and through the use of alternative dispute resolution such as mediation panels established for this purpose with the aid of experts in provenance research and history, will yield just and fair resolutions in a more efficient and predictable manner.

While Congress expressed its opinion that mediation may be a superior method of resolving these disputes, the HEAR Act doesn't require putative litigants to engage in any alternative dispute resolution. Thus, it's unclear whether this Congressional guidance will have a significant impact on these claims.

Time Will Tell

The HEAR Act offers a clearer path to claimants' true "day in court" by decluttering threshold issues like choice-of-law and SOL defenses and refocusing courts on the merits of Holocaust recovery claims. Only time will tell whether this law will result in an uptick in these claims, including those that were known but unasserted in New York, as well as ones that would be time-barred under certain state laws and are now revived.

Endnotes

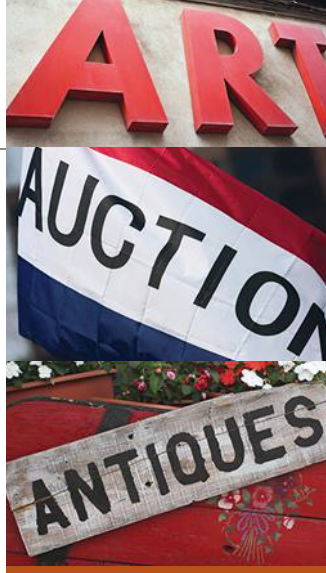
1. Holocaust Expropriated Art Recovery Act of 2016, PL 114-308 (Dec. 16, 2016), 130 Stat. 1524, Section 2(1) (HEAR Act).
2. Jennifer Anglim Kreder, "Analysis of the Holocaust Expropriated Art Recovery Act of 2016," 20 Chap. L. Rev. 1, 2 (2016).
3. *Ibid.*, at p. 3.
4. *Ibid.*, at p. 16.
5. *Ibid.*, at p. 7.
6. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 957–58 (9th Cir. 2010).

7. *Ibid.*, at p. 958.
8. *Ibid.*
9. *Ibid.*
10. S. REP. NO. 114-394, at p. 5 (2016).
11. *Supra* note 1, at Section 2(6).
12. MICH COMP LAWS Section 600.5827.
13. *Detroit Institute of Art v. Ullin*, No. 06-10333, 2007 WL 1016996 (E.D. Mich. March 31, 2007).
14. *Toledo Museum of Art v. Ullin*, 477 F. Supp.2d 802 (N.D. Ohio 2006).
15. *Ibid.*, at pp. 807–8. *See also Von Saher*, *supra* note 6, at p. 969. ("In conclusion, Saher's cause of action began to accrue when she discovered or reasonably could have discovered her claim to the Cranachs, and their whereabouts.")
16. *See Bakalar v. Vavra*, 619 F.3d 136, 141 (2d Cir. 2010) (finding that New York law, rather than Swiss law, applied to a claim to recover work by Egon Schiele, but remanding to the trial court to address the laches defense); *see also In Re Flamenbaum*, 22 N.Y.3d 962, 965 (N.Y. 2013) (claim by German museum seeking to recover work lost during World War II isn't barred by laches; "While the Museum could have taken steps to locate the tablet, such as reporting it to the authorities or listing it on a stolen art registry, the Museum explained that it did not do so for many other missing items, as it would have been difficult to report each individual object that was missing after the war. Furthermore, the Estate provided no proof to support its claim that, had the Museum taken such steps, the Museum would have discovered, prior to the decedent's death, that he was in possession of the tablet").
17. *Von Saher*, *supra* note 6, at p. 959.
18. *Ibid.*, at p. 957.
19. California Code Civil Procedure (CCCP) Section 354.3.
20. CCCP Section 338.
21. After again moving to dismiss Marei's case on other grounds, initially successfully but reversed on appeal, the museum filed a third motion to dismiss. Defendants sought that dismissal on the grounds that the action was time-barred even under the amended CCCP Section 338. The district court disagreed, applying the 6-year SOL period provided by the amended statute and holding that the period resets each time a piece of stolen property is sold. *See* Order Denying Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), *Von Saher v. Norton Simon Museum of Art et al.*, No. 07 Civ. 2866 (JFW) (April 2, 2015), ECF No. 119. After discovery, the museum filed a motion for summary judgment, which the court granted, finding that the Dutch State acquired ownership of the diptych pursuant to Dutch law and therefore the museum had good title to the paintings. *See* Order Granting Defendants' Motion for Summary Judgment, *Von Saher v. Norton Simon Museum of Art*, No. 07-2866-JFW (C.D. Cal. Aug. 9, 2016). Marei has filed a notice to appeal that decision.
22. Although the HEAR Act doesn't explicitly reference laches, it states that it applies "notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time," which suggests that it not only supersedes existing statutes of limitation, but also precludes the applicability of the laches defense. *See also Petrella v. Metro-Goldwyn Mayer, Inc.*, 134 S.Ct. 1962, 1974 (2014) ("[I]n face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief").

SPOTLIGHT

Mellow Yellow

Billie Holiday concert poster (Joe Glaser Presents, 1949), sold for $35,000 at Heritage Auctions' Entertainment & Music Memorabilia Signature Auction on June 24-25, 2016 in Beverly Hills, Calif. According to the *The New York Times,* Holiday didn't reach superstardom during her lifetime; she died at age 44, with only 70 cents in her bank account.



Lending to Museums

Ten issues to discuss with your client before loaning artwork to institutions

By **Azmina Jasani**

Public exhibitions thrive on the mutually beneficial relationship between private collectors and museums. For private collectors, lending artwork to museums confers numerous advantages. These include: sharing the viewing and appreciation of art with the general public who may otherwise not have access to it; promoting the study and scholarship of art; enhancing an artwork's provenance and, in turn, increasing its monetary value; enjoying potential tax benefits; and saving costs on storing and conserving the art. Likewise, museums profit considerably from art loans by private collectors, which afford them the opportunity to exhibit works they may otherwise not have been able to acquire and thereby fulfill their mandate of increasing public access, education and enrichment, while simultaneously allowing them to increase their profile and revenue.

Although it's in the interest of both parties to protect the artwork while on loan, things can and do go wrong. If your client is considering loaning artwork from his collection to an institution, it's imperative for him to take precautionary measures to protect his artwork while it's on loan and limit his exposure. Below are 10 key considerations you should discuss with your client.

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Well-Tailored Loan Agreement

A collector looking to lend artwork must negotiate a personalized and specific loan agreement with the borrowing institution prior to making any loans. This loan agreement is needed primarily because common law principles of bailment, which apply to the lender (bailor) and the borrower (bailee), simply don't afford the lender sufficient protections in the event of loss or damage to the artwork. A bespoke agreement is therefore necessary to expand the borrowing museum's duty of care and to distribute some of the burdens that would otherwise be borne solely by the lender.

A well-documented loan agreement must specify:

- the identity of the parties to the agreement. When the artwork is being loaned to a traveling exhibition that will display it at more than one institution, a collector may want to enter into both a master agreement encompassing all relevant institutions and separate side letter agreements with each institution to cover specifics.
- the term of the loan. The agreement should explicitly state the dates or the period of time during which the artwork will be exhibited. In the context of a traveling exhibition, the agreement should provide the dates the artwork will be exhibited at each venue and, where applicable, the dates the artwork will be kept in storage

(including its location) between exhibitions.
- a description of the artwork being loaned. This includes its title; the name of the artist; the medium or materials used for the artwork; the date of its creation; its size and provenance, the exhibition history and literature information.
- who bears the burden of insuring the artwork and at what value.
- who bears the cost of packing and shipping the artwork from and back to the collector's premises.
- in the case of foreign loans, the applicability of immunity from seizure laws, and who bears the responsibility of customs clearance.
- who bears the burden of condition reporting the artwork and when.
- how the lender would like to be credited.
- what reproduction, photography and film rights have been granted.
- any conservation conditions and pertinent special instructions, including the temperature and how the artwork must be stored and exhibited.
- the parties' right to cancel and/or terminate the loan agreement.
- how notices might be given.
- whether any repair or restoration rights have been granted to the borrowing institution(s).
- the governing law and jurisdiction law clause.

The purpose of a loan agreement is to document the intention of the parties and to reduce the level of uncertainty in the event that problems arise. Hence, the loan agreement should be kept simple and to the point.

Alfonso Ossorio, "Fire and Ice" - Price Realized: $187,000

Insurance

Ensure that the artwork is comprehensively insured for the full duration of the loan period. Before loaning any artwork, collectors must reach an agreement with the borrowing museum on who bears the cost of insuring the artwork while on loan and at what value. They must also agree on who's responsible for taking out the relevant insurance policy. In most cases, museums will bear the costs and responsibility of insuring the artwork for the amount specified by the lender. It's advisable for lenders to seek current valuations of the artwork prior to agreeing to an insurance amount. The typical insurance coverage is nail-to-nail, which protects the lender from the time the artwork is removed from the collector's wall until the time it's unpacked and returned back to the collector at his premises.

The museum's insurance policy must name the lender as the loss payee and should cover for all forms of risks, including terrorism. As prominent museums are unfortunately deemed to be potential targets of terrorism-related activity, it's increasingly common for them to be insured accordingly. Acts of war, government invasion and the like, on the other hand, are unlikely to be covered. Parties should agree on how claims of partial loss of or damage to the artwork will be handled, and the insurance policy should reflect the parties' intention. If the museum is responsible for the insurance cover, it's advisable for the collector to request a copy of the insurance certificate or policy from the museum for his records. If he chooses to rely on his own insurance policy for the duration of the art loan, then he'll generally be required to add the

museum as an additional party or to provide a waiver of subrogation against it to protect the museum in the event of loss. All specifics relating to insurance must be documented in the loan agreement.

International Loans

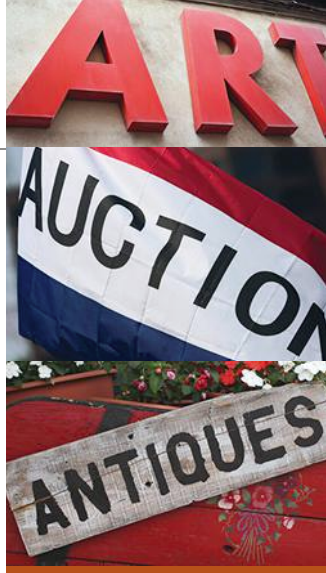
Check whether the jurisdiction where the borrowing museum is based has appropriate immunity from seizure laws. Immunity from seizure laws exists to protect cultural objects on loan from foreign jurisdictions to public institutions for the purpose of temporary exhibition. In the event that a claim is asserted over the loaned artwork, anti-seizure legislation guarantees that the work can't be seized or subjected to judicial process. Such laws were introduced to assuage the fears of collectors that loaning to foreign institutions might expose their art to the threat of judicial seizure.

The United States enacted immunity from seizure legislation in 1965 and was the first country to do so.[1] Many European countries began adopting anti-seizure legislation in the 1990s and 2000s. The United Kingdom passed its immunity from seizure laws in 2007,[2] after the highly publicized seizure of important Russian-owned works by Picasso, Matisse and Cezanne by customs authorities in Switzerland, who were acting on a court order obtained by a private company for unpaid debts by the Russian government. Confiscating the paintings was just one of the many ways in which the company sought to collect its unpaid debt from the Russian government. After being prompted by the Swiss federal authorities, the Swiss Council ordered that the paintings be returned to Russia. To ensure that collectors aren't discouraged from lending to their museums, several countries have adopted anti-seizure laws, but there still remains a long list of countries without any such legislation.

Before agreeing to make a foreign loan, then, it's important for collectors to ascertain whether the country where the borrowing museum is based has enacted appropriate anti-seizure laws and if so, whether they afford sufficient levels of protection. It's also important for the collector to consider whether the artwork at issue is likely to attract claims.

As mentioned, not all countries have immunity from seizure laws, and those that do have no uniform criteria for enforcement. Each country's anti-seizure laws are unique: Some governments limit the types of works that are protected, while others control the number and types of museums and public institutions who benefit from such protection. Some countries require an application form to be submitted on which a determination is made, while others demand that public notices of the upcoming exhibition and the pertinent artwork's appearance therein be issued in the paper before immunity can be granted. It's therefore imperative to confer with an attorney who practices in the applicable jurisdiction and obtain the necessary clearance prior to making any loan.

Obtain customs clearance. The specific customs regulations of the country where the borrowing museum is based must also be carefully reviewed. The responsibility for seeking customs clearance for import and export usually rests with the borrowing institution, and all such clearance must be sought prior to shipment. Collectors must ensure that any loan agreement they sign makes it clear that all transport and customs procedures pertaining to the loaned artwork must be carried out under the supervision of the collector or his representative. A collector may wish to appoint a courier to act as his representative, who can be physically present at all pertinent times and oversee the transport, installation and any storage of the artwork while on loan.



To maintain confidentiality and avoid uninvited exposure, many collectors who elect to remain anonymous opt for the phrase "Private Collection" or the like.

Agree on the applicable law and jurisdiction clause. Disputes are inevitable. Even the best of relationships can sour and result in arduous litigation. To avoid conflict over the question of which country's law applies and which country's court should hear the dispute and to avoid incurring substantial legal fees even before litigating on the merits, collectors and museums must reach an agreement on the applicable law and jurisdiction clause that applies to the loan, and their agreement must be recorded in the loan agreement.

Check whether any government insurance will be provided. Buying insurance cover for an international art loan can get expensive. Certain institutions are therefore entitled to make use of their government's insurance policies when borrowing objects of cultural significance. For example, the governments of the United States[3] and the United Kingdom[4] have endeavored to facilitate the lending of art by offering indemnity insurance to specific institutions provided certain criteria are met. However, often, a government's indemnity insurance isn't as comprehensive as may be necessary. We therefore advise collectors to carefully review the scope of any government insurance and, if necessary, ask the borrowing institution to purchase its own policy to cover liabilities that may be outside the scope of a government's indemnity insurance scheme. The responsibility of the borrowing museum to purchase this additional insurance cover must also be carefully recorded in the loan agreement.

Be mindful of international tax laws. Attorneys advising collectors must educate themselves on the tax laws of the host country to confirm that making the loan won't render their clients liable for any taxes there. In the event that a collector unexpectedly passes away while his artwork is on loan in a foreign jurisdiction, for example, the artwork may suddenly become subject to estate tax. Countries that value and encourage art and cultural philanthropy—like the United States[5] and the United Kingdom[6]—have carved out appropriate exceptions, but this may not always be the case.

Due Diligence

Make sure to carry out appropriate due diligence on the borrowing institution. Not all museums are equal in reputation and prestige. Collectors can inadvertently reduce the value and diminish the importance of their artwork by loaning it to a poorly run institution or one with a complicated history or dubious ties, which can in turn deter future exhibitors of the work. It's therefore critical to verify the reputation of the borrowing museum and ensure that your research is current and up to date.

Before parting with their cherished asset, collectors should inspect the security measures and protocols in place at the borrowing museum and refrain from solely relying on a museum's reputation and prestige. Collectors and their advisors may not always be able to unearth every detail in relation to a museum's security, but it's imperative that they investigate and ask the right questions.

Identification Decisions

To avoid misunderstandings and potentially irreversible damage, collectors must inform the museum exactly how they wish to be identified in the exhibition catalog and on the exhibition label, details of which should also be recorded in the loan agreement. To maintain confidentiality and avoid uninvited exposure, many collectors who elect to remain anonymous opt for the phrase "Private Collection" or the like. Collectors must carefully weigh the pros and cons of literally going public with their art.

Packing and Shipping

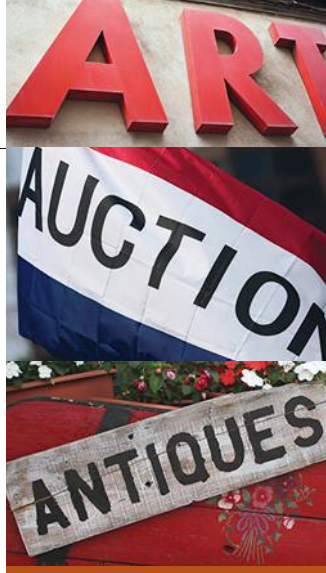
Carefully manage and oversee the packing and shipping of the artwork. The loan agreement must specify the party responsible for arranging the packing and shipment of the artwork and bearing the costs arising therefrom. The borrowing entity usually bears the cost of packing and shipping. The loan agreement must also outline all pertinent dates on which the artwork will be shipped and delivered. The biggest risk of loss or damage to the artwork is while it's being packed, crated and transported from one location to another. It's therefore imperative that collectors only entrust their artwork to reputable fine art shippers, who are experienced in transporting fragile and expensive works of art. There are plenty of horror stories that come to mind, even one in which a logistics company mistook an artwork for rubbish and shredded it with the packing material. It's also important for collectors to ascertain the security protocols of the fine art shipper's storage facility. Most fine art shippers don't carry sufficient insurance, and it's vital that the applicable insurance policy sufficiently covers any loss or damage to the artwork while it's being packed, crated and shipped. As previously mentioned, some collectors may wish to appoint couriers who are assigned to oversee the packing, crating, shipping and installation process on their behalf.

Condition Reports

Professionals must prepare a condition report recording the condition of the artwork each time it's transported from one location to another. At a minimum, a condition report must be prepared immediately prior to packing and shipping the artwork from the collector's premises to the museum, at the time of unpacking at the museum, repacking and shipping back to the collector and unpacking at the collector's premises. A condition report should also be prepared if the artwork is placed in storage. Condition reports are essential in determining the point of damage to the artwork and remove any uncertainty around the question.

Special Conditions and Instructions

The collector must specify whether any atmospheric conditions need to be maintained by the museum while the artwork is being transported, stored and exhibited. He also must provide museums with any special installation instructions that may be applicable, and all such specifications and instructions must be documented in the loan agreement. Examples of special conditions or instructions include noting whether any direct sunlight can reach the work, specifying the temperature of the environment in which the work will be stored and exhibited and/or indicating the level of humidity and any appropriate levels of artificial and natural lighting. The loan agreement must also specify whether any special frames, nails or screws are to be used or avoided when installing the works and any special care that needs to be taken during installation.



If the borrowing institution undertakes any emergency repair or restoration, collectors must ask for full details of the work undertaken in writing.

Reproduction Rights

The museum may wish to obtain photographs of the loaned artwork for use in their exhibition catalog and for other promotional materials. It may also wish to reproduce the image of the loaned artwork on mugs, t-shirts, tote bags, pens and other items sold in the museum's gift shop for commercial purposes. Before any such use is made, the museum must seek permission from the owner of the artwork, and if the artwork is under existing copyright, it also needs permission from the copyright owner of the artwork. An owner of an artwork has the right to the work itself, but doesn't own the copyright that subsists in the work. The artist, the artist's estate or an artist's collecting society (which may manage a deceased artist's intellectual property rights) usually owns the copyright in an artwork. In some jurisdictions, like the United Kingdom, copyright also subsists in the image of the artwork and accordingly, depending on the terms of hire, permission for use may also be needed from the copyright holder of the image.

The loan agreement must accurately reflect the reproduction rights granted to the museum by the owner and must explicitly state that the museum has the responsibility of seeking the appropriate consent from the copyright owner of the artwork and, where applicable, the image.

Repair or Restoration Rights

We advise collectors not to grant museums the right to repair or restore the artwork without their prior written consent, except in emergencies in which immediate action must be taken to protect the artwork or the health and safety of the visiting public and/or the museum staff. If the borrowing institution undertakes any emergency repair or restoration, collectors must ask for full details of the work undertaken in writing. As with everything else, these expectations must be carefully outlined in the loan agreement.

Weigh Costs and Benefits

Lending artwork, especially to international museums, isn't without risks. And, although art loans should be encouraged, your clients must carefully weigh the costs and benefits involved before parting with their asset. If they choose to lend, collectors must ensure that all necessary precautions have been taken and the pertinent issues highlighted above are considered to minimize their exposure and maximize the security and value of their artwork.

Endnotes

1. 22 U.S.C. 2459. *See also* "Immunity from Judicial Seizure Applications—Cultural Objects," U.S. Department of State, *www.state.gov/s/l/c3432.htm* ("The U.S. Department of State administers the Immunity from Judicial Seizure statute, which protects from seizure or other judicial process certain objects of cultural significance imported into the United States for temporary display or exhibition").
2. Tribunals, Courts and Enforcement Act 2007, Part 6, Protection of Cultural Objects on Loan, Sections 134-38.
3. *See* Arts and Artifacts Indemnity Act of 1975.
4. *See* National Heritage Act 1980, Section 16.
5. *See* Internal Revenue Code, Section 2105(c).
6. See Inheritance Tax Act 1984, Section 5.

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