THE CONFLICTING OBLIGATIONS OF MUSEUMS POSSESSING NAZI-LOOTED ART

Abstract: During the Nazi regime, much of Europe's art was pillaged. This Note addresses the conflicts faced by museums when an original owner or heir of artwork brings an ownership claim against a piece in the museum's collection. Because of their fiduciary duties, museums are encouraged to protect trust assets. Museums can protect their assets from ownership claims with statutes of limitations and laches defenses, which grow stronger with the passage of time. On the other hand, professional codes of conduct encourage museums to work with heirs when there is a claim of ownership to find a mutually agreeable solution. This Note argues that because museum trustees are given discretion, it is reasonable to follow professional ethical guidelines and thus fulfill their duty of care. When the ownership claim is valid, museums should follow the ethical guidelines and work with the heirs to find an amenable solution. When the ownership claim is invalid, however, museums are under no ethical obligation to forego litigation and work with the heirs. If museums decide to pursue litigation when the claim is valid, though, then that behavior is unethical.

Introduction

It is estimated that between 1938 and 1945, the Nazis looted between one-fourth and one-third of Europe's art.[1] Although pillaging during war is common, the Nazis instituted a systematic, official policy to encourage it.[2] Their purpose was two-fold: to repatriate German art and put that "worthy" European art in a museum in Adolph Hitler's hometown of Linz, Austria, and to use "degenerate" works as bargaining pieces to trade for art deemed worthy of possession.[3] This policy,

[1] David Wissbroecker, *Six Klimts, a Picasso, & a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DePaul-LCA J. Art & Ent. L. & Pol'y 39, 40 (2004).

[2] Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 Willamette J. Int'l L. & Disp. Resol. 243, 243–44 (2006).

[3] *See* Wissbroecker, *supra* note 1, at 40–41; Sue Choi, Comment, *The Legal Landscape of the International Art Market After* Republic of Austria v. Altmann, 26 Nw. J. Int'l L. & Bus. 167, 168 (2005). Artists that the Nazis supported included Vermeer, Rembrandt, Van Eyck, and Dürer, whereas degenerate art included the artists Van Gogh, Chagall, and Picasso, as well as any art that depicted Jews or criticized Germany. Choi, *supra*, at 168.

one of many ways the Nazis disenfranchised and persecuted the Jews,[4] resulted in laws that enabled the government to confiscate art collections of German and Austrian Jews.[5]

By the time the Allies were approaching, the Nazis had hidden the stolen works in places such as castles and mines.[6] Because of this widespread dispersal of art, as well as its misclassification, improper storage, and subsequent looting by soldiers on both sides, the Allied forces failed to recover many works.[7] Additionally, the Soviet Union had an official policy of keeping what they discovered, thus adding to the problem of dispossession.[8] Only half of the looted art has been returned to the original owners or their heirs,[9] and more than 100,000 works of art stolen by the Nazis are still missing.[10]

The stolen art is a symbol of Nazi destruction; thus, beyond vindicating property rights, recovering these objects is an equally powerful act of justice.[11] Over the past ten years, international governments and museums have increasingly recognized the need to return wrongly taken cultural property to its rightful owners.[12]

There are often two innocent victims in cases of Nazi-looted art: the original owner, or the original owner's heirs, and the good faith purchaser.[13] Original owners can assert legal claims of ownership and

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[4] Owen C. Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 DePaul-LCA J. Art & Ent. L. & Pol'y 27, 30 (1999).

[5] Benjamin E. Pollock, Comment, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-looted Art Claims*, 43 Hous. L. Rev. 193, 196 (2006).

[6] *Id.* at 197.

[7] Alexis Derrossett, Note, *The Final Solution: Making Title Insurance Mandatory for Art Sold in Auction Houses and Displayed in Museums That Is Likely to Be Holocaust-looted Art*, 9 T.M. Cooley J. Prac. & Clinical L. 223, 231 (2007); Pollock, *supra* note 5, at 197–98.

[8] Laura Fielder Redman, *The Foreign Sovereign Immunities Act: Using a "Shield" Statute as a "Sword" for Obtaining Federal Jurisdiction in Art and Antiquities Cases*, 31 Fordham Int'l L.J. 781, 783 (2008).

[9] Choi, *supra* note 3, at 170.

[10] Kaye, *supra* note 2, at 244. American and Russian soldiers also contributed to the theft of art during this time. Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 Duke L.J. 955, 960 & n.19 (2001) (pointing to the thefts by American soldiers in *DeWeerth v. Baldinger* and by American occupation forces in *Kunstsammlungen Zu Weimar v. Elicofon*).

[11] Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. Rich. L. Rev. 1, 165 (2000) (citing Eric Gibson, *De Gustibus: The Delicate Art of Deciding Whose Art It Is*, Wall St. J., July 16, 1999, at W11).

[12] *See* Kaye, *supra* note 2, at 244.

[13] *E.g.*, Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 Fordham L. Rev. 49, 51 (1995); Reyhan, *supra* note 10, at 961.

good faith purchasers can assert affirmative defenses.[14] Good faith purchasers risk loss of their artwork if their affirmative defenses fail.[15] When the good faith purchaser is a museum, its fiduciary duties potentially conflict with its ethical responsibilities to deal with a Nazi-looted art claim.[16] On one hand, fiduciary duties encourage the museum to maintain trust assets and thus not return the artwork.[17] On the other hand, ethical responsibilities encourage the museum to work with the heirs to restitute artwork taken illegally.[18] Bernd Neumann, Germany's Federal Commissioner for Culture, summarizes the museums' dilemma:

> It's understandable that [museum directors] would like to keep their collections as complete as possible. They've restored their pieces and cared for them over the decades. They want to have something to offer the public. But their behavior stands in contradiction to the moral responsibility that we have, which is without doubt more important.[19]

This Note addresses this conflict faced by museums and argues that when ethical responsibilities are viewed as informing the fiduciary duty, museums can fulfill both obligations simultaneously.[20]

Part I provides an introduction to the legal claims of heirs who seek to recover art seized by Nazis, and reviews the factual issues they must prove and their various causes of action.[21] Part II explains how

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[14] *See, e.g.*, Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 809 (N.D. Ohio 2006); Wertheimer v. Cirker's Hayes Storage Warehouse, Inc., 752 N.Y.S.2d 295, 296 (Sup. Ct. 2002).

[15] *See, e.g.*, O'Keeffe v. Snyder, 416 A.2d 862, 867 (N.J. 1980); Restatement (Second) of Torts § 229 (1965).

[16] *Compare* Unif. Trust Code § 811 (amended 2005), 7C U.L.A. 608 (2000) (calling for the defense of claims against the trust), *and* 3 Austin Wakeman Scott et al., Scott and Ascher on Trusts § 17.10 (5th ed. 2007) (same), *with* Ass'n of Art Museum Dirs., Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era (1933–1945) §§ II.D, II.E (1998), *available at* http://www.aamd.org/papers/guideln.php[hereinafter Task Force Report] (calling on museums and their trustees to resolve claims equitably).

[17] *See, e.g.*, Unif. Trust Code § 809, 7C U.L.A. 606 (control and protection of trust property).

[18] *See, e.g.*, Task Force Report, *supra* note 16, §§ II.D, II.E.

[19] *There's No Point Trying to Duck*, Spiegel Online Int'l, Dec. 3, 2008, http://www.spiegel.de/international/germany/0,1518,594232,00.html.

[20] *See, e.g.*, Restatement (Third) of Trusts, § 87 (2007); Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 Cardozo J. Int'l & Comp. L. 409, 444 n.151 (2003); *see also infra* notes 290–352 and accompanying text.

[21] *See infra* notes 26–60 and accompanying text.

museums are frequently protected from heirs' claims because of statutes of limitations and the defense of laches.[22] Part III discusses museums' fiduciary obligations and how duties of loyalty and care interact with the acquisition and deaccession of art, potentially further encouraging museums to rely on strong or absolute defenses.[23] Part IV describes the apparent conflict between museums' use of legal defenses to maintain possession of stolen artwork and their ethical responsibilities promulgated by national and international organizations.[24] Finally, Part V looks at the discretion of museums and suggests that this discretion allows them to satisfy their fiduciary duties by following ethical considerations, in an effort to show museums how to proceed when faced with Nazi-looted art.[25]

I. Legal Claims of the Heirs

Holocaust-era art restitution remained slow for about 40 years, but recently increased with renewed interest on the part of heirs seeking to reclaim their family's art.[26] Several factors have increased the number of claims of Nazi-looted art: heightened scholarly and journalistic interest, declassification of war documents (especially after the Cold War), technological advances, and increases in art prices.[27]

Litigation regarding Nazi-looted art is often complex and expensive.[28] Because of these burdens, parties often decide to settle.[29] The

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[22] *See infra* notes 61–162 and accompanying text.

[23] *See infra* notes 163–229 and accompanying text.

[24] *See infra* notes 230–289 and accompanying text.

[25] *See infra* notes 290–352 and accompanying text.

[26] Derrossett *supra* note 7, at 232. *See generally* Hector Feliciano, The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art (1997) (tracking the Nazi theft of five art collections); Lynn H. Nicholas, The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War (1994) (accounting the looting of art in Europe during World War II and efforts to recover the lost items).

[27] Redman, *supra* note 8, at 784–85; Derrossett, *supra* note 7, at 232–33.

[28] *See* Bazyler, *supra* note 11, at 183. *United States v. Portrait of Wally* is often used as an example of how drawn-out and complicated these cases can be: the case originated in 1998 and is still undecided while the painting remains in U.S. custody. *See* 663 F. Supp. 2d 232, 246 (S.D.N.Y. 2009) (explaining the procedural history in an opinion and order denying motions for summary judgment and ordering a trial); Kaye, *supra* note 2, at 261; Shira T. Shapiro, Note, *How* Republic of Austria v. Altmann *and* United States v. Portrait of Wally *Relay the Past and Forecast the Future of Nazi Looted-Art Restitution Litigation*, 34 Wm. Mitchell L. Rev. 1147, 1159 (2008).

[29] *See* Bazyler, *supra* note 11, at 166, 171; Int'l Found. for Art Research, Case Summary: Goodman and Gutmann v. Searle, http://www.ifar.org/case_summary.php?docid=1179627363 (last visited Mar. 22, 2010) [hereinafter IFAR Goodman case summary]. *Goodman v. Searle* was

facts of the dispute between Thomas Bennigson and Marilynn Alsdorf over a Pablo Picasso painting stolen during World War II are explained by a 2004 U.S. District Court for the Northern District of Illinois decision.[30] As will be seen throughout the remainder of this section, this dispute illustrates how heirs get involved, what heirs must do before bringing a claim, and what they pursue once they decide to litigate.[31]

A. *What Heirs Must Do*

Heirs wishing to litigate looted artwork claims have three core concerns: locating the artwork, establishing the right to make a claim, and overcoming difficulties created by the passage of time.[32]

1. Locating Artwork

Growing public interest in Nazi-looted art, along with newly released records and documents, have helped bring stolen artwork to light.[33] Additionally, online databases prove to be a useful source for finding stolen works.[34] In *Alsdorf v. Bennigson*, the Art Loss Register ("ALR") discovered that the Germans stole the disputed Picasso painting and notified the original owner's heir.[35]

2. Establishing Rightful Ownership

After locating the artwork, parties must prove legal standing to assert a claim against the current possessor.[36] As the years pass, it is increasingly difficult, if not impossible, for the original owners of the

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the first case involving Nazi-looted art to reach trial. Bazyler, *supra* note 11, at 166. On the eve of trial, the case ultimately settled with the parties agreeing to share ownership of the painting; the current possessor donated his one-half interest to the Art Institute of Chicago and the Art Institute purchased the remaining one-half interest from the heirs. *Id.* at 170. The next case involving Nazi-looted art to reach litigation was *Rosenberg v. Seattle Art Museum.* 42 F. Supp. 2d 1029, 1031 (W.D. Wash. 1999); Bazyler, *supra* note 11, at 171. After the museum received verification that the Nazis stole the art from Paul Rosenberg, the museum agreed to return the painting to the Rosenberg family. Bazyler, *supra* note 11, at 174.

[30] *See* Alsdorf v. Bennigson, No. 04 C 5953, 2004 WL 2806301, at *1–*3, *11 (N.D. Ill. Dec. 3, 2004).

[31] *See Alsdorf*, 2004 WL 2806301, at *1–*3.

[32] Kaye, *supra* note 2, at 252; Howard N. Spiegler, *Recovering Nazi-Looted Art: Report from the Front Lines*, 16 Conn. J. Int'l L. 297, 299 (2001).

[33] Kaye, *supra* note 2, at 255–56.

[34] Kiesha Minyard, Note, *Adding Tools to the Arsenal: Options for Restitution from the Intermediary Seller and Recovery for Good-Faith Possessors of Nazi-Looted Art*, 43 Tex. Int'l L.J. 115, 117 (2007). Common examples are the Art Loss Register and museums' own websites. *Id.*

[35] 2004 WL 2806301, at *1–*2.

[36] *See* Kaye, *supra* note 2, at 256.

painting to bring these claims because the owners are simply too old or no longer living.[37] Consequently, claims are brought by more-distant heirs who are less likely to have direct knowledge of the painting.[38] This lack of close contact with the disputed artwork may lead to innocent mistakes in identification: aesthetically similar paintings may be confused, and in fact, no claim may exist at all.[39] Heirs may use family records, photos, insurance policies, and government records to establish a rightful claim.[40]

In *Alsdorf*, ALR established the ownership by Carlota Landsberg with evidence that she was compensated for the loss of the painting at the hands of the Nazis in 1969 (on the condition that such payment would not alter her right to claim the painting if it were later located).[41] Additionally, ALR found a letter from art dealer Justin Thannhauser to Landsberg saying the Picasso painting that she entrusted to his care was stolen in 1940.[42] It also found a picture of the painting in Thannhauser's apartment and another photograph of the painting with the words "Stolen by the Germans" and "Carlota Landsberg" written on the back.[43]

It is a well-established tenet of property common law that a thief can never obtain or convey good title.[44] This is true even if a good faith purchaser subsequently purchases the stolen property.[45] The true owner of stolen Nazi art commonly faces a good faith purchaser in the battle over who is the rightful owner.[46] In order to prevail against a

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[37] *Id.*

[38] *Id.*

[39] *See* Shirley Foster, *Prudent Provenance—Looking Your Gift Horse in the Mouth*, 8 UCLA Ent. L. Rev. 143, 163 (2001).

[40] Kaye, *supra* note 2, at 256.

[41] 2004 WL 2806301, at *2.

[42] *Id.*

[43] *Id.* at *1.

[44] *E.g.*, O'Keeffe v. Snyder, 416 A.2d 862, 867 (N.J. 1980); Menzel v. List, 267 N.Y.S.2d 804, 819 (Sup. Ct. 1966); Restatement (Second) of Torts § 229 (1965).

[45] *E.g.*, Schrier v. Home Indem. Co., 273 A.2d 248, 250 (D.C. 1971) ("[A] possessor of stolen goods, no matter how innocently acquired, can never convey good title."). A good faith purchaser is one who buys without notice of facts that would encourage an ordinarily prudent person to inquire about the seller's title. 77 Am. Jur. Proof of Facts 3d *Proof of a Claim Involving Stolen Art or Antiquities* § 2 (2008).

[46] *See* Am. Jur. Proof of Facts, *supra* note 45, § 2. Various heirs of the original owner may also battle each other for ownership. *See* United States v. Portrait of Wally, No. 99 Civ. 9940(MBM), 2002 WL 553532, at *31 (S.D.N.Y. Apr. 12, 2002).

good faith purchaser, a true owner must prove both ownership and theft.[47]

3. Overcoming Difficulties Created by the Passage of Time

Once heirs prove their ownership right to the painting, they are in a stronger legal position than the good faith purchaser who possesses a stolen painting.[48] This superior position, though, may not be asserted if barred by the statute of limitations or laches.[49]

The passage of time is a major problem in restitution cases.[50] Not only does it highlight the issue of statute of limitations and the defense of laches, but it can also make the heirs' search to establish ownership more difficult.[51] More than 60 years after the end of World War II, fewer and fewer generations of witnesses are accessible, making oral history and evidence further removed and potentially less credible.[52]

B. *Causes of Action*

Once heirs have evidence that proves rightful ownership, generally they will bring a cause of action for replevin or conversion.[53] In the *Alsdorf* case, the heir retained counsel and brought an action for replevin after settlement negotiations failed.[54]

Replevin is an action to repossess personal property taken wrongfully.[55] Before a claim for replevin arises, the person seeking reposses-

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[47] Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal*, 73 Brook. L. Rev. 155, 200 (2007). In this situation, the original owner of a piece of art can recover it even if it has exchanged hands many times—because it was originally stolen. Derrossett, *supra* note 7, at 237.

[48] Reyhan, *supra* note 10, at 969.

[49] *See id.* Part II offers an in-depth treatment of these defenses. *See infra* notes 61–162 and accompanying text.

[50] *See* Shapiro, *supra* note 28, at 1174.

[51] *See* Kreder, *supra* note 47, at 199; Derrossett, *supra* note 7, at 241.

[52] *See* Shapiro, *supra* note 28, at 1174–75.

[53] *See, e.g.*, Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 290–91 (7th Cir. 1990); Wertheimer v. Cirker's Hayes Storage Warehouse, Inc., 752 N.Y.S.2d 295, 296 (Sup. Ct. 2002); *Menzel*, 267 N.Y.S.2d at 806.

[54] 2004 WL 2806301, at *3. Ultimately, this case did settle: Alsdorf paid $6.5 million to the heir in order to have clear title to the painting. Int'l Found. for Art Research, Case Summary: Bennigson v. Alsdorf; Alsdorf v. Bennigson; United States v. One Oil Painting Entitled *Femme En Blanc* by Pablo Picasso, http://www.ifar.org/case_summary.php?docid=1183048498 (last visited Mar. 22, 2010).

[55] Vineberg v. Bissonnette, 529 F. Supp. 2d 300, 306 (D.R.I. 2007), *aff'd*, 548 F.3d 50 (1st Cir. 2008); Black's Law Dictionary 1325 (8th ed. 2004).

sion must first make a demand on the good faith purchaser to return the property in dispute, which the purchaser must then refuse.[56] In summary, for a valid cause of action of replevin, heirs must prove ownership, right to possession, detention by the defendant, demand and refusal, and damages.[57]

Another common cause of action for owners dispossessed of art is conversion, which allows them to recover the equivalent monetary value of the work.[58] Conversion is an action that requires plaintiffs to prove a right to possess the property at the time of conversion, the defendants acted wrongly or disposed of the plaintiffs' property right, and the plaintiffs suffered damages.[59] Because what is considered conversion is often in dispute, it is unlikely a court will resolve this cause of action through summary judgment.[60]

II. Status of the Law Protecting Museums

When museums are faced with a claim by an heir to Nazi-era looted art, they most often utilize the affirmative defenses of statute of limitations and laches.[61] The success of these defenses, even in cases not involving museums, demonstrates how the passage of time works increasingly to protect a good faith purchaser.[62]

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[56] 66 Am. Jur. 2d *Replevin* § 1 (2001); Barbara J. Tyler, *The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis in World War II?*, 30 Rutgers L.J. 441, 456–57 (1999).

[57] *E.g.*, *Autocephalous*, 917 F.2d at 290 (plaintiff must establish right to possession, the unlawful detention of the property, and the wrongful possession of the property by the defendant); Am. Jur. Proof of Facts, *supra* note 45, § 42.

[58] Patty Gerstenblith, Art, Cultural Heritage, and the Law: Cases and Materials 422 (2d ed. 2008); Am. Jur. Proof of Facts, *supra* note 45, § 26; *see Portrait of Wally*, 2002 WL 553532, at *23. The *Restatement (Second) of Torts* defines conversion as "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." Restatement (Second) of Torts § 222A (1965).

[59] Am. Jur. Proof of Facts, *supra* note 45, § 42; *see, e.g.*, Restatement (Second) of Torts §§ 222A, 237, 244.

[60] Am. Jur. Proof of Facts, *supra* note 45, § 26.

[61] *See, e.g.*, Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 809 (N.D. Ohio 2006); Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 431 (N.Y. 1991).

[62] *See, e.g.*, Detroit Inst. of Arts v. Ullin, No. 06-10333, 2007 WL 1016996, at *1 (E.D. Mich. Mar. 31, 2007); Wertheimer v. Cirker's Hayes Storage Warehouse, Inc., 752 N.Y.S.2d 295, 296 (Sup. Ct. 2002).

A. *Statute of Limitations*

The passing of the statute of limitations is crucial when dealing with Nazi-era stolen artwork because U.S. common law does not allow good title to pass to stolen works of art until the statute of limitations on the initial theft expires.[63] Because the original owner can prevail on a claim if theft is shown, the good faith purchaser is only protected if the statute of limitations bars the claim.[64]

There are competing interests at stake in having a statute of limitations.[65] A statute of limitations gives heirs time to reclaim their art, encouraging people to come forward with claims before "evidence has been lost, memories have faded, and witnesses have disappeared."[66] But another purpose of the statute of limitations is to give a good faith purchaser some repose.[67] Fairness dictates that good faith purchasers need not worry indefinitely that original owners will come along to reclaim their art.[68] Additionally, statutes of limitations promote judicial economy and encourage timeliness if suits are brought.[69]

The time in which one can bring a claim for a stolen work starts to run when the cause of action accrues.[70] There are generally two options as to when the statute of limitations begins to run depending on whether the state adheres to a "discovery rule" or a "demand and refusal rule."[71] As will be seen in several case examples, museums and individu-

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[63] Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes over Title*, 31 N.Y.U. J. Int'l L. & Pol. 15, 16 (1998); *see, e.g.*, *Toledo Museum of Art*, 477 F. Supp. 2d at 806.

[64] Kreder, *supra* note 47, at 200. In contrast to the American approach, civil law nations tend to favor the good faith purchaser. *Id.*

[65] *See, e.g.*, Stephen E. Weil, *The American Legal Response to the Problem of Holocaust Art*, 4 Art Antiquity & L. 285, 291 (1999).

[66] Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 349 (1944); Weil, *supra* note 65, at 291.

[67] *See* Weil, *supra* note 65, at 291.

[68] *See id.*

[69] Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 Yale L.J. 2437, 2455 (1994). In the art context, there is a further concern for the viability of title and stability of the art market. *E.g.*, Reyhan, *supra* note 10, at 1028.

[70] *E.g.*, Hoelzer v. City of Stamford, 933 F.2d 1131, 1136 (2d Cir. 1991); Lerner, *supra* note 63, at 18.

[71] Am. Jur. Proof of Facts, *supra* note 45, § 29. These rules help to mitigate some of the harshness towards the original owner which occurs when the statute of limitations begins to run, or accrue, when the possessor acquires stolen property. *See* Lerner, *supra* note 63, at 19–20.

als holding stolen artwork have used statutes of limitations with great effectiveness to maintain ownership.[72]

1. Discovery Rule

Most states follow a "discovery rule," which means that the statute of limitations begins to run once the true owner knows or should know the correct person or institution to sue, that is, the current possessor of the art.[73] In 1980, the Supreme Court of New Jersey held in *O'Keeffe v. Snyder* that the discovery rule applies to an action for replevin of a painting.[74] The paintings at issue were allegedly stolen from Georgia O'Keeffe in 1946.[75] When she learned of their whereabouts in 1976, she demanded their return.[76] Using the discovery rule, the court found that O'Keeffe's cause of action accrued "when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings."[77] The court remanded the case to determine if O'Keeffe exercised due diligence in her search for the paintings.[78]

Courts can look at several factors to determine if the original owner can rely on the discovery rule, such as whether there were ways to notify the art world of the theft, and ways in which a purchaser would know the art had been stolen.[79] Essentially, though, this rule requires

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[72] *See, e.g.*, Orkin v. Taylor, 487 F.3d 734, 742 (9th Cir. 2007); *Toledo Museum of Art*, 477 F. Supp. 2d at 809.

[73] *E.g.*, O'Keeffe v. Snyder, 416 A.2d 862, 869 (N.J. 1980); Kreder, *supra* note 47, at 199.

[74] 416 A.2d at 870.

[75] *Id.* at 865.

[76] *Id.* at 866.

[77] *Id.* at 870; *see* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 281, 288–90 (7th Cir. 1990) (holding that an action by the Republic of Cyprus and Church of Cyprus to recover stolen mosaics was timely under the discovery rule because the Republic of Cyprus exercised due diligence by contacting international organizations, scholars, museums, collectors, and more, and its cause of action did not accrue until it learned of the mosaics' location). When determining when the owner should know who possesses the stolen painting, courts seem to give weight to the specific resources of the owner, such as those of a museum or art collector versus an average individual. Erisoty v. Rizik, No. Civ. A. 93-6215, 1995 WL 91406, at *13–*14 (E.D. Pa. Feb. 23, 1995); Reyhan, *supra* note 10, at 993. Additionally, the recovery efforts do not have to be exhaustive, but reasonable. *See Erisoty*, 1995 WL 91406, at *14.

[78] *O'Keeffe*, 416 A.2d at 870.

[79] *Id.* Other factors include:

> (1) the nature of the injury; (2) the availability and quality of witnesses and physical evidence; (3) the lapse of time since the initial wrongful act; (4) whether the circumstances permit the inference that the delay has been in-

original owners to pursue their missing work diligently.[80] The rule is an equitable consideration, promoting fairness between original owners and subsequent good faith purchasers, and lessening unjust results from a more strict application of the statute of limitations.[81]

2. Demand and Refusal Rule

The "demand and refusal" rule, followed in New York, states that the statute of limitations begins to run when the original owner demands return of the artwork but is refused by the current possessor or good faith purchaser.[82] In contrast to the discovery rule, application of this rule allows the original owner more time to find the good faith purchaser,[83] and thus gives the original owner the most protection.[84] In fact, some critics believe that the demand and refusal rule is like having, effectively, no statute of limitations.[85]

The Court of Appeals of New York adopted this rule in a 1991 decision, *Guggenheim v. Lubell*.[86] The Solomon R. Guggenheim Foundation brought an action against a good faith purchaser to recover a Marc Chagall gouache allegedly stolen by a museum employee in the late 1960s.[87] The court rejected the good faith purchaser's argument that because the museum did nothing to locate the gouache in the twenty years between its disappearance and the museum's discovery of the gouache with the good faith purchaser, the museum's claim was barred

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> tentional or deliberate; and (5) whether the delay has unusually prejudiced the defendant.

Erisoty, 1995 WL 91406, at *12 (citing John G. Petrovich, Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 UCLA L. Rev. 1122, 1152 (1980)).

[80] Am. Jur. Proof of Facts, *supra* note 45, § 29. The actual definition of due diligence will vary from case to case, taking into account the "nature and value" of the property. *O'Keeffe*, 416 A.2d at 873.

[81] *See O'Keeffe*, 416 A.2d at 869.

[82] Kreder, *supra* note 47, at 199; *see, e.g.*, Golden Budha Corp., v. Canadian Land Co. of Am., 931 F.2d 196, 201 (2d Cir. 1991); *Guggenheim*, 569 N.E.2d at 427; Menzel v. List, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966).

[83] Am. Jur. Proof of Facts, *supra* note 45, § 29.

[84] *Guggenheim*, 569 N.E.2d at 430. One of the justifications the court gives for a rule that is friendly towards original owners is New York's cultural influence. *See id.* at 431. Additionally, courts are aware that stolen art is extremely difficult to recover and the original owners, already suffering because of their lost art, should not have the burden of proving ownership. *Hoelzer*, 933 F.2d at 1137–38.

[85] Hawkins et al., *supra* note 13, at 51–52 (arguing that the *Guggenheim v. Lubell* decision does not give enough weight to the value of repose given that two innocent parties, the theft victim and purchaser, are often involved).

[86] 569 N.E.2d at 427.

[87] *Id.*

by the three-year statute of limitations.[88] Instead, the court held that "the timing of the museum's demand for the gouache and the appellant's refusal to return it are the only relevant factors in assessing the merits of the Statute of Limitations defense."[89] No kind of due diligence on the part of the original owner is required.[90] The court favored the "clarity and predictability" of the demand and refusal rule.[91]

3. Successful Application of Statutes of Limitations

Despite the balance achieved by imposing a statute of limitations, some legal scholars and law students believe that courts should suspend the statute of limitations in Holocaust-looted art cases because of the unusually appalling context of the Holocaust.[92] This is most likely because several looted art cases were determined solely on the basis of statute of limitations grounds.[93]

Two recent cases involve a dispute between the heirs of Martha Nathan, and the Toledo Museum of Art and the Detroit Institute of Arts.[94] The paintings in dispute originated from the same sale by the

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[88] *Id.* at 428–29.

[89] *Id.* at 427.

[90] *Hoelzer*, 933 F.2d at 1138; *Guggenheim*, 569 N.E.2d at 430. The court does not impose a reasonable diligence requirement because it is concerned that an owner would be "unduly burden[ed]" because of the numerous facts that affect an owner's search, such as the value of the property stolen and the institution that held the property. *Guggenheim*, 569 N.E.2d at 431. Rather, the issue of reasonable diligence could be utilized in the context of a laches defense. *Id.*; *see* Republic of Turk. v. Metro. Museum of Art, 762 F. Supp. 44, 46–47 (S.D.N.Y. 1990) (holding that the defendant's complaint of plaintiff's delay in bringing a claim went solely to the issue of laches and not a statute of limitations defense).

[91] *Guggenheim*, 569 N.E.2d at 427.

[92] *See, e.g.*, Gerstenblith, *supra* note 20, at 444; Lerner, *supra* note 63, at 15; Stephanie Cuba, Note, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 Cardozo Arts & Ent. L.J. 447, 450–61 (1999); *see also* Bibas, *supra* note 69, at 2439 (proposing, in art theft cases and not necessarily in the Nazi-looting context, that statutes of limitations should not apply when original owners report the theft to the police and a theft database).

[93] *See, e.g.*, *Orkin*, 487 F.3d at 742 (holding that original owner's claim was barred by statute of limitations because even under the most generous standard of accrual for the cause of action, the claim expired by 1993, applying the three-year statute of limitations in 1990, the date of the last public announcement of the good faith purchaser's ownership); DeWeerth v. Baldinger, 836 F.2d 103, 112 (2d Cir. 1987) (holding that original owner's claim of ownership was barred by statute of limitations). Bibas observes that courts have lessened the impact of statutes of limitations in ways favoring original owners, but in the fifteen years since his note was published, the passage of time leans more favorably towards the good faith purchaser. *See* Bibas, *supra* note 69, at 2449.

[94] *See Detroit Inst. of Arts*, 2007 WL 1016996; *Toledo Museum of Art*, 477 F. Supp. 2d 802.

original owner of a collection of artwork.[95] Both museums believed the paintings were sold in a valid sale.[96] The heirs refused to concede that Nathan "sold" the paintings in 1938 after fleeing the Nazis because there was not enough evidence as to the terms of the purchase.[97]

In 2006, the U.S. District Court for the Northern District of Ohio held in *Toledo Museum of Art v. Ullin* that the heirs of Martha Nathan had no property claim to the paintings because the statute of limitations expired.[98] The court used the discovery rule to determine when the statute of limitations began to accrue.[99] Because the original owner herself failed to bring a claim for the painting during her lifetime, her estate made no claim, and because of the increased public attention regarding Nazi-looted art in the late 1990s, her heirs should have made an inquiry into the painting well before filing their action in 2006, and therefore the heirs' claim was time-barred by Ohio's four-year statute of limitations.[100]

Similarly, in 2007, the U.S. District Court for the Eastern District of Michigan held in *Detroit Institute of Arts v. Ullin* that the statute of limitations barred the heirs' claims of ownership.[101] The court did not apply the discovery rule and so the counterclaims began to accrue when the wrong, out of which the counterclaims arose, took place—when the original owner sold the painting in 1938.[102] Michigan's three-year statute of limitations barred the heirs' claims.[103]

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[95] *See Detroit Inst. of Arts*, 2007 WL 1016996, at *1; *Toledo Museum of Art*, 477 F. Supp. 2d at 804.

[96] *See Detroit Inst. of Arts*, 2007 WL 1016996, at *1; *Toledo Museum of Art*, 477 F. Supp. 2d at 804–05.

[97] *Detroit Inst. of Arts*, 2007 WL 1016996, at *1 n.3; *Toledo Museum of Art*, 477 F. Supp. 2d at 804 & n.1.

[98] 477 F. Supp. 2d at 809. The original owner's heirs asserted a claim of ownership against the Toledo Museum of Art ("TMA") in May 2004 and the museum rejected the ownership claims in 2005 after providing the heirs with the painting's provenance information. *Id.* at 805. TMA sought declaratory judgment in January 2006 to quiet title. *Id.* In response, the heirs brought counterclaims for conversion, restitution, and declaratory judgment. *Id.* TMA moved to dismiss the heirs' counterclaim. *Id.* at 806.

[99] *See id.* at 806–07.

[100] *Id.* at 803, 807–08.

[101] 2007 WL 1016996, at *4. In early 2006, the Detroit Institute of Arts ("DIA") requested declaratory and injunctive relief. *Id.* at *1. The heirs then filed counterclaims for declaratory judgment, restitution, and conversion and DIA brought a motion to dismiss those counterclaims. *Id.*

[102] *Id.* at *2–*3. The court went further and found that even if they used the discovery rule, the heirs should have discovered they had a cause of action in 1973, when the estate made additional claims for wartime losses, that would also be barred by the three-year statute of limitations. *Id.* at *3.

[103] *Id.* at *3.

In both cases the courts did not address the issue of whether a "sale" occurred because it was irrelevant to the statute of limitations analysis.[104] Because of the application of each state's statute of limitations, the issue of whether the sale was forced or voluntary remained unresolved and the paintings stayed with the museums.[105]

B. *Laches*

Although both the discovery and demand and refusal rules can be seen as overly harsh towards good faith purchasers, a laches defense can lessen the severe result.[106] Like the statute of limitations defense, laches is an affirmative defense,[107] but unlike application of the statute of limitations, laches is not binding on courts.[108] A laches defense could bar a claim that would otherwise be valid under the statute of limitations.[109] The laches defense requires a showing that the plaintiff's unreasonable delay in bringing a claim prejudiced the defendant.[110]

Proving both facts—unreasonable delay and prejudice—can place a heavy evidentiary burden on the good faith purchaser.[111] A case with a laches defense is very fact-specific, which means it is time-consuming to research.[112] Therefore, it is difficult to resolve a case with a laches

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[104] *See id.* at *4; *Toledo Museum of Art*, 477 F. Supp. 2d at 804 n.1. This same issue was also left unresolved in *Orkin v. Taylor* when the court did not settle the dispute between the parties over whether the painting was effectively confiscated by the Nazis through a forced sale or was sold legitimately, because the heirs' claim was barred by the statute of limitations. 487 F.3d at 738, 741.

[105] *See Detroit Inst. of Arts*, 2007 WL 1016996, at *1 n.3, *4; *Toledo Museum of Art*, 477 F. Supp. 2d at 809; Jennifer Anglim Kreder, *Declaratory Judgment Actions as to Art Displaced During the Holocaust*, Art & Cultural Heritage L. Newsl., Summer 2008, at 14, 14.

[106] Am. Jur. Proof of Facts, *supra* note 45, § 29. One scholar characterizes laches as "the equitable counterpart to the statute of limitations." Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 Seattle U. L. Rev. 631, 697 (2000).

[107] Lerner, *supra* note 63, at 25 n.34.

[108] 51 Am. Jur. 2d *Limitation of Actions* § 8 (2000). Instead, the court will balance the equities of each side. *Id.*

[109] Am. Jur. Proof of Facts, *supra* note 45, § 32.

[110] *E.g.*, Vineberg v. Bissonnette, 548 F.3d 50, 56 (1st Cir. 2008); Robins Island Pres. Fund, Inc. v. Southold Dev. Corp., 959 F.2d 409, 423 (2d Cir. 1992); Derrossett, *supra* note 7, at 241. This involves weighing the interests of the good faith purchaser and the original owner's diligence in pursuing the claim. Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc., No. 98 Civ. 7664(KMW), 1999 WL 673347, at *7 (S.D.N.Y. Aug. 30, 1999) (citation omitted)). Critics of this rule argue that the flexibility of determining these aspects achieves individual justice, but at the expense of guidance because parties have no direction about what they should do. Bibas, *supra* note 69, at 2458.

[111] Lerner, *supra* note 63, at 27.

[112] Gerstenblith, *supra* note 20, at 443.

defense through a motion to dismiss or summary judgment because facts are often in dispute.[113] Using this defense effectively means that litigation will be drawn-out and costly.[114]

1. Unreasonable Delay Element

In determining if there was unreasonable delay in bringing a claim involving disputed ownership of art, courts focus on the plaintiffs' diligence from the time of the theft, rather than the actual length of the delay.[115] When original owners do not exhibit diligence, laches may extinguish their ownership rights.[116] Because of this focus on diligence, it is not clear as to how long is too long to allow a claim to prevail.[117] The Second Circuit Court of Appeals, though, clearly stated that extreme examples, such as a delay of 200 years, are certainly too long.[118] Also, because of the focus on diligence, this aspect is especially fact-sensitive and can be difficult to determine.[119]

The plaintiffs' diligence is a factor in a laches defense.[120] For example, the Second Circuit Court of Appeals in its 1982 decision, *Kunstsammlungen Zu Weimar v. Elicofon*, affirmed the district court's finding that the original owner of two Albrecht Dürer portraits used reasonable diligence in locating the stolen paintings held by a good faith

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[113] *See id.*; *see also* Bakalar v. Vavra, No. 05 Civ. 3037(WHP), 2006 WL 2311113, at *4 (S.D.N.Y. Aug. 10, 2006) (denying summary judgment based on a laches defense where there were issues of material fact regarding the length of delay, whether such delay was excusable, and the prejudice to the good faith purchaser); *Republic of Turk.*, 762 F. Supp. at 47 (denying defendant's motion for summary judgment because genuine issues of material fact regarding defendant's prejudice existed). *But cf. Vineberg*, 548 F.3d at 57 (affirming grant of plaintiff's summary judgment motion because lack of prejudice to the defendant was clear).

[114] Lerner, *supra* note 63, at 28.

[115] *E.g.*, DeWeerth v. Baldinger, 804 F. Supp. 539, 553 (S.D.N.Y. 1992), *rev'd on other grounds*, 38 F.3d. 1266 (2d Cir. 1994); Hawkins et al., *supra* note 13, at 67; *see, e.g.*, *Greek Orthodox Patriarchate*, 1999 WL 673347, at *10.

[116] Phelan, *supra* note 106, at 701.

[117] *See* Foster, *supra* note 39, at 154. Foster points to the example of *New Jersey v. New York*, where the U.S. Supreme Court found that a delay of 103 years did not prejudice the defendant. 523 U.S. 767, 769 (1998); Foster, *supra* note 39, at 154.

[118] *See Robins Island*, 959 F.2d at 424.

[119] *See DeWeerth*, 804 F. Supp. at 553 (noting that in 1987 the U.S. District Court for the Southern District of New York found that plaintiff did not unreasonably delay in bringing a claim, whereas when the case was appealed to the Second Circuit Court of Appeals, that court came to the opposite conclusion).

[120] Hawkins et al., *supra* note 13, at 67. When examining diligence, the Second Circuit Court of Appeals looked to factors such as publicizing the loss of and continuously searching for the painting. *DeWeerth*, 836 F.2d at 111–12 (examining diligence in the mistaken context of a statute of limitations defense instead of laches).

purchaser.[121] Examples of this diligence included reporting the paintings as missing, engaging in numerous correspondences with museum officials, and informing military agencies of the theft until discovering the painting in 1966.[122]

In contrast, in 1987 the Second Circuit Court of Appeals held in *DeWeerth v. Baldinger* that the original owner unreasonably delayed bringing a claim because her efforts to locate her painting, allegedly stolen during World War II, and her claim of ownership in 1982 were not diligent.[123] In examining delay, the plaintiffs' actions and available measures are important.[124] For example, the court in *DeWeerth* noted that the original owner was aware of several programs designed to locate art lost during World War II, but did not take advantage of those programs.[125] Also important are plaintiffs' inactions: what they failed to do.[126] For example, in *DeWeerth*, the court found that the original owner's failure to consult the *Catalogue Raisonné* (a definitive collection of an artist's works) was particularly inexcusable, given that her nephew, after consulting the *Catalogue Raisonné*, identified her missing painting within three days.[127] The original owner's failure to search for the painting for 24 years was most indicative of her lack of diligence.[128]

2. Prejudice Element

Prejudice generally consists of the loss of evidence, such as witnesses and documents (evidence-based prejudice), or a material change in the defendant's position (expectations-based prejudice).[129] Common examples of prejudice are loss of evidence and important witnesses, sale of the disputed property for fair market value to a good faith purchaser, or use of resources in reliance upon the state of affairs

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[121] 678 F.2d 1150, 1152, 1165 (2d Cir. 1982).

[122] Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829, 850–51 (E.D.N.Y. 1981), *aff'd* 678 F.2d at 1150.

[123] *See* 836 F.2d at 107, 111.

[124] Hawkins et al., *supra* note 13, at 67; *see also DeWeerth*, 836 F.2d at 112.

[125] 836 F.2d at 111.

[126] *Id.* at 111–12; *see also Werthheimer*, 752 N.Y.S.2d at 297 (holding that failing to take steps to recover the allegedly stolen painting for nearly half a century, including making inquiries when the painting appeared in an advertisement for sale in the city in which the original owner lived, exhibited the family's lack of due diligence).

[127] *See* 836 F.2d at 112.

[128] *Id.*

[129] *E.g.*, *Vineberg*, 548 F.3d at 57; *Robins Island*, 959 F.2d at 424; Hawkins et al., *supra* note 13, at 67–68.

that existed before knowledge of the theft.[130] Merely pointing to the passage of time as being prejudicial is not enough.[131]

In 2008, the U.S. Court of Appeals for the First Circuit held in *Vineberg v. Bissonnette* that a laches defense was not viable because the defendant did not show adequate prejudice.[132] There, the current possessor inherited a Franz Xaver Winterhalter painting from her mother in 1991 which her stepfather purchased in a forced sale by the Nazis in 1937.[133] The current possessor claimed she was prejudiced because potential evidence and witnesses were likely unavailable at this late date, although she did not elaborate on the types of evidence she was missing.[134] Considering the defendant's evidence-based contention for prejudice, the court rejected her claim and found, in dicta, that merely pointing to "potential witnesses and evidence" is not the same as identifying "particular witnesses . . . [and] documents," or the nature of such witnesses and documents, that were not available because of the passage of time.[135] Not only must defendants show with particularity the evidence that was lost, but also how that evidence would aid in their defense over a contested issue.[136]

When looking at expectations-based prejudice, the courts will consider if defendants suffered from a material change in position[137] or suffered because they believed they acquired good title.[138] The emotional pain resulting from losing a painting, though, is not enough to show prejudice.[139] Likewise, in 1991 the Second Circuit Court of Ap-

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[130] *See Vineberg*, 548 F.3d at 57.

[131] *See id.* at 58.

[132] *Id.* The court also identifies this case as involving "evidence-based" prejudice rather than "expectations-based" prejudice. *Id.* at 57.

[133] *Id.* at 53–54.

[134] *Id.* at 57.

[135] *Id.* at 57–58.

[136] *See Vineberg*, 548 F.3d at 58. The court found fault in the fact that the defendant was alleging evidence-based prejudice even though there was no contested issue that such evidence would have helped to resolve. *Id.*

[137] *DeWeerth*, 804 F. Supp. at 553; Hawkins et al., *supra* note 13, at 67.

[138] Phelan, *supra* note 106, at 706; *see also Wertheimer*, 752 N.Y.S.2d at 297 (holding that the current possessor was prejudiced by the lack of due diligence because it was "virtually impossible for [the current possessor] to prove that any of its predecessors in interest acquired good title"). Another example of this type of prejudice is found in the real estate context in *Robins Island*, in which the court held that a cause of action for ejectment was barred by laches because the delay of 200 years made it impossible to know "whether title would have changed hands if this action had been timely brought," and thus the defendant suffered prejudice because it is unlikely it "would have purchased the property had it known its title was in dispute." 959 F.2d at 424.

[139] *See DeWeerth*, 804 F. Supp. at 554.

peals in *Hoelzer v. City of Stamford* stated in dicta that the current possessor, an art restorer who started to restore a set of Works Progress Administration murals after the murals were inadvertently discarded from a public high school, would not establish prejudice necessary for a laches defense because he paid nothing for the murals and would instead receive a "windfall" if the court granted him title.[140]

3. Application of Laches

Although the courts acknowledge that questions of fact typically arising in a laches defense are generally resolved at trial, there are several examples where courts have found sufficient unreasonable delay and/or prejudice to grant motions for summary judgment.[141]

In 2002, the New York Supreme Court, Appellate Division, in *Wertheimer v. Cirker's Hayes Storage Warehouse, Inc.*, affirmed the defendant's motion for summary judgment dismissing the complaint as barred by the doctrine of laches.[142] The original owner of a painting whose ownership was in dispute did not exercise diligence in searching for the painting following its alleged misappropriation and sale by the person to whom the owner entrusted it when the family fled the Nazis.[143] Because the family did not take any steps to recover the painting after 1960, the court held that the current possessor was prejudiced by not being able to prove its predecessors had good title.[144]

In *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, the U.S. District Court for the Southern District of New York in 1999 granted the defendants' motion for summary judgment.[145] Although the court determined that French law applied to the action, in dicta the court found that if New York law applied, laches would bar the original owner's claim.[146] The court found that the original owner did not exer-

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[140] 933 F.2d at 1133, 1138.

[141] *E.g.*, *Robins Island*, 959 F.2d at 424–25 (affirming the grant of summary judgment in favor of current possessor because action barred by statute of limitations and laches); *Greek Orthodox Patriarchate*, 1999 WL 673347, at *9 (noting that "[i]n some cases, however, the record is sufficiently clear on summary judgment to establish whether or not a particular search was diligent"); *In re* Peters, 821 N.Y.S.2d 61, 69 (App. Div. 2006) (noting that lack of diligence and prejudice may be resolved as a matter of law when apparent); *cf. Vineberg*, 548 F.3d at 59 (affirming the grant of summary judgment in favor of original owner because laches defense was deficient).

[142] 752 N.Y.S.2d at 296–97.

[143] *Id.*

[144] *Id.*

[145] 1999 WL 673347, at *1.

[146] *Id.* at *6–*7.

cise due diligence in searching for the Archimedes Palimpsest in the early part of the twentieth century because it did not even know the Palimpsest went missing.[147] There was little evidence surrounding the good faith purchase: no documents existed showing the transfer of title.[148] The current possessor was prejudiced by the delay in action because the critical witness (the one who purchased the Palimpsest) was deceased and key documents were missing, as expected over the course of the seventy-year delay.[149]

In 2006, the New York Supreme Court, Appellate Division, in *In re Peters*, reversed a decision to allow pre-action discovery because the action was not meritorious and, in the alternative, was barred by either statute of limitations or laches.[150] When the original owner fled the Nazis, he left the painting in dispute with his brother, who later sold it without the owner's consent.[151] After unsuccessful negotiations in the mid-1930s to repurchase the painting, the family did not assert any claims of ownership or make additional demands on those holding it, even though the painting was exhibited at prominent museums.[152] The court furthermore held that the current possessor was prejudiced by this delay because it could not establish good title, given that none of the individuals involved in the original sale were alive.[153]

C. *Recent Developments Show How Law Is Favorable to Good Faith Purchasers*

It is easy to see that museums have strong defenses to claims by original owners or heirs.[154] As time progresses, it will become easier to

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[147] *Id.* at *10. The court also criticized the Patriarchate's excuse that, as an order of monks, they should not be expected to search for a missing painting. *Id.* The fact that the Patriarchate retained counsel to prevent the Christie's auction of the Palimpsest showed they could have obtained help to search for the Palimpsest. *Id.*; *see also DeWeerth*, 836 F.2d at 112 (noting that plaintiff appeared to be "a wealthy and sophisticated art collector" who could have retained someone to search for her painting).

[148] *Greek Orthodox Patriarchate*, 1999 WL 673347, at *2.

[149] *Id.* at *10.

[150] 821 N.Y.S.2d at 63, 69.

[151] *Id.* at 63.

[152] *Id.* at 66, 68.

[153] *Id.* at 69.

[154] *See, e.g.*, *Detroit Inst. of Arts*, 2007 WL 1016996, at *4; *Wertheimer*, 752 N.Y.S.2d at 296–97. In a concurring opinion, Justice Newman in *Hoelzer* highlights an interesting paradox:

> Museums in possession of stolen art will probably think it preferable to fashion rules that place some obligation on owners to act with diligence in seeking to locate works they claim were stolen from them. On the other hand, museums that are victims of theft [such as in *Guggenheim*] will probably think

prove that the plaintiff delayed in bringing the suit and that prejudice exists because witnesses and documents are gone.[155] As a result, if museums raise these defenses, the likelihood of winning increases with time.[156]

Museums recognize the strength of these defenses and are beginning to initiate litigation when an heir surfaces with a claim to artwork in the museum's collection.[157] Museums are filing declaratory judgment actions to settle legal title and preemptively defeat any claims an heir might have.[158]

The first two cases in which museums filed declaratory judgment actions were both decided in favor of the museums because the statute of limitations expired for the heirs.[159] More recently, to settle title to an Oskar Kokoschka painting, the Museum of Fine Arts, Boston, brought suit against Dr. Claudia Seger-Thomschitz, an heir of the disputed painting's original owner.[160] The court also decided in favor of the museum because the statute of limitations expired.[161] Additionally, both the Museum of Modern Art and the Solomon R. Guggenheim Foundation brought suit against Julius H. Schoeps to settle title to two Pablo Picasso paintings, but the case settled before reaching trial.[162]

> it preferable to have rules that minimize the obligation of owners to locate their stolen property.

933 F.2d at 1139 (Newman, J., concurring).

[155] Alexandra Minkovich, Note, *The Successful Use of Laches in World War II-Era Art Theft Disputes: It's Only a Matter of Time*, 27 COLUM.-VLA J.L. & ARTS 349, 351 (2004).

[156] *See id.*

[157] *See* Kreder, *supra* note 105, at 14.

[158] *Id.* (contending that these declaratory judgment actions are at the "forefront of Holocaust-era litigation").

[159] *See Detroit Inst. of Arts*, 2007 WL 1016996, at *4; *Toledo Museum of Art*, 477 F. Supp. 2d at 809.

[160] Museum of Fine Arts v. Seger-Thomschitz, No. 08 Civ. 10097 (RWZ), slip op. at 1 (D. Mass. May 28, 2009); Kreder, *supra* note 105, at 17; Press Release, Museum of Fine Arts, Museum of Fine Arts, Boston, Asserts Rightful Ownership of Kokoschka Painting, *Two Nudes (Lovers)* 1 (Jan. 24, 2008), *available at* http://www.mfa.org/dynamic/sub/ctr_link_url_ 5980.pdf. Seger-Thomschitz made a claim of restitution in March 2007 after which the museum researched the painting's provenance. Press Release, Museum of Fine Arts, *supra*, at 3; *see also Museum of Fine Arts*, No. 08 Civ. 10097 (RWZ), at 8. In January 2008, the Museum of Fine Arts ("MFA") filed a declaratory judgment action to quiet title. *Museum of Fine Arts,* No. 08 Civ. 10097 (RWZ), at 8; Press Release, Museum of Fine Arts, *supra*, at 1.

[161] *Museum of Fine Arts*, No. 08 Civ. 10097 (RWZ), at 20.

[162] *See* Schoeps v. Museum of Modern Art, 594 F. Supp. 2d 461, 463 (S.D.N.Y. 2009); Randy Kennedy, *Museums, Heirs Settle Dispute over Picasso*, N.Y. TIMES, Feb. 3, 2009, at C2, *available at* http://www.nytimes.com/2009/02/03/arts/design/03arts-MUSEUMSHEIRS_BRF.html?ref=nyregion.

III. Fiduciary Obligations in Acquiring and Restituting Art

As seen in Part II, good faith purchasers can utilize affirmative defenses to defeat claims of ownership by original owners or heirs.[163] These claims of ownership can be and are brought against museums.[164] Museums serve important roles as educators and preservers, acquiring, protecting, researching, and exhibiting historical and cultural objects.[165] Although some museums are organized as charitable trusts, most incorporate as non-profit corporations qualifying as public benefit or charitable organizations.[166] Over the years, the museum's purpose has broadened to include cultural sensitivity, reflected in the manner of acquisition, preservation, and restitution of cultural artifacts.[167]

Fiduciary obligations arise from museums' statuses as charitable trusts or non-profit corporations.[168] Museum managers are trustees and thus are subject to the fiduciary duties common to all public and charitable trusts.[169] Unlike traditional private trusts, the beneficiaries of museum trusts are not specific individuals, but the general public.[170] This is because of the elements of public support and public benefit functioning in a museum.[171] A fiduciary's basic duties consist of loyalty and care.[172]

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[163] *See, e.g.*, Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 809 (N.D. Ohio 2006); Wertheimer v. Cirker's Hayes Storage Warehouse, Inc., 752 N.Y.S.2d 295, 296 (Sup. Ct. 2002); *see also supra* notes 61–162 and accompanying text.

[164] *E.g.*, *Toledo Museum of Art*, 477 F. Supp. 2d at 803; Rosenberg v. Seattle Art Museum, 42 F. Supp. 2d 1029, 1031–32 (W.D. Wash. 1999).

[165] Patty Gerstenblith, *The Fiduciary Duties of Museum Trustees*, 8 Colum.-VLA J.L. & Arts 175, 176 (1983); *see* Gerstenblith, *supra* note 20, at 414.

[166] Gerstenblith, *supra* note 20, at 413 (qualifying as public benefit or charitable organizations because of the museum's educational purposes); Jennifer L. White, Note, *When It's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 Mich. L. Rev. 1041, 1048, 1050 (1996).

[167] *See* Gerstenblith, *supra* note 20, at 451–52.

[168] Daniel Range, Comment, *Deaccessioning and Its Costs in the Holocaust Art Context: The United States and Great Britain*, 39 Tex. Int'l L.J. 655, 657 (2004); White, *supra* note 166, at 1051.

[169] Gerstenblith, *supra* note 165, at 176–77. For the purposes of this Note, the trustee fiduciary standard will be used, so museum management, although possibly titled as a director, shall be referred to as a trustee. *See, e.g.*, Unif. Trust Code § 804 (amended 2005), 7C U.L.A. 601 (2000); *see also infra* note 173.

[170] Gerstenblith, *supra* note 165, at 177; Range, *supra* note 168, at 657.

[171] *See* Gerstenblith, *supra* note 165, at 180.

[172] Gerstenblith, *supra* note 20, at 416; White, *supra* note 166, at 1051.

The duty of loyalty is complete loyalty towards the beneficiary.[173] Both the public beneficiaries and the trust terms deserve loyalty.[174] In exercising the duty of care, the trustee standard is employing care that ordinarily prudent persons would use in handling their own property.[175] A trustee must maintain trust assets.[176] The duty of care involves attention to museum management, such as preservation of both the physical assets, like the actual collections and the building, as well as monetary assets.[177]

Museums must grapple with the duties of loyalty and care in many different contexts: when making decisions regarding the acquisition and deaccession of works and assessing the potential to pursue litigation to clarify title to disputed works.[178]

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[173] *E.g.*, Renz v. Beeman, 589 F.2d 735, 740 (2d Cir. 1978); Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (stating that "[n]ot honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior"); SCOTT AND ASCHER ON TRUSTS, *supra* note 16, § 17.2; White, *supra* note 166, at 1052. *See generally* Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 601–07 (1997) (providing an overview of the fiduciary duty of loyalty). There is some debate of whether to use a trust or corporate standard when defining the duties of loyalty and care. *See* Gerstenblith, *supra* note 20, at 417; White, *supra* note 166, at 1049–58 (explaining the differences between the two standards and advocating that a trust standard be applied towards museum actions). Because a trust standard is more demanding than a corporate standard, this Note utilizes trustee fiduciary duties regardless of whether a museum is organized as a charitable trust or non-profit corporation. *See, e.g.*, UNIF. TRUST CODE § 804, 7C U.L.A. 601; White, *supra* note 166, at 1055.

[174] Gerstenblith, *supra* note 165, at 180. Discussing loyalty towards the trust, in 1960 the Supreme Court of Pennsylvania in *Commonwealth v. Barnes Foundation* held that a cause of action existed because a charitable organization could not completely shut out the public on the whim of the trustees in violation of the agreement between the donor and the foundation. 159 A.2d 500, 504–05 (Pa. 1960).

[175] *E.g.*, *In re* Clark's Will, 177 N.E. 397, 398 (N.Y. 1931) (stating that a trustee must "employ such diligence and such prudence in the care and management, as in general, prudent men of discretion and intelligence in such matters, employ in their own like affairs") (quoting King v. Talbot, 40 N.Y. 76, 85–86 (1869)); *In re* Detre's Estate, 117 A. 54, 57 (Pa. 1922) (stating that a trustee is "not liable when he acts in good faith as others do with their own property"); UNIF. TRUST CODE § 804, 7C U.L.A. 601 ("A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust."); Phelan, *supra* note 106, at 677; White, *supra* note 166, at 1053.

[176] *E.g.*, United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003); UNIF. TRUST CODE § 809, 7C U.L.A. 606 (trustee has a duty to use reasonable care and skill to preserve the trust property).

[177] Gerstenblith, *supra* note 20, at 416–17; White, *supra* note 166, at 1052–53.

[178] *See* Gerstenblith, *supra* note 20, at 420.

A. *Fiduciary Duties of Loyalty and Care in Acquiring Art and the Risk That Works Are Stolen*

Sometimes a museum will unknowingly purchase a stolen work of art.[179] It can also acquire works through a donation or by bequest from a good faith purchaser.[180] When a work is donated, a museum may be less likely to investigate the work's provenance, not wanting to "look a gift horse in the mouth," and it may unknowingly acquire a stolen work.[181] When a work is acquired through a good faith purchase, a museum may not obtain good title if the work was stolen, in which case the museum must return it to its original owner.[182]

In acquiring works and dealing with the risk of stolen artwork, museums must fulfill their duty of care.[183] In a situation regarding the acquisition of trust property analogous to the problem faced by museums in negligently acquiring stolen artwork, the Supreme Court of Hawaii in 1984, in *In re Estate of Dwight*, found that a trustee violated his duty of care when he purchased land without first properly inspecting the property.[184] There, the trustee did not question the tenant of the land about the condition of the building, which had a leaking roof, sagging support beams, bad electrical wiring, and other defects.[185] The trustee purchased the property without having a structural inspection or determining if the building passed health, safety, and fire code requirements.[186] Such lack of action, the court found, did not comport with the duty of care used by a prudent person.[187]

In the museum context, obtaining a work through a less-than-diligent process, negligently disregarding undocumented or gap-filled

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[179] *See* Lauren McBrayer, *The Art of Deaccession: An Ethical Perspective*, *in* ALI-ABA, Course of Study: Legal Problems of Museum Administration Mar. 30–Apr. 1, 2005, at 339, 351 (2005).

[180] *Id.*

[181] *See id.* at 355.

[182] *Id.* at 351–52. A museum can obtain good title, though, if affirmative defenses can be successfully mounted. *See* Kreder, *supra* note 47, at 200; Derrossett, *supra* note 7, at 241.

[183] *See* Gerstenblith, *supra* note 20, at 420, 441; *see also* Unif. Prudent Investor Act § 2(d), 7B U.L.A. 20 (1994) ("A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.").

[184] *See* 681 P.2d 563, 567 (Haw. 1984); *see also In re* Estate of Collins, 139 Cal. Rptr. 644, 648 (Ct. App. 1977) (holding that trustees "failed to follow the 'prudent investor' standard, first, by investing two-thirds of the trust principal in a single investment, second, by investing in real property secured only by a second deed of trust, and third, by making that investment without adequate investigation of either the borrowers or the collateral").

[185] *In re Estate of Dwight*, 681 P.2d at 567.

[186] *Id.*

[187] *Id.*

provenance, and thus subjecting the museum to a potential restitution in the future is a violation of the duty of care.[188] The penalty for breaching the duty of care is the deaccession cost associated with returning the work to its rightful owners.[189]

A poorly obtained acquisition can have undesirable consequences for a museum.[190] An example of this can be seen in the contest that developed between the Seattle Art Museum ("SAM") and the Rosenberg family over an Henri Matisse painting the museum received by bequest but without adequate investigation.[191] The Rosenberg family asserted that the Nazis stole the painting during World War II.[192] Settlement negotiations stalled and the heirs sued SAM.[193] When SAM's own research, though, indicated that the painting was stolen, SAM returned the painting to the heirs.[194] If better standards are in place at the acquisition stage, it is less likely museums will acquire stolen art, thus later avoiding deaccessioning and breaching a fiduciary duty.[195]

B. *Fiduciary Duties of Loyalty and Care in Deciding to Deaccession*

In deaccessioning a work, where museums remove artwork from their collections, museums may act voluntarily or involuntarily, depend-

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[188] *See* Gerstenblith, *supra* note 20, at 411, 452–53, 457; Phelan, *supra* note 106, at 675. Museums are becoming increasingly aware of the risks posed by poor acquisition policies, as evidenced in the Metropolitan Museum of Art's Collections Management Policy, which has a section devoted to Nazi/World War II Era guidelines for researching provenance. Metro. Museum of Art, Collections Management Policy 6 § IV.D.2 (Nov. 2008). The Policy states that additional research should be undertaken if provenance information is incomplete, such information should be made public, and any claims that arise should be reviewed "promptly and responsibly" and resolved in an "equitable, appropriate and mutually agreeable manner." *Id.* § IV.D.2.a–c.

[189] *See* Range, *supra* note 168, at 672.

[190] *See, e.g.*, Gerstenblith, *supra* note 20, at 409–11 (explaining how the Metropolitan Museum of Art purchased the "Lydian Hoard" for $1.2 million knowing that the objects were stolen, and later returned the objects to the Republic of Turkey once Turkey brought a suit in federal district court).

[191] *See* Int'l Found. for Art Research, Case Summary: Rosenberg v. Seattle Art Museum v. Knoedler-Modarco, Inc., http://www.ifar.org/case_summary.php?docid=1184701032 (last visited Mar. 22, 2010) [hereinafter IFAR SAM case summary].

[192] *Rosenberg*, 42 F. Supp. 2d at 1031.

[193] IFAR SAM case summary, *supra* note 191.

[194] *Id.* SAM initiated suit against the gallery from which the donor purchased the painting in the 1950s, alleging it misrepresented the provenance of the painting to the donors. *See Rosenberg*, 42 F. Supp. 2d at 1031–32, 1037. This case also settled with the gallery compensating SAM for its legal fees and the loss of the painting to the heirs. IFAR SAM case summary, *supra* note 191.

[195] *See* Gerstenblith, *supra* note 20, at 465.

ing on the context.[196] For example, the law might compel the deaccessioning of a work because the museum does not have legal title.[197] Additionally, although deaccessioning a work may technically be voluntary, in reality it may merely be done to settle a lawsuit without further litigation.[198] And in another context, a museum may truly return looted art voluntarily, without any threat of a lawsuit.[199] When deciding to deaccession, museum trustees must keep in mind the public's benefit of acquired art and take into account the duty of loyalty, the potential breach of the duty of care if museum assets are disrupted, and the financial burdens accompanied with both deaccessioning and choosing not to deaccession.[200]

Museum trustees owe a duty of loyalty to the trust beneficiary, the public.[201] Because deaccessioning works often removes them from the public domain, deaccessioning may conflict with a museum's duty of loyalty to the trust beneficiaries.[202] More people would benefit if the work stayed in the museum, rather than being held privately.[203] The risk of museums breaching their duty of loyalty greatly increases if the public opposes the deaccesion because museums could disenfranchise their beneficiaries.[204] Furthermore, if the public is displeased with the deaccession, the museum could receive bad publicity, resulting in lower attendance or fewer bequests.[205] In the context of Nazi-looted art however, the public is often in favor of deaccessioning art stolen during the Holocaust.[206] The trustees have to weigh the gain in public sentiment against the loss of a painting that benefits the public.[207]

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[196] *See id.* at 425.

[197] *See id.* at 425, 436.

[198] *Id.* at 425.

[199] *Id.* at 450–51 (explaining how the Getty Museum returned looted antiquities to Italy voluntarily, without the threat of a lawsuit, after receiving documentation of rightful ownership).

[200] *See id.* at 441; Range, *supra* note 168, at 672.

[201] Gerstenblith, *supra* note 165, at 177; Range, *supra* note 168, at 657; *see In re* Estate of Gump, 2 Cal. Rptr. 2d 269, 287 (Ct. App. 1991) (holding that trustee violated duty of loyalty when it threatened to charge an audit only to beneficiaries that objected to its account, in an effort to get them to drop their objections).

[202] *See* McBrayer, *supra* note 179, at 341. Additionally, removing a work can ruin a collection and the work is often irreplaceable. Phelan, *supra* note 106, at 668.

[203] McBrayer, *supra* note 179, at 358; *see* Foster, *supra* note 39, at 147.

[204] *See* Range, *supra* note 168, at 658.

[205] *Id.* at 672.

[206] *Id.* at 665.

[207] *See* Foster, *supra* note 39, at 147; Range, *supra* note 168, at 672. Perhaps the greater common good would be served if the museum abides by established property laws and returns a work to which it never had good title. *See* Foster, *supra* note 39, at 147–48.

When a museum decides to restitute a work of art, it may also violate its duty of care to preserve museum assets.[208] Museums breach their duty of care during a deaccession because trust property, a work in its collection, is removed[209] and museum resources are used to facilitate the deaccession.[210] For example, in order to pay a confidential settlement to an heir claiming ownership of a stolen painting in the Metropolitan Museum of Art's collection, the museum consigned the painting to auction.[211] Because the museum sold trust property and used proceeds from the sale to fund the deaccession-related costs, it arguably breached its duty of care to preserve museum assets.[212]

Despite the potential for public goodwill through restitution, the museum must also consider the financial burden of deaccessioning in the form of provenance research and potential litigation.[213] There is also the huge financial loss of the painting itself, a cost that not even public goodwill may be able to match.[214] For example, when the Kimbell Art Museum in Fort Worth, Texas, decided to deaccession a painting after learning it was illegally seized during World War II, the museum later repurchased the painting for $5.7 million when the heirs put the painting up for auction.[215] It appears that the museum heavily valued the ethics of their decision to return the artwork to the heirs.[216]

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[208] *See* Gerstenblith, *supra* note 20, at 411, 441. One could also argue that in refusing to deaccession a stolen work, museums breach a duty of care by keeping an inappropriate investment. *See* 4 Scott and Ascher on Trusts, *supra* note 16, § 19.4; *see also* Pub. Serv. Co. of Colo. v. Chase Manhattan Bank, 577 F. Supp. 92, 104–08 (S.D.N.Y. 1983) (holding that the trustee inadequately monitored the investment and did not discover that the investment was unsuitable for the trust; thus, failure to rid the trust of the investment was a breach of duty to dispose of the investment in a proper amount of time).

[209] Gerstenblith, *supra* note 20, at 411; *see* Gerstenblith, *supra* note 165, at 193. Usually a piece of art will be housed in the museum for decades, becoming a part of its identity. McBrayer, *supra* note 179, at 358.

[210] *See* Gerstenblith, *supra* note 20, at 420, 443.

[211] Int'l Found. for Art Research, Case Summary: Metropolitan Museum of Art Settles Heir's Claim to Monet, http://www.ifar.org/case_summary.php?docid=1179703220 (last visited Mar. 22, 2010) [hereinafter IFAR Met Monet case summary].

[212] *See, e.g.*, Gerstenblith, *supra* note 20, at 441; IFAR Met Monet case summary, *supra* note 211.

[213] Range, *supra* note 168, at 665.

[214] *See id.*

[215] Int'l Found. for Art Research, Case Summary: Kimbell Art Museum Return of Turner Painting to Jaffé Heirs, http://www.ifar.org/case_summary.php?docid=1186675435 (last visited Mar. 22, 2010).

[216] *See* Michael Granberry, *Kimbell Reacquires Disputed Turner Painting*, Guide Live, Apr. 20, 2007, http://www.guidelive.com/sharedcontent/dws/ent/visualarts/stories/DN-kimbell_0420gl.ART0.State.Edition1.4337838.html. The director of the museum said that museum officials

C. *Fiduciary Duties of Loyalty and Care in Deciding to Litigate*

Museums are also faced with the formidable task of assessing the unique facts of each case before deciding whether to settle a claim or face litigation.[217] Fiduciaries have a duty to defend actions that could result in the loss of trust property.[218] In this context, this generally means going to court.[219]

According to trust law, though, a museum may properly settle a claim, instead of pursuing litigation, if a reasonably prudent person under the circumstances would also settle.[220] An example of such a reasonable decision was found in *Selleck v. Hawley*, where in 1932 the Supreme Court of Missouri's dicta indicated that the trustee would not be punished for paying a debatable tax instead of going to trial to dispute the tax's validity, because it would have cost more money to litigate than to pay the tax.[221] Even if a museum determines that either the affirmative defenses of statute of limitations or laches can be used, the time needed to mount those defenses would use up museum resources.[222] At such a point, the museum may decide that the cost to litigate, both monetary and in the form of public goodwill, is too great to proceed.[223]

> made no attempt to resist returning the work. It was clear that this was the morally correct thing to do. Having said that, it did leave a hole in our collection. But with today's events [re-purchasing the painting at auction], we're able to close that circle and bring it back to the Kimbell.

Id.

[217] *See* Gerstenblith, *supra* note 20, at 441 (illustrating that museums' choice to settle a claim or pursue litigation can be especially scrutinized if the restitution occurs without litigation or a court order, or if the museum proceeds to restitute when a legal defense is available).

[218] Unif. Trust Code § 811 (amended 2005), 7C U.L.A. 608 (2000); *see* Metzenbaum v. Metzenbaum, 252 P.2d 31, 34 (Cal. Ct. App. 1953) (holding that trial court erred in refusing trustee reimbursement for attorneys' fees because of trustee duty to "defen[d] against adverse claims to trust assets").

[219] *See, e.g.*, *Toledo Museum of Art*, 477 F. Supp. 2d at 805 (examining museum that brought action to quiet title to painting after heirs brought a claim of ownership); *Rosenberg*, 42 F. Supp. 2d at 1031–32 (examining heirs who brought action against a museum to compel the painting's return; museum filed third-party complaint against gallery from which donors purchased painting).

[220] Scott and Ascher on Trusts, *supra* note 16, § 17.10 (stating that trustees can pay a claim, even if they do not believe it is well founded, if it is reasonable); *see, e.g.*, Restatement (Third) of Trusts, § 87 (2007).

[221] 56 S.W.2d 387, 396 (Mo. 1932).

[222] *See* Gerstenblith, *supra* note 20, at 443.

[223] *See id.* Two attorneys involved in Nazi-looted art disputes stated:

The dispute between the Wadsworth Atheneum Museum of Art, in Hartford, Connecticut, and the Italian government is an example of how the decision not to litigate could be reasonable and even advantageous for trust beneficiaries.[224] The contention centered on a painting stolen by Russian troops in 1945 and purchased by the Atheneum in 1965.[225] In 1997 the Atheneum concluded that the painting was stolen.[226] Italy claimed ownership of the painting, and although the Atheneum could have raised a statute of limitations defense, it decided instead to return the painting and avoid litigation.[227] The painting was valued at $500,000 to $700,000, but in exchange for returning the painting, the Atheneum received the works of several Italian masters on loan, with the Italian government providing the transportation and insurance costs worth approximately $350,000.[228] The public benefitted from this access to works outside the museum's permanent collection.[229]

IV. Professional Responsibilities

When public awareness of Nazi-looted art increased during the late 1990s, Congress considered enacting legislation to set standards for returning stolen art.[230] Museum directors, however, testified that they could better handle the subject themselves, resulting in codes of ethics promulgated by the Association of Art Museum Directors and the American Association of Museums, discussed below.[231] This climate of

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> In . . . negotiations, we aim to convince the defendant gallery . . . of the value of settling without having to endure the cost and negative publicity of being sued as the holder[] of Holocaust Art and as the possessor[] of stolen property seized at the behest of the Nazi authorities.

Donald S. Burris & E. Randol Schoenberg, *Reflections on Litigating Holocaust Stolen Art Cases*, 38 Vand. J. Transnat'l L. 1041, 1049 (2005).

[224] *See* Unif. Trust Code § 811 cmt. (amended 2005), 7C U.L.A. 608 (2000) (noting it may be proper for the trustee to compromise or settle an action depending on the chance of recovery and the cost of enforcing the suit); Scott and Ascher on Trusts, *supra* note 16, § 18.1.6 ("[I]f it is reasonable to compromise a claim, the trustee may properly do so.").

[225] Int'l Found. for Art Research, Case Summary: Italy and Wadsworth Atheneum Agree on Return of Zucchi Painting, http://www.ifar.org/case_summary.php?docid=1184707993 (last visited Mar. 22, 2010) [hereinafter IFAR Wadsworth Atheneum case summary].

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *See id.*

[230] Gerstenblith, *supra* note 20, at 437.

[231] *Id.* For example, when Congresswoman Maloney asked Glenn Lowry, Director of the Museum of Modern Art, if he saw government in the process of dealing with these

awareness also produced international efforts to deal with stolen art claims.[232]

These codes of professional responsibility do not advise outright that museums should return artwork seized by Nazi forces.[233] Instead, the codes state that disputes should be resolved equitably, but the concerns for research and transparency in the collections seem to point towards returning the paintings to their rightful owners.[234]

A. *Association of Art Museum Directors*

The Association of Art Museum Directors ("AAMD") was founded in 1916 to help establish and maintain professional standards for museums and their directors.[235] In 1998, the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era (1933–1945) released a report on its findings, which purports to reconcile the interests of heirs with museums' fiduciary and legal duties.[236]

The Task Force Report urges extensive provenance research for works with suspicious gaps in provenance, even before claims are brought against museums, with the resulting information disseminated

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claims, he replied that "there are a number of different interested parties, from museums to groups like the World Jewish Congress. And I think, at least from the point of view of museums, it is going to be an issue that we need to think through thoroughly." *The Restitution of Art Objects Seized by the Nazis from Holocaust Victims and Insurance Claims of Certain Holocaust Victims and Their Heirs: Hearing Before the H. Comm. on Banking and Financial Servs.*, 105th Cong. 30 (1998). Additionally, Lowry said that "I am convinced the [Association of Art Museum Directors'] task force will provide the kinds of guidelines and recommended actions necessary to ensure that America's museums set the standard for ethical behavior in this respect." *Id.* at 11.

[232] *See, e.g.*, Commission for Looted Art in Europe, Vilnius Forum Declaration (2000), http://www.lootedartcommission.com/vilnius-forum (last visited Mar. 9, 2010) [hereinafter Vilnius Declaration]; *Washington Conference Principles on Nazi-Confiscated Art*, 1998 WASH. CONFERENCE ON HOLOCAUST-ERA ASSETS PROC. app. G ¶¶ 1–11, at 971–72, *available at* http://www.state.gov/www/regions/eur/holocaust/heacappen.pdf [hereinafter Washington Principles].

[233] *See* TASK FORCE REPORT, *supra* note 16; Am. Ass'n of Museums, Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, (1999, amended 2001), http://www.aam-us.org/museumresources/ethics/upload/ethicsguidelines_naziera.pdf (last visited Mar. 22, 2010) [hereinafter Guidelines].

[234] *See, e.g.*, TASK FORCE REPORT, *supra* note 16, §§ II.C.1 II.E.2 (recommending museums offer to resolve these matters in an equitable manner and facilitate access to information on works with World War II-era provenance); Guidelines, *supra* note 233, at 6, 7 (recommending museums resolve the matter in an equitable manner and make available to the public information regarding provenance research).

[235] Ass'n of Art Museum Dirs., About AAMD, http://www.aamd.org/about/ (last visited Mar. 22, 2010).

[236] Kreder, *supra* note 47, at 167; TASK FORCE REPORT, *supra* note 16, § II.

to the public.[237] The Report further encourages museums to resolve matters in an equitable and agreeable manner and urges member museums to work with the claimants to settle claims through mediation.[238] A prompt and cooperative response, as encouraged by the Task Force Report, could greatly satisfy heirs who may then work with the museum to let it keep the artwork.[239] For example, in 2000, the North Carolina Museum of Art voluntarily returned a painting to the heirs of the original owner after their provenance research verified the heirs' claim.[240] The heirs were so pleased with the museum's response that they decided to sell the painting back to the museum below its market price.[241]

In a paper discussing a museum's choice to deaccession, the AAMD encourages the museum to take into account any new evidence indicating that a painting was stolen or illegally exported or imported.[242] AAMD also recommends museums consider whether the deaccession best maximizes benefit to the museum and the public and whether the item has historical or cultural significance to the city in which the museum is located.[243] AAMD recognizes, though, that the answers to these types of queries are unique to each museum.[244]

More recently, in May 2007, the AAMD issued a paper with questions that serve as a checklist for museums to ensure they are continuing the diligent work in researching provenance and responding to claims.[245] Among the questions on the checklist are, "[i]s the museum updating its provenance research to the best of its ability as new information becomes available," "[h]as the museum made public the results

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[237] *See* Task Force Report, *supra* note 16, §§ II.A, II.B, II.C, add.

[238] *See id.* §§ II.D, II.E. Specifically, museums are encouraged to review claims "promptly and thoroughly," resolve a claim "in an equitable, appropriate, and mutually agreeable manner," and "consider using mediation wherever reasonably practical." *Id.* §§ II.E.1, II.D.2, II.E.3.

[239] *See* Gerstenblith, *supra* note 20, at 451.

[240] Spiegler, *supra* note 32, at 297 & n.2.

[241] *See id.* at 297.

[242] *See* Ass'n of Art Museum Dirs., Art Museums and the Practice of Deaccessioning 2 (Nov. 2007) (position paper) *available at* http://www.aamd.org/papers [hereinafter AAMD Deaccessioning Paper].

[243] *Id.* at 3. For example, in a dispute over six Gustav Klimt paintings, the Austrians often referred to the Klimts as their *Mona Lisa*, and that seems to have heightened the hostility towards the original owner's heir attempting to regain the paintings before turning to U.S. litigation. *See* Kreder, *supra* note 47, at 193–94.

[244] AAMD Deaccessioning Paper, *supra* note 242, at 3.

[245] *See* Ass'n of Art Museum Dirs., Art Museums and the Identification and Restitution of Works Stolen by the Nazis 2–3 (May 2007) (position paper, *available at* http://www.aamd.org/papers/documents/Nazi-lootedart_clean_06_2007.pdf [hereinafter AAMD Identification and Restitution Paper].

of its provenance research, and is it continuing to do so," and "[w]hat are the steps a museum should take in establishing whether a claim is legitimate?"[246] The paper suggests the AAMD's core values underlie the answers to the questions posed, which include fulfilling the mission of serving the public and maintaining high standards of "curatorial, professional and ethical integrity."[247]

B. *International Agreement*

The influence of the AAMD's Task Force Report guidelines extended internationally.[248] The first international effort to be influenced was the Washington Conference on Holocaust-Era Assets, which attempted to establish guidelines to generate research and resolve Nazi-looted art claims fairly.[249] The conference gathered forty-four nations and thirteen non-governmental organizations in late 1998.[250]

The moral influences underlying this conference are evident throughout its eleven principles.[251] The intent of the principles is to provide "just and fair" solutions to resolve ownership disputes regarding Nazi-looted art.[252] The principles do not directly target museums, and the main focus appears to be the claimants' interest of rightful ownership, not the museums' burdens of following the principles, such as the financial costs of additional provenance research, publicizing stolen art, and deaccessioning.[253] To help claimants, nations are encouraged to create central registries of looted art, publicize art confiscated by the Nazis, make records accessible, and resolve any issues expeditiously.[254]

These efforts are only a representation of action because the conference did not establish uniformity among nations, recognizing instead that participating nations had to act within their own laws and legal systems.[255] Additionally, the conference only stated guidelines that are not binding on nations.[256]

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[246] *Id.* at 3.

[247] *Id.* at 3–4.

[248] *See* Kreder, *supra* note 47, at 169.

[249] *Id.* at 169–71; Washington Principles, *supra* note 232, ¶¶ 3, 9.

[250] J.D. Bindenagel, *Message from the Editor*, 1998 WASH. CONFERENCE ON HOLOCAUST-ERA ASSETS PROC., *available at* http://www.state.gov/www/regions/eur/holocaust/heaca.pdf.

[251] *See* Washington Principles, *supra* note 232, ¶¶ 1–11.

[252] *See id.* ¶¶ 8, 9.

[253] *See* Range, *supra* note 168, at 668; Washington Principles, *supra* note 232, ¶¶ 1–11.

[254] Washington Principles, *supra* note 232, ¶¶ 6, 5, 2, 8, 9.

[255] Kreder, *supra* note 47, at 171; Washington Principles, *supra* note 232, at intro & ¶ 11 (noting at the outset that "among participating nations there are differing legal systems"

In an October 2000 effort, participating governments met for the Vilnius International Forum on Holocaust Era Looted Cultural Assets to build upon the principles set forth in the Washington Conference.[257] They did not, however, significantly refine or expand those principles.[258] The forum did renew emphasis, though, on the need for the nations to determine how to implement the principles, especially the alternative dispute resolutions, and to do so in a timely manner.[259]

Created in 1946 as a non-governmental organization, the International Council of Museums ("ICOM") brings together museums and museum professionals to develop the "conservation, continuation and communication" of the world's natural and cultural heritage.[260] Its Code of Ethics, revised in 2004, does not explicitly address Nazi-looted art, but urges due diligence in determining provenance and cooperating promptly and responsibly if restitution is sought.[261] In January 1999, ICOM issued a series of recommendations for returning art confiscated during World War II.[262] The recommendations stress following "stringent ethical principles" while further researching and making accessible provenance and "actively address[ing] the return" of objects formerly owned by Jews, pursuant to national legislation.[263]

C. *American Association of Museums*

The American Association of Museums ("AAM"), established in 1906, represents museums by developing industry standards, encouraging the sharing of knowledge, and advocating for issues relevant to the museum community.[264] The AAM promulgates a Code of Ethics for Mu-

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and later that "[n]ations are encouraged to develop national processes to implement these principles").

[256] Derrossett, *supra* note 7, at 235.

[257] *See* Vilnius Declaration, *supra* note 232.

[258] Kreder, *supra* note 47, at 172; *see* Vilnius Declaration, *supra* note 232.

[259] Range, *supra* note 168, at 669; *see* Vilnius Declaration, *supra* note 232. The Vilnius Declaration also proposed periodic meetings of nations to continue dealing with efforts to restitute stolen art. Vilnius Declaration, *supra* note 232, ¶ 5.

[260] Int'l Council of Museums, ICOM Mission, http://icom.museum/mission.html (last visited Mar. 10, 2010).

[261] *See* Int'l Council of Museums, Code of Ethics, at ii, 3, 10 (2006), *available at* http://icom.museum/code2006_eng.pdf.

[262] Press Release, Int'l Council of Museums, Recommendations Concerning the Return of Works of Art Belonging to Jewish Owners (Jan. 14, 1999), *available at* http://icom.museum/worldwar2.html.

[263] *Id.*

[264] Am. Ass'n of Museums, About AAM, http://www.aam-us.org/aboutaam/index.cfm (last visited Mar. 9, 2010).

seums ("Code").[265] The Code acknowledges the guiding concept that museums share a commitment to serving the public.[266] The AAM recommends that each member-museum adopt the Code in its own separate code of ethics.[267]

The Code stresses that the museum's duty to the public is not to just act legally, but ethically as well.[268] Serving as a public trust, a museum should respond to and represent the interests of the public.[269] The highest public trust is involved in collection stewardship and a museum must ensure that collections are lawfully held, documented, and accessible.[270] If museums must dispose of a work, it must only be for the "advancement of the museum's mission."[271] Additionally, "competing claims of ownership . . . should be handled openly, seriously, responsively and with respect for the dignity of all parties involved."[272]

The AAM set forth its own Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era ("Guidelines") in 2001 to help museums address problems of non-restituted art unlawfully appropriated during the Nazi era.[273] The Guidelines remind members that a museum's collections are held in public trust and any steps to research provenance and possibly restitute disputed art must be done with the public trust in mind.[274] Its broad goals ask museums to identify pieces in their collection that changed ownership between 1932 and 1946, to make available to the public provenance information on such pieces, and to give this kind of research priority.[275] To advance these goals, the AAM encouraged museums to "expand online access to collection information."[276]

In 2006, the U.S. District Court for the Northern District of Ohio in *Toledo Museum of Art v. Ullin* highlights how museums have adhered to certain portions of the Guidelines.[277] The Toledo Museum of Art

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[265] Am. Ass'n of Museums, Code of Ethics for Museums (2000), http://www.aam-us.org/museumresources/ethics/coe.cfm (last visited Mar. 9, 2010) [hereinafter Code of Ethics].

[266] *See id.*

[267] *Id.*

[268] *See id.*

[269] *Id.*

[270] *Id.*

[271] Code of Ethics, *supra* note 265.

[272] *Id.*

[273] Gerstenblith, *supra* note 20, at 444; Guidelines, *supra* note 233, at 1–2.

[274] *See* Guidelines, *supra* note 233, at 7.

[275] *Id.* at 2–3.

[276] *Id.* at 3.

[277] *See* 477 F. Supp. 2d 802, 805 (N.D. Ohio 2006); Guidelines, *supra* note 233, at 2–3.

("TMA") posted on its website, in accordance with the Guidelines' suggestion, artwork in its collection with a Nazi-era provenance.[278] The heirs to a Paul Gauguin painting, allegedly sold under duress in 1938, saw the posting, recognized the lost painting, and contacted the museum.[279]

TMA, however, did not continue to adhere to the Guidelines.[280] After gathering its own research, TMA did not decide to resolve the dispute through mediation and rejected the heir's claim of ownership in an action seeking declaratory judgment.[281] The Guidelines, in contrast, encourage museums to resolve disputes through mediation rather than litigation once a claim of disputed ownership is brought.[282] Again not following the Guidelines' suggestion, TMA asserted a statute of limitations defense in response to the heirs' counterclaim for conversion.[283] The Guidelines suggest that in order to resolve claims in an "equitable, appropriate, and mutually agreeable manner,"[284] the museum may choose to waive available defenses to reach such an "equitable and appropriate resolution."[285]

The court in *Toledo Museum of Art* held that the Guidelines were not intended to be legal obligations or mandatory rules, but rather to facilitate museums' ethical acts.[286] The heirs argued that by posting the painting on its website, TMA adopted the Guidelines and thus invited the public to make claims and agreed to forego their statute of limitations defense.[287] The court held, however, that the museum did not waive its statute of limitations and laches defenses by adopting the AAM guidelines of posting information regarding artwork with Nazi-era

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[278] *Toledo Museum of Art*, 477 F. Supp. 2d at 805.

[279] *Id.* at 803, 804 n.1, 805.

[280] *See id.* at 805; Guidelines, *supra* note 233, at 6–7.

[281] *See Toledo Museum of Art*, 477 F. Supp. 2d at 805. According to the court's opinion, TMA rejected the ownership claim because it was "without merit." *Id.* at 808. It is unclear, though, whether TMA thought the claim was without merit because its provenance research indicated the painting was not stolen but sold, or because the claim was barred by statute of limitations. *See id.* at 804 n.1, 808.

[282] Guidelines, *supra* note 233, at 6; *see* Gerstenblith, *supra* note 20, at 445. Although the Guidelines do encourage museums to take steps like mediation, there is much latitude as to when museums should forego the litigation method. *See* Guidelines, *supra* note 233, at 6 (the Guidelines suggest a time "when appropriate and reasonably practical").

[283] *Toledo Museum of Art*, 477 F. Supp. 2d at 805.

[284] Guidelines, *supra* note 233, at 6.

[285] *Id.* at 7.

[286] 477 F. Supp. 2d at 809.

[287] *Id.* at 808.

provenances.[288] Although the museum complied with the suggestion to post artwork online, it did not waive its defenses as a result.[289]

V. Achieving Balance: Informed Duty of Care

Deaccessioning a work of art forces museum directors to find a balance between their legal, fiduciary, and ethical obligations.[290] Museum fiduciaries must grapple with many factors, such as public reaction and costs of litigation, as they decide how to proceed.[291] Ultimately, the museum trustee must struggle with what is in the best interest of the public and the museum.[292] Fiduciary obligations generally do not lead to a clear answer of when to deaccession.[293] Although trustees are instructed to preserve trust assets and defend against claims that could result in a loss of trust property, trustees may also settle claims if it is reasonable.[294]

Behind this conflict are the strong defenses of statute of limitations and laches that encourage museums to keep the artwork.[295] Professional ethics, however, clearly indicate the opposite when faced with a legitimate claim by an heir, recommending foregoing technical defenses and working with the heir to find an equitable solution.[296]

Also relevant in this conflict is the trust standard of "abuse of discretion," in which courts will generally defer to trustee decision if it

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[288] *Id.* at 809.

[289] *Id.*; *see also* Detroit Inst. of Arts v. Ullin, No. 06-10333, 2007 WL 1016996, at *4 (E.D. Mich. Mar. 31, 2007) (holding that museum did not waive its right to assert defenses when it posted painting information on its website, pursuant to the Guidelines).

[290] *See* Range, *supra* note 168, at 673.

[291] *See* Gerstenblith, *supra* note 20, at 451.

[292] *See, e.g.*, Gerstenblith, *supra* note 165, at 177; Range, *supra* note 168, at 657.

[293] Range, *supra* note 168, at 657. In the Metropolitan Museum of Art's Collections Management Policy, it lists as considerations in determining when to deaccession:

> The Museum is ordered to return an object to its original and rightful owner by a court of law; the Museum determines that another entity is the rightful owner of the object; or the Museum determines that the return of the object is in the best interest of the museum.

Metro. Museum of Art, *supra* note 188, § VI.A.5.

[294] *See* Unif. Trust Code § 811 (amended 2005), 7C U.L.A. 608 (2000); Scott and Ascher on Trusts, *supra* note 16, § 17.10.

[295] *See, e.g.*, Detroit Inst. of Arts v. Ullin, No. 06–10333, 2007 WL 1016996, at *4 (E.D. Mich. Mar. 31, 2007); Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 809 (N.D. Ohio 2006).

[296] *See, e.g.*, Task Force Report, *supra* note 16, §§ II.D, II.E; Guidelines, *supra* note 233, at 6–7.

meets the reasonable prudent person standard.[297] Because of the abuse of discretion doctrine, trustees can act within their discretion by adopting professional codes of conduct as a way to inform and fulfill their fiduciary duties.[298] Although museums are exercising this discretion, recent examples of museums turning to litigation to maintain artwork show that they are still struggling with how to best proceed.[299]

A. *Abuse of Discretion*

A trustee has discretion in exercising fiduciary powers.[300] This discretion is usually implicit in the terms of the trust, or can be explicitly stated.[301] Courts will not interfere unless the trustees acted unreasonably, as measured by a reasonable prudent person standard, or against their fiduciary duties.[302] Examples of abuse of discretion include acting dishonestly, in bad faith, or with improper motive.[303]

For example, the Court of Appeals of New York in a 1934 decision, *City Bank Farmers' Trust Company v. Smith*, held that the dispute between a beneficiary and a trustee, regarding a discretionary action taken by the trustee, forms no basis for a declaratory judgment.[304] This is because a trustee "assumes the responsibility of administering the trust

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[297] Restatement (Third) of Trusts, §§ 77, 87 (2007); *see also* Restatement (Third) of Trusts, § 87 cmt. c (stating whether "the trustee's decision is one that would not be accepted as reasonable by persons of prudence").

[298] *See, e.g.*, Restatement (Third) of Trusts, § 87; Gerstenblith, *supra* note 20, at 444 n.151.

[299] *See, e.g.*, Museum of Modern Art v. Schoeps, 549 F. Supp. 2d 543, 544 (S.D.N.Y. 2008); IFAR SAM case summary, *supra* note 191.

[300] *E.g.*, Restatement (Third) of Trusts, § 87.

[301] *Id.* § 87 cmt. a.

[302] *Id.* § 87 cmt. b, c; *see* Gerstenblith, *supra* note 58, at 295 (citing Rowan v. Pasadena Art Museum, Case No. C 322817 (Cal. Super. Ct. 1981) (holding that the court should not intercede in museum decisions, such as what to exhibit, sell, or loan, because those decisions "must be left to the broad and reasonable discretion of the trustees . . . unless it can be demonstrated clearly and unequivocally that an abuse of discretion has taken place")); *see, e.g.*, Brackett v. Middlesex Banking Co., 95 A. 12, 16 (Conn. 1915); Baer v. Kahn, 101 A. 596, 599 (Md. 1917); *In re* Jane Bradley Uihlein Trust, 417 N.W.2d 908, 912 (Wis. Ct. App. 1987).

[303] Restatement (Third) of Trusts, § 87 cmt. c; *see, e.g.*, Blunt v. Kelly, 131 F.2d 632, 634 (3d Cir. 1942) (stating trustee bound to act in good faith); Budreau v. Mingledorff, 63 S.E.2d 326, 333 (Ga. 1951) (holding court will not interfere with honest exercise of discretion); George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 560 n.91 (rev. 2d ed. 1980) (explaining cases in which courts found an abuse of discretionary power).

[304] 189 N.E. 222, 223 (N.Y.), *aff'd* 191 N.E. 217 (N.Y. 1934).

with reasonable care" and the court does not ordinarily advise a trustee when the trustee has choices.[305]

B. *Codes of Conduct Show That Trustees Do Not Abuse Their Discretion When Returning Artwork*

Although professional codes of conduct, such as the AAM Guidelines, do not have legal effect, they can be useful in defining the duty of care and in establishing when museum trustees can be judged to fulfill their fiduciary obligations.[306] By returning Nazi-looted art, the trustee comports with the duty of care established by the profession and thus acts reasonably, which means the trustee need not fear inviting court intervention.[307] Museums are currently using this discretion and such use will solidify ethical obligations.[308]

1. Exercise of Discretion

It is ethically correct to settle ownership claims when those claims are valid.[309] Museum trustees exercise their discretion in deciding to settle claims with Holocaust survivors and their heirs.[310] As of 2002, one law firm compiled a list of claims made against U.S. museums involving Nazi-looted art: out of the twelve claims, four pieces were returned and the remaining eight stayed with the museum.[311] In seven of those eight cases, museums kept the artwork after paying a monetary settlement.[312]

Although some scholars raise concerns that such examples of restitution or payment may mean a violation of the duty of care, these examples instead show how trustees follow professional guidelines and

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[305] *Id.*; *see also* Evans v. Eaton Corp. Long Term Disability Plan, 514 F.3d 315, 318, 322, 325–26 (4th Cir. 2008) (holding that despite ambiguous evidence, disability plan administrator did not abuse discretion in terminating an employee's benefits because its "careful and coherent reasoning, faithful adherence to the letter of ERISA and the language in the plan, and a fair and searching process" did not stray "too far from the mark").

[306] Gerstenblith, *supra* note 20, at 444 n.151, 444–45; White, *supra* note 166, at 1046 n.22 (citing cases in which courts used codes of ethics to establish standards of care); *see supra* notes 230–289 and accompanying text.

[307] *See, e.g.*, Restatement (Third) of Trusts, § 87; Gerstenblith, *supra* note 20, at 444 n.151.

[308] *See, e.g.*, IFAR Wadsworth Atheneum case summary, *supra* note 225.

[309] *See, e.g.*, Task Force Report, *supra* note 16, § II.D.2; IFAR SAM case summary, *supra* note 191.

[310] *See, e.g.*, IFAR SAM case summary, *supra* note 191; IFAR Wadsworth Atheneum case summary, *supra* note 225.

[311] Gerstenblith, *supra* note 20, at 438–39, 438 n.121.

[312] *See id.* at 440. It appears that the eighth case involved the donation of the work to the museum after the museum loaned the painting to the claimant for ten years. *Id.* at 440–41.

thus fulfill their duty of care.[313] For example, when SAM decided to return Matisse's *Odalisque* after conducting thorough provenance research, its director announced: "By our action today, the Seattle Art Museum is drawing a clear ethical line. Since day one, SAM has been committed to doing the right thing."[314] Such a decision comports with AAMD Task Force Report guidelines, in that to "review such a claim promptly and thoroughly," SAM contacted the Holocaust Art Restitution Project a few months after first receiving the heirs' claim.[315] By returning the art to its rightful owner, SAM "resolve[d] the matter in an equitable, appropriate, and mutually agreeable manner" and thus reasonably fulfilled its duty of care in its deaccession decision.[316]

In examples where the museum retains the artwork, there are some creative settlements involving partial purchase by the museum and partial donation by the heir.[317] Even in cases where the museums pay full price, it is still arguably within the proper duty of care. [318] For the Princeton University Art Museum, the decision to pay heirs the full market value of Bernardino Pinturicchio's *St. Bartholomew*, was a happy collaboration of the museum's desire to retain the painting because of its educational value as a teaching piece, and the heirs' desire for the work to remain accessible to the public.[319] This example highlights another aspect of both the AAMD and AAM suggestions: resolving the

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[313] *See id.* at 441.

[314] Press Statement, Ass'n of Art Museum Dirs., SAM to Return Matisse Odalisque to Rosenbergs (June 14, 1999), *available at* http://www.aamd.org/newsroom/r061499.php [hereinafter SAM Press Statement].

[315] Task Force Report, *supra* note 16, § II.E.1; SAM Press Statement, *supra* note 314. This action also fulfills the AAM's Guidelines suggesting to resolve claims of ownership "openly, seriously, responsively, and with respect for the dignity for all parties involved." Guidelines, *supra* note 233, at 6.

[316] Task Force Report, *supra* note 16, § II.E.2; SAM Press Statement, *supra* note 314; *see* Unif. Trust Code § 804 (amended 2005), 7C U.L.A. 601 (2000).

[317] *See* Int'l Found. for Art Research, Case Summary: Art Institute of Chicago Settles Claim to Mochi Bust, http://www.ifar.org/case_summary.php?docid=1179550075 (last visited Mar. 22, 2010); Int'l Found. for Art Research, Case Summary: Boston Museum of Fine Arts Claim by Gentili di Guiseppe Heirs, http://www.ifar.org/case_summary.php?docid=1183054992 (last visited Mar. 22, 2010); IFAR Goodman case summary, *supra* note 29.

[318] *See* Unif. Trust Code § 804, 7C U.L.A. 601; Int'l Found. for Art Research, Case Summary: Princeton University Art Museum Reaches Agreement with Gentili di Guiseppe Heirs, http://www.ifar.org/case_summary.php?docid=1184688280 (last visited Mar. 22, 2010).

[319] Press Statement, Princeton Univ., Princeton University Art Museum Reaches Agreement with Heirs of Owner of Painting Sold During World War II Era (June 13, 2001), *available at* http://www.princeton.edu/pr/news/01/q2/0613-artmuswwii.htm. The museum director also added that the museum "is fully committed to the responsible resolution of ownership claims concerning World War II-era cultural property." *Id.*

dispute in a mutually agreeable manner.[320] Additionally, the parties sought resolution other than through litigation, another ethical encouragement.[321]

2. Ethical Obligations Will Be Solidified by Museum Deaccessioning

The ethics do have some gaps in guidance, which are vague and, as some scholars note, not successful.[322] As seen in the May 2007 AAMD paper, the questions posed are more helpful in getting museums to think about their actions, and less helpful in providing actual guidance.[323] For example, the paper asks, "is the museum balancing a swift and compassionate response to claimants with its responsibility as an institution to act with care and prudence in protecting the works it holds in trust for the public?"[324] This question seems to be the crux of the museum's dilemma.[325]

Before a museum can be confident that fulfillment of professional guidelines is an acceptable way to fulfill the duty of care, more museums need to work with the heirs to find an agreeable solution and set an example of complying with ethics.[326] The North Carolina Museum of Art's reaction to a claim regarding *Madonna and Child in a Landscape*, by Lucas Cranach the Elder, answers the above question in the affirmative.[327] There, the museum decided to return the painting to the heirs, and the heirs were so pleased with the museum's response that they offered to sell it to the museum substantially below its estimated value and the painting remains on display in the museum.[328] Such an example is illustrative to museums that find themselves asking the same question.[329]

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[320] *See* Task Force Report, *supra* note 16, § II.D.2; Guidelines, *supra* note 233, at 6.

[321] Guidelines, *supra* note 233, at 6; *see* Task Force Report, *supra* note 16, § II.E.3.

[322] *See* Bazyler, *supra* note 11, at 185; *see also* McBrayer, *supra* note 179, at 353.

[323] *See* AAMD Identification and Restitution Paper, *supra* note 245.

[324] AAMD Identification and Restitution Paper, *supra* note 245, at 3.

[325] *See, e.g.*, *Toledo Museum of Art*, 477 F. Supp. 2d at 803; Unif. Trust Code § 809 (amended 2005), 7C U.L.A. 606 (2000); Guidelines, *supra* note 233, at 6–7.

[326] *See, e.g.*, Restatement (Third) of Trusts, § 87 (2007); Gerstenblith, *supra* note 20, at 444–45; IFAR SAM case summary, *supra* note 191; IFAR Wadsworth Atheneum case summary, *supra* note 225.

[327] *See* Int'l Found. for Art Research, Case Summary: Hainisch and North Carolina Museum of Art in Raleigh, North Carolina, http://www.ifar.org/case_summary.php?docid=1184602007 (last visited Mar. 22, 2010).

[328] *Id.*

[329] *See id.*; AAMD Identification and Restitution Paper, *supra* note 245, at 3. Additionally, the museum was thorough in its research into the claim, taking several months to investigate the claim and thus also fulfilling the duty of care by taking the time to pursue the provenance

C. *Recent Aggressive Actions by Museums May Not Run Counter to Their Ethical Responsibilities*

Museums are ethically compelled to settle claims of ownership when the claims are valid.[330] When the claims are not valid, they are not ethically compelled to settle those claims and litigation may be an option.[331] But when the museum pursues litigation when the claim is valid, that is unethical.[332]

What about the recent cases of museums filing declaratory judgment actions?[333] Although ethical guidelines suggest a museum should forego defenses like statutes of limitations, this is not stopping those museums from initiating litigation and utilizing the statute of limitations to keep disputed artwork.[334] These examples could mean that museums are becoming hostile to heirs' claims and are focusing on their fiduciary duty to preserve trust assets with the help of legal remedies that are strongly in their favor.[335] Such behavior would be unethical if the heirs' claims are valid.[336]

In the dispute over an Oskar Kokoschka painting between the Museum of Fine Arts, Boston ("MFA") and the painting's heir, the museum notes that after learning of the heir's claim, it researched the painting's provenance according to its own standard as well as the guidelines established by AAM, AAMD, and the Washington Principles.[337] After obtaining that research, the MFA decided to file a declaratory judgment action.[338] If the MFA followed ethical guidelines in researching the claim,

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research. *See* Yonat Shimron, *A Madonna Stolen by Nazis Takes a Trip Home*, News & Observer (Raleigh, N.C.), Dec. 1, 2008, at A1, *available at* http://www.newsobserver.com/news/story/1315599.html; Task Force Report, *supra* note 16, § II.E; Guidelines, *supra* note 233, at 6.

[330] *See, e.g.*, Task Force Report, *supra* note 16, § II.D.2; IFAR Wadsworth Atheneum case summary, *supra* note 225.

[331] *See, e.g.*, Task Force Report, *supra* note 16, §§ II.E.1–2; Guidelines, *supra* note 233, at 6.

[332] *See, e.g.*, Task Force Report, *supra* note 16, §§ II.D, II.E; Guidelines, *supra* note 233, at 6–7.

[333] *E.g.*, *Museum of Modern Art*, 549 F. Supp. 2d at 544; *Toledo Museum of Art*, 477 F. Supp. 2d at 803, 809; *see also supra* notes 159–162 and accompanying text.

[334] *See, e.g.*, *Museum of Modern Art*, 549 F. Supp. 2d at 544; Guidelines, *supra* note 233, at 7.

[335] *See, e.g.*, *Toledo Museum of Art*, 477 F. Supp. 2d at 803, 809; Unif. Trust Code § 809 (amended 2005), 7C U.L.A. 606 (2000).

[336] *See, e.g.*, Task Force Report, *supra* note 16, §§ II.D, II.E; Guidelines, *supra* note 233, at 6–7.

[337] Press Release, Museum of Fine Arts, *supra* note 160, at 3.

[338] *Id.* at 4.

but did not follow those guidelines in pursuing litigation, it could mean that the museum felt confident in an affirmative defense.[339]

The MFA, however, pursued litigation because it believed the heir's claim was meritless.[340] The MFA's research showed that the 1939 sale of the painting by the original owner was voluntary, was sold without Nazi coercion, and was not stolen by the Nazis.[341] Because good title passed in that 1939 sale, the museum contends, they have rightful ownership.[342] The MFA's course of action in this dispute may be distinguished from other disputes in which a museum also brings legal action, by the fact that the MFA, after researching the claim, believed it would not be an equitable solution to return a painting to heirs who have no legal right of ownership because the painting was never wrongfully taken during World War II.[343]

The encouragement to settle claims in an "equitable, appropriate, and mutually agreeable manner" only applies when a museum finds that the work was stolen.[344] Museums face a difficult situation when making the ethical decision not to restitute art legitimately acquired, even though on its face it appears to be a hostile decision.[345] Museums should remember that although it is ethical to mediate or settle claims when an heir brings a legitimate claim of ownership, it is also ethical to pursue litigation when an heir brings a bogus claim of ownership.[346]

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[339] *See, e.g.*, *Detroit Inst. of Arts*, 2007 WL 1016996, at *4; *Toledo Museum of Art*, 477 F. Supp. 2d at 809; Press Release, Museum of Fine Arts, *supra* note 160, at 1, 3.

[340] Press Release, Museum of Fine Arts, *supra* note 160, at 1, 4.

[341] *Id.* at 2. The heir, on the other hand, believed the sale was forced. Kreder, *supra* note 105, at 17; Press Release, Museum of Fine Arts, *supra* note 160, at 1.

[342] *See* Press Release, Museum of Fine Arts, *supra* note 160, at 1.

[343] *See Museum of Modern Art*, 549 F. Supp. at 544; Press Release, Museum of Fine Arts, *supra* note 160, at 1. Although the court's decision did not determine whether the sale was forced, basing its decision on the passage of the statute of limitations, the decision noted that "there is no evidence that [the original owner's family] believed the transfer was not legitimate." Museum of Fine Arts v. Seger-Thomschitz, No. 08 Civ. 10097 (RWZ), slip op. at 18 (D. Mass. May 28, 2009). Two similar examples from 2006 and 2007, decided on statute of limitations grounds, also involved a dispute about whether the sale was forced—an issue the court never resolved. *See Detroit Inst. of Arts*, 2007 WL 1016996, at *4; *Toledo Museum of Art*, 477 F. Supp. 2d at 809; *see also* Kreder, *supra* note 105, at 14.

[344] Guidelines, *supra* note 233, at 6–7; *see* Task Force Report, *supra* note 16, § II.D; Guidelines, *supra* note 233, at 2–3.

[345] *See, e.g.*, Press Release, Museum of Fine Arts, *supra* note 160, at 4; Task Force Report, *supra* note 16, §§ II.D.1, II.E.1; *see also Q&A with Thomas R. Kline*, Art & Cultural Heritage L. Newsl., Spring 2008, at 12, 14 ("I believe U.S. museums are still receptive to relatively strong claims, but are less tolerant of claims they see as marginal or poorly documented.").

[346] *See, e.g.*, Task Force Report, *supra* note 16, §§ II.D, II.E; IFAR Wadsworth Atheneum case summary, *supra* note 225.

What is unethical, however, is pursuing litigation when the ownership claim is valid or if further research is needed.[347] In *Museum of Modern Art v. Schoeps*, the parties also disagreed about whether a sale of paintings was made under duress.[348] This dispute to settle title of two Pablo Picasso paintings between two museums (the Museum of Modern Art and the Solomon R. Guggenheim Foundation) and Julius H. Schoeps, though, muddles the situation because although both museums filed a suit against the heir, the case settled, resulting in the museums keeping the artworks after paying the heir.[349] If the museums chose to initiate legal action because their research showed the paintings were never stolen, why did they settle the case and pay money to keep paintings supposedly rightfully theirs?[350]

The settlement agreement is confidential, so it would be unfair to speculate about the museums' fulfillment of the duty of care without knowing more about the terms of settlement and the motives behind it.[351] The case can serve as an example, though, of how museums are still struggling to deal with Nazi-looted art claims and how, if more museums realized that foregoing litigation and instead restituting art fulfills their fiduciary duty, uniformity of action could be achieved.[352]

Conclusion

The Nazi regime produced some of the great tragedies of the modern age. It is more than ten years since museums, in recognition of this history, first started to promulgate specific codes of ethical conduct related to art stolen during World War II. Despite these professional codes of conduct, museums use affirmative defenses to bar claims by heirs; the recent declaratory judgment actions show that museums are confident with their legal defenses and will assert them.

Fiduciary duties do not provide clear guidance to museums about how to resolve Nazi-looted art cases. Museums can be torn between preserving trust assets and deaccessioning stolen works in a way that en-

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[347] *See, e.g.*, Task Force Report, *supra* note 16, §§ II.D, II.E; Guidelines, *supra* note 233, at 6–7.

[348] *See* Museum of Modern Art v. Schoeps, 594 F. Supp. 2d 461, 465 (S.D.N.Y. 2009).

[349] *See* Museum of Modern Art v. Schoeps, 603 F. Supp. 2d 673, 674 (S.D.N.Y. 2009).

[350] *See, e.g.*, Restatement (Second) of Torts § 229 (1965) (stating thief can never obtain good title); Press Release, Museum of Fine Arts, *supra* note 160, at 1.

[351] *See Museum of Modern Art*, 603 F. Supp. 2d at 676.

[352] *See, e.g.*, Restatement (Third) of Trusts, § 87 (2007); Gerstenblith, *supra* note 20, at 444–45; IFAR SAM case summary, *supra* note 191; IFAR Wadsworth Atheneum case summary, *supra* note 225.

hances their reputation. By looking to the ethical codes for guidance, museums can use their discretion and follow those suggestions knowing it is a sanctioned way to fulfill their fiduciary duties.

When museums follow ethical guidelines, they do not breach their fiduciary duties. The ethical guidelines compel museums to work with heirs to find a mutually agreeable solution when the ownership claim is valid, but when the ownership claim is invalid, museums do not have to work with heirs and can pursue litigation. If museums decide to pursue litigation when an ownership claim is valid, though, then that action would be unethical.

Emily A. Graefe