

Unpacking Nazi-Era Art Restitution Cases Under HEAR Act

By **Harry Sandick, John Sare and James Mayer** (October 2, 2024)

While in power, the Nazis ruthlessly engineered the theft of hundreds of thousands of artworks and other cultural property from their victims.[1]

During and after World War II, a significant number of these pieces made their way to museums, galleries and private collections in the U.S. This led to civil litigation in U.S. courts when the Nazis' victims and their heirs sought the restitution of these artworks.

In 2016, Congress enacted the Holocaust Expropriated Art Recovery Act, or HEAR, Act, which extended the statute of limitations for Nazi era — 1933-1945 — restitution claims and sought to prioritize resolution of those claims "in a just and fair manner," a standard that has generally been understood to disfavor the resolution of claims on procedural grounds, such as statutes of limitations.[2]

Since the passage of the HEAR Act, courts, commentators and litigants have struggled to delineate the extent to which time-based arguments remain relevant — as both a legal and an ethical matter — to resolving Nazi-era restitution claims.[3]

A June decision in *Bennigson v. The Solomon R. Guggenheim Foundation*[4] in the Supreme Court of the State of New York provides valuable clarity on this issue, illustrating how a just and fair resolution under the HEAR Act may sometimes require dismissal of a claim where the claimants waited too long to assert their claim.

Background: The HEAR Act and Other Efforts to Facilitate Restitution

In recent decades, the U.S. has implemented several measures to combat perceived obstacles to restitution faced by the victims of Nazi persecution and their heirs.

In 1998, the U.S. endorsed the nonbinding best practices laid out in the Washington Conference Principles on Nazi-Confiscated Art, which encourage governments to seek "a just and fair solution" to resolve Nazi-era restitution claims.[5]

In 2009, the U.S. joined the Terezin Declaration on Holocaust Era Assets and Related Issues, which stated in relevant part that to achieve just and fair solutions, participating countries should strive to ensure claims are resolved "based on the facts and merits of the claims." [6]

And earlier this year, the U.S. Department of State promulgated additional "legally non-binding but morally important best practices," specifying that the preferred just and fair solution for these claims is restitution.[7] Major industry players, such as the American Alliance of Museums and the Association of Art of Museum Directors, have issued guidance to facilitate implementation of these nonbinding principles.[8]



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Prior to the HEAR Act, and despite these efforts, there was a perception that U.S. courts too often disposed of Nazi-era restitution cases on timeliness grounds, unfairly preventing the victims of Nazi persecution and their heirs from having their claims considered on the merits.[9]

In response, Congress passed the HEAR Act, specifying that the act's purpose is to "ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner." [10] To effectuate these goals, the HEAR Act temporarily replaced state statutes of limitations for Nazi-era restitution claims, establishing a federal six-year statute of limitations, with the limitation period triggered by a claimant's "actual knowledge" of the claim. [11]

The HEAR Act does not explicitly preclude assertion of equitable time-based defenses, such as laches, and there has been debate over the extent to which such time-based defenses square with the text and spirit of the act and related nonlegislative authorities, such as the Washington Principles and Terezin Declaration, all of which call for a just and fair resolution to Nazi-era restitution claims.

Laches is an equitable defense available when a plaintiff's unreasonable delay in prosecuting a claim prejudices the defendant. [12] Courts have applied laches when the delay results in the loss of critical evidence, including deceased witnesses, faded memories and lost documents. [13]

Ultimately, the doctrine of laches focuses on prejudice to the defending party, and thus the injustice of having to defend under circumstances where the plaintiff's conduct has hampered its ability to do so. [14] As such, several commentators and courts have explained that the fact-based application of laches can advance, rather than hinder, the HEAR Act's goal of resolving Nazi-era restitution claims in a just and fair manner. [15]

Bennigson v. The Solomon R. Guggenheim Foundation

The Bennigson decision is the first instance of a New York state court — a jurisdiction where many Nazi-era restitution cases are litigated — endorsing this position. In fact, the Bennigson court determined that the plaintiffs' claim was barred by laches as a matter of law on a motion to dismiss. [16]

In so ruling, the opinion provides useful guidance to courts and litigants evaluating whether assertion of a laches defense would promote just and fair resolution of Nazi-era restitution claims.

The Bennigson case involved a claim to a famous Picasso painting, "Woman Ironing," brought by the heirs of Karl Adler, a German Jew who fled Nazi Germany in 1938 with his wife. [17] The Adlers ultimately made their way to safety in Argentina in 1940, but were dispossessed of a significant fortune in the process.

Desperate for money to fund his flight, Adler sold the painting in 1938 in Paris to Justin Thannhauser, another German Jew fleeing Nazi persecution. After Thannhauser purchased the painting, it was publicly displayed in several major museums, including prominent museums in New York City, where Thannhauser emigrated.

In 1963, the New York Times reported in a full-page article that Thannhauser planned to bequeath his collection to the Solomon R. Guggenheim Foundation, and the report included

a photograph of the painting.

More than a decade later, in 1974, a trustee of the Guggenheim contacted Adler's son in New York, seeking information about the painting's provenance. Adler's son confirmed the work's provenance but did not demand its return or voice any concerns about Adler's 1938 sale of the painting. Yet the plaintiffs alleged that they did not learn of their claim to the painting until 2013.

In granting the Guggenheim's motion to dismiss, the court rejected the plaintiffs' argument that the HEAR Act barred application of laches and determined that plaintiffs delayed unreasonably in asserting their claim, prejudicing the Guggenheim.[18] In reaching this conclusion, the court highlighted as especially unreasonable the unexplained nearly 40-year delay between the Guggenheim's outreach to Adler's son and the plaintiffs' asserted discovery of their claim in 2013, particularly given that the painting was famous and had "been on prominent display ... essentially since its [s]ale."[19]

The court analyzed the specific economic and third-party duress claims advanced by the plaintiffs to conclude that the plaintiffs' delay prejudiced the Guggenheim, explaining that "all of the individuals who could testify with direct knowledge that the Sale was tainted, as to the coercive environment that the Sale occurred in or as to why this claim was not brought earlier have passed away."[20]

The court determined that the unreasonable delay caused a loss of evidence akin to that highlighted by the U.S. Court of Appeals for the Second Circuit in 2019 in its *Zuckerman v. The Metropolitan Museum of Art* decision, placing the Guggenheim in the unjust position of defending duress claims without the availability of evidence from any of the parties to the transaction, or even evidence regarding subsequent investigations into the disputed transaction.[21]

The court distinguished the First Judicial Department's rejection of a laches defense in *Reif v. Nagy* — another HEAR Act case in the New York State Supreme Court in 2018 — on the grounds that the defendant in that case suffered no prejudice, having recently acquired the painting at a substantial discount given uncertainty over its provenance.[22]

In short, the *Bennigson* court, like the Second Circuit in *Zuckerman* and the First Department in *Reif*, first focused on whether the plaintiffs' delay was reasonable under the circumstances — investigating the extent to which the original owners and their heirs were aware of the location of the artwork and its provenance over time, and thus evaluating their ability to have made an earlier claim to the work.

Second, in evaluating prejudice, the *Bennigson* court followed *Zuckerman* and *Reif* to examine whether the delay unduly prejudiced the defendant — thus undermining the HEAR Act's goal of achieving a just and fair resolution — by examining the specific kind of evidence needed to establish the plaintiffs' claims.

Key Takeaways

Following the New York State Supreme Court's decision in *Bennigson v. The Solomon R. Guggenheim Foundation*, parties evaluating whether a laches defense may advance the just and fair resolution of Nazi-era restitution claims under the HEAR Act and as suggested by the nonbinding Washington Principles and Terezin Declaration should consider the following:

- Whether the artwork's original owner had an opportunity to claim or seek restitution of the disputed work during their lifetime, and if so, whether they in fact asserted such a claim;
- Whether the original owner or their heirs were subsequently contacted about the provenance of the artwork;
- Whether the artwork was well known, prominently and frequently exhibited, and whether subsequent owners openly attributed provenance to the original owner;
- Whether the current owner of the artwork was aware of or investigated the provenance of the artwork at the time of purchase or in connection with subsequent provenance research;
- Whether the artwork was alleged to have been directly stolen by the Nazis, indirectly misappropriated by the Nazis through a forced sale to a Nazi collaborator, or sold to a third party not alleged to be a collaborator; and
- The extent to which the passage of time has unduly burdened a current owner's ability to respond to the specific legal claims advanced by the claimants through the loss of relevant evidence.

The plaintiffs filed a notice of appeal of the Bennigson decision in July, so it is possible that the final chapter of this story has not been written, even now almost 85 years after the work's sale.

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[1] Michael J. Bazylar, *Holocaust Justice: The Battle for Restitution in America's Courts* 202 (N.Y.U Press 2003).

[2] Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, §§ 2, 3, 5, 130 Stat. 1524, 1526–28 (2016).

[3] See, e.g., *Reif v. Nagy*, 80 N.Y.S.3d 629, (N.Y. Sup. Ct. 2018) (rejecting laches defense on grounds that the HEAR Act applies), *aff'd as modified*, 175 A.D.3d 107 (1st Dep't 2019) (recognizing laches defense but finding it unwarranted); *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 190 (2d Cir. 2019) (applying laches defense); see generally Simon J. Frankel, *The HEAR Act and Laches After Three Years*, 45 N.C.J. Int'l L. 441 (2020).

[4] 214 N.Y.S.3d 628 (N.Y. Sup. Ct. 2024).

[5] U.S. Dep't of State, *Washington Conference Principles on Nazi–Confiscated Art* (Dec. 3, 1998), <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/>.

[6] U.S. Dep't of State, 2009 Terezin Declaration on Holocaust Era Assets and Related Issues (June 30, 2009), <https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/>.

[7] U.S. Dep't of State, 25th Anniversary of the Washington Principles on Nazi-Confiscated Art: Best Practices & the Way Forward (Mar. 5, 2024), <https://www.state.gov/best-practices-for-the-washington-conference-principles-on-nazi-confiscated-art>.

[8] See, e.g., American Alliance of Museums, *Ethics, Standards, and Professional Practices: Unlawful Appropriation of Objects During the Nazi Era* (1999), revised (2001), <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/unlawful-appropriation-of-objects-during-the-nazi-era/>; Association of Art Museum Directors, *Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945)* (1998), https://www.obs-traffic.museum/sites/default/files/ressources/files/AAMD_report_spoliation.pdf.

[9] See Zuckerman, 928 F.3d at 195.

[10] HEAR Act §3.

[11] *Id.* §5. The uniform six-year statute of limitation is temporary in that the HEAR Act sunsets on January 1, 2027. *Id.* §5(d).

[12] *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 580 U.S. 328, 333 (2017).

[13] See Bennis, 214 N.Y.S.3d at 642 (collecting cases).

[14] Zuckerman, 928 F.3d at 193.

[15] *Id.* at 196 (quoting HEAR Act § 3(2)); see also Simon J. Frankel & Sari Sharoni, *Navigating the Ambiguities and Uncertainties of the Holocaust Expropriated Art Recovery Act of 2016*, 42 *Colum. J.L. & Arts* 157, 162 (2019).

[16] Bennis, 214 N.Y.S.3d at 630–32.

[17] The facts described herein are taken from the Bennis decision. See *id.* at 632–42.

[18] *Id.* at 631.

[19] *Id.* at 644–45.

[20] *Id.* at 644.

[21] *Id.* (quoting Zuckerman, 928 F.3d at 193–94).

[22] *Id.* at 643 (citing Reif, 175 A.D.3d at 130).