

## **RECOVERING STOLEN ART YEARS AFTER THE FACT**

### **PERSPECTIVE**

**By Brian Kabateck and Joshua Najemy**

A new law passed by the California Legislature and signed by Gov. Arnold Schwarzenegger in late August opens a rare, time-limited window for filing claims for the return of stolen art that would otherwise be barred by the statute of limitations. The bill Assembly Bill 2675 - does so in a fair and limited manner, making key concessions to the concerns of potential defendants. This bill was crafted as an avenue for bringing cases seeking to recover art confiscated by Nazis during World War II after that avenue was narrowed by the court. *Von Saher v. Norton Simon*, 578 F.3d 1016 (2009).

The bill facilitates recovery of "works of art stolen through simple theft, as well as works taken by fraud or duress." This makes the law broad enough to avoid the pitfalls of the statute struck down in *Von Saher*. That statute was found to impinge on the federal government's domain over foreign affairs by singling out the acts of the former German government. However, it also makes the law broad enough to cover art confiscated during the atrocities of the Armenian Genocide, a topic and area of law in which this firm has been deeply involved with helping victims. Although this bill by no means applies exclusively to these cases, by specifically including art taken through fraud and duress, it has clear implications for cases of art taken from both classes of victims.

Once you have an applicable act of theft, here is what the new law does: it clarifies and expands the tolling effect of the discovery rule; increases the statute of limitations period from three years to six years; and imposes some limitations on the application of the new law and strengthens a good faith purchaser's defenses.

First, the bill clarifies that the discovery rule applies to cases of property stolen before 1982. Before this bill, there were conflicting California appellate decisions regarding use of the discovery rule with theft under California Code of Civil Procedure Section 338(c). A 1982 amendment to that section explicitly provided for tolling a victim's cause of action until he, his agent or the law enforcement agency investigating the theft, discovered the whereabouts of the article. Before then, there was no explicit mention of discovery-related tolling. The conflict was whether there was an implied discovery rule that would apply to thefts that occurred before the amendment. In *Naftzger v. American Numismatic Society*, the court ruled that there was such an implied discovery rule. 42 Cal.App.4th 421 (1996). This bill sides with the court's ruling in *Naftzger* that there is an implied discovery rule prior to the 1982 amendment and that it "abrogates any contrary holding."

The bill also clarifies that the statute of limitations begins to run from the time of *actual* discovery of the whereabouts of the stolen property, and does not attribute any constructive knowledge to the victim. This is part of the holding in *Naftzger* adopted by the bill, and it applies to all causes of action for theft. However, the bill singles out fine art for special treatment by prescribing a new discovery rule that is even more favorable to plaintiffs. Under the new law, in the case of fine art, the statute of limitations does not start until the victim has

actual knowledge of the identity and whereabouts of the work, *and* has actual knowledge of the facts giving rise to the victim's claim for possession of the work. For example, let's take someone who knew that his grandparents once owned a da Vinci and that the Getty now owns it. Sometime later, he then discovers that the work had been forcibly confiscated from his grandparents before its sale to the Getty. Upon that discovery, he will have a cause of action, despite having known the whereabouts of the piece for years.

In addition, the bill states that California Code of Civil Procedure Section 361, which allows for the use of another state's statute of limitations law under certain circumstances, does not apply to the theft of fine art. This further guarantees the protections of the new law.

Second, the bill retroactively extends the statute of limitations period for fine art from three to six years, and it revives certain claims that were dismissed due to statute of limitations. However, the revival is somewhat limited. It only applies to dismissals where the judgment is not yet final, or where the time for filing an appeal has not yet passed. There is no reprieve for cases long since adjudicated. The revival of claims under this bill is far more limited than Senate Bill 1899, which validly revived fully dismissed claims relating to the Northridge earthquake. Therefore, there is no *ex post facto* problem.

Finally, the bill imposes certain limitations. For instance, there is a short sunset. The special provisions only apply to cases filed up to Dec. 31, 2017. Thus, there is a discrete window of opportunity for filing cases under the expanded rules in this section.

Another limitation is that the special provisions only apply to claims against a museum, gallery, auctioneer or dealer. Claims against private individual owners do not provide the same liberality to the plaintiff regarding the discovery rule and longer limitations period. This recognizes the fact that museums and other art professionals are better able to protect themselves against such a lawsuit. A museum has more extensive access to records of ownership and is usually insured. On the other hand, a private collector who purchases a work will suffer greater hardship from an action for specific recovery, and will have less ability to guard against it.

As a further concession to the concerns of potential defendants, this bill allows defendants to raise all legal and equitable defenses, including laches and unclean hands. This is extremely important. The defenses of laches and unclean hands would otherwise be unavailable since they are equitable defenses and replevin or specific recovery is a legal action. Therefore, a defendant can still argue that a plaintiff's delay caused prejudicial loss of evidence or loss of witness testimony, and that the plaintiff's claim should be barred.

Although AB 2765 creates a large opening for new cases seeking recovery of fine art previously barred by the statute of limitations, it has restrictions and limitations in place to ensure the fair protection of defendants. This bill will protect the rights of many Californians by allowing a greater opportunity to correct the wrongs of the past. It will also encourage museums and other institutions to investigate more carefully the origin of individual works, possibly uncovering even more cases of stolen art. As a result of the just purpose advanced by this bill and its balanced and restrained approach, the bill did not receive a single vote in opposition to its passage.