Holocaust-Era Art and Property Recovery Claims After 'Zuckerman'

Last week, the U.S. Supreme Court declined to review the U.S. Court of Appeals for the Second Circuit's decision in Zuckerman v. Metropolitan Museum of Art, which held that the equitable doctrine of laches barred a claim to recover a Holocaust-era artwork, even though that claim was brought within the six-year statute of limitations that Congress enacted through the Holocaust Expropriated Art Recovery (HEAR) Act.

By **Mary-Christine Sungaila, William Feldman and Marco A. Pulido** | March 11, 2020

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In this article, we detail the background of *Zuckerman*, the framework of the HEAR Act, and the implications of the court's cert denial on Holocaust-era art and property recovery claims. We also offer reasons why *Zuckerman* was wrongly decided, and ways to anticipate and respond to the laches defense—which museums and collectors may now raise as a matter of course—in future HEAR Act cases. We conclude with suggestions to incentivize museums to return art looted or sold under duress during the Holocaust, without the need for litigation.

Case Background and the HEAR Act

Pablo Picasso's "The Actor" (Photo: Courtesy Photo)

Zuckerman concerned a disputed claim of ownership over a masterwork, Pablo Picasso's The Actor, currently held by New York's Metropolitan Museum of Art. That painting once belonged to Paul and Alice Leffmann, German Jews who fled first from Germany to Italy in 1937, then to Switzerland and Brazil, to escape Nazi persecution. The Leffmanns financed their escape from Nazi-allied Italy by selling The Actor in 1938 for a price far below its actual value. The painting was later resold at a substantially increased price and, eventually, donated to the Met in 1952.

Laurel Zuckerman, the Leffmanns' great-grand niece, demanded that the Met return the painting in 2010. After the museum refused, Zuckerman sued in 2016, arguing that the Met was not the rightful owner because the Leffmanns had sold the painting under duress.

Zuckerman sued within the time Congress prescribed under the HEAR Act. To encourage having Holocaust-era art and property recovery claims heard on the merits rather than dismissed on such procedural technicalities as limitations periods, the HEAR Act (which Congress unanimously enacted in 2016) establishes a nationwide, six-year statute of limitations for such claims. The centerpiece of the legislation, Section 5, provides that "notwithstanding any … defense at law related to the passage of time, a civil claim … to recover any artwork or other property that was lost … because of Nazi persecution may be commenced not later than six years after the actual discovery" of the identity and location of the artwork, and the plaintiff's interest in that artwork. Claims that existed when the HEAR Act was passed are deemed to have been "actually discovered" on the enactment date. The act covers any Holocaust-era art or property lost between 1933 and 1945 "because of" Nazi persecution, including "any persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi party, or their agents or associates, during the covered period."

The district court dismissed Zuckerman's action on the ground that she had failed to adequately allege duress under New York law. The Second Circuit affirmed, but on a different basis: it concluded that the equitable doctrine of laches, which bars untimely claims that prejudice a defendant, mandated dismissal of the suit. For the first time on appeal, the court held that the suit was "unreasonably delayed" by over 70 years (the time between the Leffmanns' 1938 sale and Zuckerman's 2010 demand for return of the painting) and that this delay prejudiced the Met because there were no living witnesses who could address the circumstances of the 1938 sale. .

The Second Circuit then held that the HEAR Act did not preempt the laches defense. While the court recognized that laches ordinarily cannot bar relief in the face of a limitations period enacted by Congress, it concluded that Congress did not intend for the HEAR Act to preempt laches because the statute only

referred to "defense[s] *at law* relating to the passage of time," without mentioning equitable defenses, and because the legislative history reflected that Congress deleted language from a draft that would have "explicitly swept aside a laches defense." The Second Circuit added that allowing defendants to assert laches furthered the Act's goal of ensuring a "just and fair" resolution of the claims.

Zuckerman sought review in the U.S. Supreme Court, which denied her petition, see *Zuckerman v. Metropolitan Museum of Art*, No. 19-942, (U.S. Mar. 2, 2020).

Implications of the Cert Denial and Approaches Going Forward

The Supreme Court's denial of the cert petition in *Zuckerman* does not mean that the court agreed with the merits of the Second Circuit's decision. See *Hughes Tool v. Trans World Airlines,* 409 U.S. 363, 365 n.1 (1973) (observing that the denial of cert "imparts no implication or inference concerning the court's view of the merits"); see also *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J., opinion regarding cert denial) (The court "has rigorously insisted" that a denial of cert "carries with it no implication whatever regarding the court's views on the merits of a case which it has declined to review. The court has said this again and again; again and again the admonition has to be repeated."). Yet, as a practical matter, private collectors and museums are now likely to rely on the Second Circuit's decision in *Zuckerman* to invoke the laches doctrine early in litigation in an effort to avoid reaching discovery and the merits of HEAR Act claims. Nonetheless, there remain ways for claimants to limit or avoid the effects of the Second Circuit's interpretation of the HEAR Act.

To begin, litigants should remember that the application of laches to HEAR Act claims remains an open question in every federal circuit outside the Second Circuit, as well as in every state court. See, e.g., *Lawrence v. Woods*, 432 F.2d 1072, 1074 (1970); *Owsley v. Peyton*, 352 F.2d 804, 805 (4th Cir. 1965) (observing that although "state courts may for policy reasons follow the decisions of the court of appeals whose circuit includes their state, they are not obliged to do so.") Accordingly, plaintiffs filing suit outside the Second Circuit, where the circuit decision is not binding, should be prepared to argue why laches should not apply to HEAR Act claims. Indeed, there is good reason *not* to apply laches to claims brought under the HEAR Act.

First, Congress has long been presumed to legislate consistent with the general rule that laches cannot bar a legal claim brought within a limitations period. See *SCA Hygiene Products Aktiebolag v. First Quality Baby Products,* 137 S. Ct. 954, 959 (2017); *Petrella v. Metro-Goldwyn-Mayer,* 572 U.S. 663, 677 (2014). Had Congress intended to depart from this general rule and codify a laches defense, it could have said so in the HEAR Act itself. It did not.

Moreover, the Second Circuit's decision rests heavily on certain aspects of the HEAR Act's legislative history—specifically, the fact that later drafts of the bill deleted language that would have explicitly swept aside the laches defense. But Congress provided no reason for that deletion, and the Second Circuit should not have read it as an indication that Congress intended to depart from the well-settled rule that laches cannot apply to bar timely claims. Furthermore, the legislative history, when read *as a whole*, confirms that Congress in fact intended for the HEAR Act to implement longstanding U.S. policy that Holocaust-era claims be resolved on their "facts and merits"—not blocked on technical timeliness grounds such as laches.

The Second Circuit also erred in concluding that allowing defendants to assert laches comports with the HEAR Act's goal of resolving claims on their merits in a "just and fair manner." The laches defense does not resolve claims on their merits; it instead focuses only on whether a defendant has been prejudiced because of a plaintiff's unreasonable delay in bringing an action, without considering whether that action is meritorious. See *Capruso v. Village of Kings Point*, 23 N.Y.3d 631, 641 (N.Y. 2014).

As confirmed by members of Congress who sponsored the HEAR Act and filed an amicus brief in support of Zuckerman's cert petition: laches cannot be a valid exception to the HEAR Act, as it would become the exception that swallows the rule, frustrating Congress's intent to eliminate all time-based defenses to

Holocaust-era art and property recovery claims. Interpreting the HEAR Act to allow laches would merely replace one time-based procedural hurdle (state-law limitations periods) with another (state-law laches defenses).

There are already decisions from other courts that cast doubt on *Zuckerman*. For example, in *Reif v. Nagy*, 61 Misc. 3d 319, 328 (N.Y. Sup. Ct. 2018), *aff'd as modified*, 175 A.D.3d 107 (N.Y. App. Div. 1st Dep't 2019), the court declined to apply laches to a claim brought within the HEAR Act's limitations period. And the Ninth Circuit has observed that, "read in context, HEAR's Section 5(a) language that the six-year statute of limitations applies 'notwithstanding any defense at law relating to the passage of time'"—the same language on which the Second Circuit relied on to support its decision—is simply "meant to prevent courts from applying defenses that would have the effect of shortening the six-year period in which a suit may be commenced." See *Cassirer v. Thyssen-Bornemisza Collection Foundation,* 862 F.3d 951, 965 (9th Cir. 2017). Nonetheless, a true circuit split has yet to develop.

In addition, all HEAR Act litigants—both within the Second Circuit and elsewhere—should allege facts in their complaint specifically aimed at overcoming the laches defense. See *Zuckerman*, 928 F.3d at 197 ("Each case must be assessed on its own facts."). For instance, plaintiffs should allege that defendants' actions weigh against the application of laches, e.g., facts indicating that the cultural institution has "unclean hands," or did not exercise reasonable diligence to determine the artwork's origins when it acquired the artwork. See *Shoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461,468 (S.D.N.Y. 2009); *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311, 321 (N.Y. 1991). Plaintiffs should also allege facts demonstrating that they did not "unreasonably delay" in seeking to recover the artwork, and that the defendant was not prejudiced by any such delay. See *Capruso v. Village of Kings Point*, 23 N.Y.3d 631, 641 (N.Y. 2014). Indeed, a New York appellate court recently determined that similar facts were sufficient to overcome a laches defense in *Reif v. Nagy*, 175 A.D.3d 107, 130-31 (N.Y. App. Div. 1st Dep't 2019).

Those facts may be sufficient to withstand dismissal at the pleading stage, deferring resolution of the laches defense at least until after discovery. At that point, the opportunity for a resolution short of a verdict may be possible, as a museum or cultural institution may be more inclined to resolve the claim rather than risk public disclosure of the steps that they took—or did not take—to determine whether artwork came from a legitimate source.

Outside of the litigation context, there may be ways to shift the incentives for museum directors, who owe fiduciary duties to preserve artworks in their museums, to return artworks to Holocaust victims and their families. For instance, if states absolved museum directors and officers of their fiduciary duties, this would likely allow claimants to have a better opportunity to recover artworks, as museum directors and officers would not have a personal stake in the potential loss of the artworks from their museums' collections. Further, states could require museums to certify that Holocaust-era artworks and property in their collections were not looted or sold under duress during the Holocaust era. These steps would go a long way toward requiring museums to ensure that they rightfully own all of the artworks in their collections and to return the artworks that they do not.

Conclusion

The Supreme Court's cert denial in *Zuckerman* leaves the door open for state courts and federal courts outside of the Second Circuit to decline to follow the approach taken in *Zuckerman*. And it is important that courts do so to support restorative justice efforts for victims of the Holocaust and their families, and victims of other atrocities who may look to the HEAR Act as a model for obtaining their own restorative justice. This includes, for example, victims of the Armenian Genocide, Cambodian Genocide and ISIL's efforts to steal and destroy art as part of its terrorist strategy.

Beyond the litigation context, the cert denial in *Zuckerman* also underscores the need for creative approaches to shift the incentives of museum directors and officers, so that art and property recovery claimants have a better shot at reclaiming pieces that rightfully belong to them and their families.

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