

2016

## International Art and Cultural Heritage Law

Patty Gerstenblith

Jacqueline Farinella

David Bright

Kevin Ray

---

### Recommended Citation

Patty Gerstenblith et al., *International Art and Cultural Heritage Law*, 50 ABA/SIL YIR 439 (2016)  
<https://scholar.smu.edu/til/vol50/iss0/31>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in *International Lawyer* by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

## International Art And Cultural Heritage Law

PATTY GERSTENBLITH, JACQUELINE FARINELLA, DAVID BRIGHT, AND KEVIN RAY

### I. Statute of Limitations, Choice of Law, and Adverse Possession: *Von Saher v. Norton Simon Museum of Art* and *Cassirer v. Thyssen-Bornemisza Collection Foundation*

In spring of 2015, Judge John F. Walter of the United States District Court for the Central District of California issued new decisions in two long-running disputes concerning art works looted during the Holocaust. *Von Saher v. Norton Simon Museum of Art* concerns a Cranach diptych, *Adam and Eve*, which is claimed by the daughter-in-law of the Dutch collector Jacques Goudstikker. Goudstikker relinquished the painting to the Nazis in a forced sale and died while fleeing the Netherlands.<sup>1</sup> The 2015 decision addresses only the question of whether the claim is barred by the statute of limitations.<sup>2</sup> The second dispute concerns the claim by the Cassirer family to a Pissarro painting currently in the collection of the Thyssen-Bornemisza Foundation, located in Spain.<sup>3</sup> In this case, the district court judge addressed the question of choice of law and held that, under Spanish law, title had vested in the Foundation.<sup>4</sup>

---

1. *Von Saher v. Norton Simon Museum of Art*, No. CV 07-2866-JFW (JTLx), at \*2 (C.D. Cal. Apr. 2, 2015).

2. The claim was originally filed in 2007. The Ninth Circuit Court of Appeals has twice heard this dispute. The earlier Ninth Circuit decisions addressed the validity of two different “special” statutes of limitation extending the time period for recovery of stolen artworks. In the first decision, the Ninth Circuit held that the statute was unconstitutional under the federal foreign affairs preemption doctrine. *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 965 (9th Cir. 2010). In the second decision, the Ninth Circuit upheld a different version of the statute of limitations. *Von Saher v. Norton Simon Museum of Art*, 754 F.3d 712, 719 (9th Cir. 2014); *see* Cal. Code Civ. Proc. § 338, amended by 2010 Cal. Legis. Serv. Ch. 691 (A.B. 2765) (West).

3. The Cassirer claim has also been to the Ninth Circuit twice: first, to interpret the Foreign Sovereign Immunities Act, and second, to address the validity of the 2010 version of the California statute of limitations. *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010); *Cassirer v. Kingdom of Spain*, 737 F.3d 613 (9th Cir. 2013).

4. *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. CV 05-3459-JFW (Ex) (C.D. Cal. June 4, 2015).

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

440 THE YEAR IN REVIEW

A. VON SAHER V. NORTON SIMON MUSEUM OF ART AT PASADENA

Upon remand from the second Ninth Circuit decision, the district court judge addressed defendants' motion to dismiss and, in particular, whether the von Saher claim was barred under the California statute of limitations, which requires that a suit be filed within six years of the actual discovery of the "identity and the whereabouts of the work of fine art."<sup>5</sup> This section of the amended statute applies to pending and future actions commenced on or before December 31, 2017, including actions that have been dismissed if the judgment is not yet final or the time for filing an appeal has not expired, so long as the taking of the work of fine art occurred within one hundred years before enactment of the amended statute.<sup>6</sup>

The defendants argued that the current claimant's predecessor-in-interest, Desi Goudstikker, had discovered the location of the Cranachs between 1946 and 1952 and that the limitations period expired six years after that discovery.<sup>7</sup> The plaintiff, on the other hand, argued that the statutory time period should start anew each time the claim passes to a new heir.<sup>8</sup> The court rejected the plaintiff's view, holding that "an heir stands in the shoes of his or her predecessor-in-interest with respect to the statute of limitations."<sup>9</sup> The court held that, in amending the statute in 2010, the California legislature did not change established law concerning the operation of statutes of limitation.

The court then turned to the question of when the six-year limitations period started to run. The court looked to California precedent, reaching back to the mid-nineteenth century, which held that "each time stolen property is transferred to a new possessor, a new tort or act of conversion has occurred. . . . Accordingly, . . . the statute of limitations in an action seeking to recover stolen property begins to run anew against each subsequent purchaser."<sup>10</sup> But, the court needed to determine whether a new statutory time period would begin after a transfer of the stolen property if the statutory period had expired while the stolen property was in the hands of the prior possessor.

In answering this, the court relied heavily on the notion that under the Anglo-American common law of property, a thief cannot convey title. Each subsequent purchaser is on notice and "is conclusively presumed to have ascertained the true ownership of the property before purchasing it."<sup>11</sup> Expiration of the statute of limitations does not vest title in the current possessor nor divest the original owner of title; it only bars the owner's right to the remedy of recovering the stolen property. Because title does not vest in the current possessor, each new acquisition of the property by a subsequent purchaser constitutes a new conversion, thus triggering a new statutory limitations period.<sup>12</sup>

---

5. Cal. Civ. Proc. Code § 338(c)(3)(A).

6. Cal. Civ. Proc. Code § 338(c)(3)(B).

7. *Von Saher*, No. CV 07-2866-JFW, at \*6.

8. *Id.*

9. *Id.* at \*7.

10. *Id.* at \*8.

11. *Id.* at \*9 (quoting *Harpending v. Meyer*, 55 Cal. 555, 560 (1880)).

12. This conclusion, in effect, rejects the tacking aspect of adverse possession doctrine as applied to land, according to which successive adverse possessors may, when they are in privity with each other, add together their respective times of possession so as to satisfy the statutory time period. It also rejects a "shelter" approach in which, if the statute of limitations has expired while the property is in the possession of a prior

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

ART & CULTURAL HERITAGE 441

Although highly reliant on earlier state precedent and therefore limited in its application to California, this decision is significant, given the important role that California's cultural institutions and market play in the art world. The same question was addressed in one of the seminal cases on the interpretation of the statutes of limitation as applied to the recovery of stolen artworks, *O'Keefe v. Snyder*, in which a due diligence/constructive discovery rule was adopted to determine accrual of the cause of action.<sup>13</sup> There, over a vigorous dissent authored by Justice Handler, the majority held that this question was a procedural one, focused only on the operation of the statute of limitations.<sup>14</sup> But, viewing each transfer of the stolen property to a new possessor as a new tort aligns with the New York approach, which requires a demand for return of the stolen property and refusal before the current possessor is considered to be a wrongdoer. Because each refusal constitutes a new tort, the claim does not accrue until the current possessor refuses the original owner's demand. Both the dissent in *O'Keefe* and now this decision in *von Saber* view this question as a substantive one based on the law of torts and conversion.

While recognizing that different states interpret the intersection between substantive and procedural law differently, the *von Saber* opinion establishes important policy considerations that may influence future decisions in other jurisdictions. The decision that the statutory time limit starts anew with each transfer places much of the burden of tracing title on the purchaser and focuses on the conduct of the purchaser rather than on that of the original owner. This accords with the view that it is easier for a potential purchaser to determine the state of the title to artwork before purchasing than it is for an original owner, from whom the artwork was stolen, to search the world to locate the stolen work. On the other hand, art market proponents might argue that this decision could effectively make artworks unsalable because a purchaser would never know whether the work has a theft in its history. Nonetheless, in keeping with its policy determination to place the burden of searching title on the purchaser, the court concluded by noting that "there is nothing unfair about affording Plaintiff an opportunity to pursue the merits of her claims . . . . As the California Legislature recognized by enacting AB 2765, museums are sophisticated entities that are well-equipped to trace the provenance of the fine art that they purchase."<sup>15</sup>

**B. CASSIRER V. THYSSEN-BORNEMISZA COLLECTION FOUNDATION**

This dispute concerns a painting by the French Impressionist artist Camille Pissarro, *Rue Saint-Honoré, après-midi, effet de pluie*, that was expropriated by the Nazi government in 1939 through a forced sale from its owner, Lilly Cassirer Neubauer.<sup>16</sup> The painting was sold through the art market, including several transactions in the United States,

---

possessor, that person can transfer valid title to a subsequent purchaser. See Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119, 145-49 (1988/89).

13. *O'Keefe v. Snyder*, 83 N.J. 478 (1980).

14. *Id.* at 489.

15. *Von Saber*, No. CV 07-2866-JFW, at \*11. Further proceedings will now address additional issues including the act of state doctrine and the possibilities that the Museum acquired title pursuant to adverse possession under California law or that the prior possessor had acquired title under Dutch law. See *id.* at \*10 n.7.

16. *Cassirer*, No. CV 05-3459-JFW, at \*2.

SPRING 2016

**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

442 THE YEAR IN REVIEW

ultimately to Baron Hans-Heinrich Thyssen-Bornemisza, who later loaned and then sold it to the Thyssen-Bornemisza Collection Foundation in Spain.<sup>17</sup> The painting has been on display in the Thyssen-Bornemisza Museum in Madrid since 1992, except for brief periods when it was on loan to other public institutions, and its current location and possessor were identified in several publications.<sup>18</sup> After two visits to the United States Court of Appeals for the Ninth Circuit, the defendant moved for summary judgment on three issues; the court granted the motion on the ground that the defendant had acquired title under Spanish law governing adverse possession.

1. *Choice of Law*

The court's first step was to determine whether the law of Spain or that of California should govern. Before making that determination, the court had to choose which choice-of-law rules to apply: the federal common law rules or those of California.<sup>19</sup> The federal common law approach is based on which place "has the most significant relationship to the thing and the parties . . ."<sup>20</sup> The specialized conflict of law rule is that "a transfer of an interest in a chattel by adverse possession or by prescription and the nature of the interest transferred are determined by the local law of the state where the chattel was at the time the transfer is claimed to have taken place."<sup>21</sup> The comment to the Restatement explains that "[t]he state where a chattel is located has the dominant interest in determining the circumstances under which an interest in the chattel will be transferred by adverse possession or by prescription."<sup>22</sup>

This formulation means that, whenever a possessor claims to have acquired title by adverse possession or prescription in a jurisdiction that recognizes these doctrines, the possessor will prevail. The court concluded that Spain has the greatest interest in determining ownership of the painting and that Spanish law should apply under the federal choice-of-law rules.<sup>23</sup> The court justified its conclusion by relying on the goal of protecting the parties' justified expectations, the location of the painting in Spain for more than twenty years, and the relatively weak relationship between the painting itself and California.

The court then came to the same conclusion in its alternative analysis of the California choice-of-law rules. First, the court noted that a true conflict between the law of Spain and that of California exists in that the latter recognizes neither the doctrine of adverse possession nor prescription as applied to personal property.<sup>24</sup> Each jurisdiction has a strong interest in applying its own law and furthering its choice among the conflicting policies that underpin the different approaches to claims for the recovery of stolen

---

17. *Id.* at \*2-3.

18. *Id.* at \*3.

19. Federal jurisdiction was premised on the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330 *et seq.*, and therefore the federal rules should govern. But, the Ninth Circuit in *Sachs v. Republic of Austria* called into question whether the federal rules or California state rules should apply in this circumstance. 737 F.3d 584 (9th Cir. 2013). The court therefore chose to analyze the choice of law issue under both sets of rules.

20. Restatement (Second) of Conflict of Laws § 222 (1971).

21. *Id.* § 246.

22. *Id.* § 246 cmt. a.

23. *Cassirer*, No. CV 05-3459-JFW, at \*6-7.

24. *Id.* at \*7.

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

ART & CULTURAL HERITAGE 443

personal property. Spain's law accepting adverse possession and prescription places greater emphasis on certainty of title, protecting defendants from stale claims, and encouraging plaintiffs to act diligently. On the other hand, California law focuses on the difficulty original owners have in locating their stolen property and the need for subsequent purchasers to search provenance and title before acquiring personal property, a policy that was furthered by the 2010 amendments to the California statute of limitations.<sup>25</sup>

The court then weighed the nature and strength of each jurisdiction's interest in applying its own law for the purpose of determining not which policy is better but to determine "the appropriate limitations on the reach of state policies."<sup>26</sup> The court also looked to a jurisdiction's interest in regulating conduct that occurred within its borders. Using this criteria, the court concluded that Spain had the greater interest in seeing its law applied because of the presence of the painting in Spain for such a long period of time and Spain's desire to regulate conduct within its borders and to guarantee that individuals and entities within its border could rely on the availability of an adverse possession or prescription defense.<sup>27</sup> In contrast, almost all of the transactions involving the painting, from the original expropriation in Germany, to multiple sales in various jurisdictions (including one in California and a brief sojourn there in 1951) and its eventual acquisition and display in Spain, occurred outside of California.<sup>28</sup> California's interest was based on the "fortuitous decision" of the Cassirer family to move to California, and therefore, is far less significant than that of Spain.<sup>29</sup> The court thus concluded that the law of Spain should apply.

2. *Adverse Possession*

Under the Spanish law of adverse possession,<sup>30</sup> a possessor can gain title to movable property if the possessor possessed the property (1) for the statutory period; (2) as owner; and (3) "publicly, peacefully and without interruption."<sup>31</sup> The required statutory period is three years if the possessor acts in good faith and is six years if acting in bad faith.<sup>32</sup> The court found it unnecessary to determine whether the Foundation's possession was in good faith because it satisfied the longer time period of six years.

---

25. Cal. Code Civ. Proc. § 338, amended by 2010 Cal. Legis. Serv. Ch. 691 (A.B. 2765) (West).

26. *Cassirer*, No. CV 05-3459-JFW, at \*10. (quoting *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 97 (2010)).

27. *Cassirer*, No. CV 05-3459-JFW, at \*10.

28. *Id.*

29. *Id.* The court noted that California law does not bar the application of adverse possession to personal property and stated that "[u]nlike a statute of limitations, the law of adverse possession does not present a procedural obstacle, rather concerns the *merits* of an aggrieved party's claim." *Id.* at \*11. The characterization of adverse possession as substantive in contrast to operation of the statute of limitations, which the court viewed as procedural, is perhaps ironic in that adverse possession, certainly in the context of land, is a function of the expiration of the statutory limitations period. The primary difference is that the European version of adverse possession, more properly termed acquisitive prescription (in contrast to extinctive prescription), vests title in the current possessor. Whether expiration of the limitations period in the various states of the United States similarly vests title is an open question and one that likely varies from state to state.

30. Also termed *usucapio* or acquisitive prescription.

31. *Cassirer*, No. CV 05-3459-JFW, at \*11-12 (citing Spanish Civil Code Arts. 1941-1948).

32. *Cassirer*, No. CV 05-3459-JFW, at \*11.

SPRING 2016

**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

444 THE YEAR IN REVIEW

The second element was met because the Foundation projected an external image of ownership of the painting since its acquisition in 1993.<sup>33</sup> This element does not relate to the possessor's "internal intention" but only to its outward conduct, which, in the case of the Foundation, includes public display and lending the painting to other institutions. The element of public, peaceful and uninterrupted possession was also satisfied through the Foundation's public display and publication of its possession of the painting, which were sufficient to give the original owner at least constructive notice of the painting's location. The possession was both uninterrupted and peaceful from the time of acquisition in 1993 until the Cassirer claim was filed in 2001.

The court rejected the plaintiffs' argument that the Foundation was an "accessory" to a crime against humanity or a crime against property in the event of armed conflict under Spanish Civil Code Article 1956, which would have made prescription inapplicable. The Foundation did not fit the definition of accessory under Spanish law because the Foundation did not hide evidence in an attempt to prevent discovery of the crime, that is, the looting and theft of artworks during the Holocaust. The court also rejected the argument that Spain's adverse possession laws violate the European Convention on Human Rights (ECHR). As prior interpretation of the ECHR recognized, "[i]t is characteristic of property that different countries regulate its use and transfer in a variety of ways. The relevant rules reflect social policies against the background of the local conception of the importance and role of property."<sup>34</sup> Therefore, Spain's laws of adverse possession, which are long-standing and generally applicable, do not violate the ECHR because they reflect a balance between the rights of original property owners and those of current possessors.

This decision is significant primarily because of the choice of law issue. It is consistent with a very short list of other United States judicial opinions that chose to apply the law of a foreign jurisdiction in cases of disputed title to cultural objects.<sup>35</sup> Much of the discrepancy between the law of United States jurisdictions and that of foreign jurisdictions lies in the European good faith purchaser doctrine, which allows a thief to transfer title to a good faith purchaser, in contrast with the law generally accepted among the U.S. states that a thief can never transfer good title, although the original owner's claim may be barred under an affirmative defense. While the jurisdictional differences in *Cassirer* focused on the law of adverse possession, as in *Greek Orthodox Patriarchate*, rather than on the good faith purchaser doctrine, this may be an instance where application of California law might have produced a significantly different result.

---

33. *Id.* at \*12.

34. *Id.* at \*18 (quoting *J.A. Pye (Oxford) Ltd. v. United Kingdom*, 43 Eur. H.R. Rep. 45, para. 74 (2008)).

35. These include *Greek Orthodox Patriarchate v. Christies, Inc.*, 98 Civ. 7664 (KMW), 1999 U.S. Dist. LEXIS 13257 (S.D.N.Y. 1999) (barring the original owner's claim under French law) and *Bakalar v. Vavra*, 05 Civ. 3037 (WHP), 2008 U.S. Dist. LEXIS 66689 (S.D.N.Y. 2008) (applying Swiss law), *rev'd.*, 619 F.3d 136 (2d Cir. 2010) (holding that the District Court should have applied New York law). Some decisions, such as *Autocephalous Greek-Orthodox Church of Cyprus and the Republic of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989), have analyzed claims under both U.S. law and the law of a foreign jurisdiction, and, as in *Autocephalous Greek-Orthodox Church* and *Greek Orthodox Patriarchate*, reached the same conclusion under the laws of both jurisdictions, although for different reasons. British courts have also chosen in some cases to apply the law of a foreign jurisdiction, such as in *Islamic Republic of Iran v. Berend*, [2007] EWHC 132 (QB), [2007] 2 All ER (Comm) 132 (applying French law) and *Winkworth v. Christie, Manson & Woods Ltd.* [1980] 1 Ch 496 1 All E.R. 1121, [1980] 2 WLR 7 (applying Italian law).

VOL. 2016

**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

ART & CULTURAL HERITAGE 445

The court concluded its opinion with a brief and somewhat enigmatic discussion suggesting that if the amended 2010 version of the California statute of limitations had retroactively revived the plaintiffs' claim after it was time-barred, then the amended statute would deprive the Foundation of its property without due process and would therefore be unconstitutional. This conclusion must be premised on the idea that the expiration of the statutory time period does not merely bar an original owner's claim but also vests title in the current possessor. While this is dicta, given the court's choice of law decision, it is unfortunate that the court made this assertion of unconstitutionality without deeper analysis of the relationship between the statute of limitations and vesting of title. The case is currently on appeal to the Ninth Circuit.

**II. The California Resale Royalty Act: *Sam Francis Foundation v. Christies***

On May 5, 2015, the United States Court of Appeals for the Ninth Circuit affirmed in part a lower court decision that a portion of the California Resale Royalty Act ("CRRA") facially violates the dormant Commerce Clause by regulating art sales that take place outside the State of California.<sup>36</sup> But, the Ninth Circuit preserved the CRRA by holding the offending provision severable from the remainder of the Act. The case was remanded to consider additional issues raised on appeal, including whether the CRRA is preempted by federal copyright law and whether one of the defendants, eBay, Inc., is considered either a "seller" or a "seller's agent" under the CRRA.<sup>37</sup>

The CRRA, adopted in California in 1976, is the only statute in the United States to create a *droit de suite*, a legal concept recognized in over fifty countries around the world—including throughout the EU and South America—which creates a right for visual artists to some percent of future sales of their artwork.<sup>38</sup> When a work of fine art is sold and either the seller resides in California or the sale occurs in California, the CRRA requires the seller or seller's agent to pay the artist a royalty of 5% of the sale price.<sup>39</sup> Royalties are owed only on sales of certain works of art—original paintings, sculptures or drawings, or original works of art in glass—and only on sales of \$1,000 or higher.<sup>40</sup> If the seller, or the seller's agent, is unable to locate the artist, the royalty will default to the California Arts Council.<sup>41</sup> The CRRA also authorizes an artist or the artist's heirs to sue a seller or seller's agent for failure to comply with the Act's provisions.<sup>42</sup>

Plaintiffs in this consolidated appeal represented both artists and artists' estates, and each brought a separate class action against Sotheby's Inc., Christie's, Inc., and eBay, Inc. alleging that defendants, as agents of sellers of fine art, failed to pay royalties on sales covered by the CRRA.<sup>43</sup> The district court granted the defendants' motion to dismiss, which argued that the CRRA violates the dormant Commerce Clause.<sup>44</sup> The district

---

36. *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1322 (9th Cir. 2015).

37. *Id.* at 1322–23

38. Cal. Civ. Code § 986(a) (West 2010).

39. *Id.*

40. Cal. Civ. Code § 986(b), (c)(2) (West 2010).

41. Cal. Civ. Code § 986(a)(1) (West 2010).

42. CAL. CIV. CODE § 986(a)(3) (West 2010).

43. *Sam Francis Found.*, 784 F.3d at 1322.

44. *Id.*

SPRING 2016

**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**



**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

446 THE YEAR IN REVIEW

court found that the entire CRRRA must be struck down because the offending clause, which regulates out-of-state conduct, could not be severed from the rest of the Act.<sup>45</sup>

The Ninth Circuit agreed that the CRRRA does violate the dormant Commerce Clause, a constitutional rule developed through jurisprudence that limits the power of states to regulate commerce outside their jurisdictions.<sup>46</sup> The court relied heavily on *Healy v. Beer Institute*, a 1989 United States Supreme Court decision that held “a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.”<sup>47</sup> Applying this principal to the CRRRA, the court scrutinized the Act’s clause that applies to sales when the seller resides in California, and hypothesized a scenario in which a California resident purchases a work of art in New York from an artist located in North Dakota, and later sells that work to a buyer in New York.<sup>48</sup> In this hypothetical, a direct application of the CRRRA would require a royalty payment to the artist in North Dakota, although the commercial transactions had no connection to the State of California other than the residence of the seller.<sup>49</sup> The Ninth Circuit thus concluded that this provision of the CRRRA, regulating out-of-state sales when *the seller resides in California*, facially violates the dormant Commerce Clause.<sup>50</sup> The court held that a statute’s application to commerce outside the state’s borders is invalid, “whether or not the commerce has effects within the State.”<sup>51</sup>

The majority first addressed arguments made by the concurrence, which argued that the holding should have been narrowed to apply only to seller’s agents.<sup>52</sup> The concurring opinion argued that the majority went beyond the scope of the case at hand, a case brought against only seller’s agents and not by sellers who resided in California.<sup>53</sup> The concurrence proposed that the CRRRA permissibly reaches California-resident art owners without becoming an extraterritorial regulation.<sup>54</sup> The majority countered by stating that the application of the dormant Commerce Clause does not regard narrowing facts, such as applicability to corporate agents versus natural persons, and applying those limits would “confuse the issue and lead to judicial inefficiency.”<sup>55</sup>

Critical to California artists who have benefitted from the Act for almost forty years, the Ninth Circuit found the invalid clause severable from the rest of the CRRRA.<sup>56</sup> First, the CRRRA includes a broadly written severability clause that states any invalid section should not affect any other provision or application of the Act, and creates a presumption of severability.<sup>57</sup> Second, looking to California law, the court determined that all three

---

45. *Id.*

46. *Id.* at 1323–24 (citing *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976)); see U.S. Const. art I § 8, cl. 3.

47. *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989).

48. *Sam Francis Found.*, 784 F.3d at 1323.

49. *Id.*

50. *Id.* (emphasis added).

51. *Id.* (quoting *Healy*, 491 U.S. at 336).

52. *Sam Francis Found.*, 784 F.3d at 1324–25.

53. *Id.* at 1326–27 (Reinhardt, J. concurring).

54. *Id.*

55. *Id.* at 1325.

56. *Id.* at 1325–26.

57. *Id.*; see Cal. Civ. Code § 986(e) (West 2010).

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

ART & CULTURAL HERITAGE 447

relevant criteria were met—"[t]he invalid provision must be grammatically, functionally, and volitionally separable."<sup>58</sup> The court found the first two criteria were met facially, and looked to legislative history to address the third criteria—that the adopting legislature would have adopted the Act had it foreseen a partial invalidation.<sup>59</sup> The court found evidence in the legislative record that the invalidity of this clause had actually been predicted by law makers, and that the provision was, nonetheless, retained in the Act when it was adopted.<sup>60</sup> The court further pointed to the inclusion of the broadly written severability clause in the Act.<sup>61</sup>

### III. Auction Seller Representations: *Koch v. Greenberg*

Just over a decade ago, Eric Greenberg consigned bottles of wine from his personal collection to Zachys Wine Auctions.<sup>62</sup> At auction, William Koch purchased \$3.7 million dollars of wine, including some bottles from Mr. Greenberg's collection.<sup>63</sup> Later, Koch learned that many of the bottles, including some from Greenberg's collection, were counterfeit.<sup>64</sup> Koch filed suit against Greenberg, Zachys Wine & Liquor Store, Inc., and Zachys Wine Auctions, Inc. in the United States District Court for the Southern District of New York.<sup>65</sup> A three-week jury trial was held in March and April 2013, with the trial bifurcated into two phases (1) liability and non-punitive damages and (2) punitive damages.<sup>66</sup>

On liability and non-punitive damages, the jury returned a verdict in favor of Koch on all claims, awarding compensatory damages of \$355,811, equal to the purchase price of the twenty-four bottles that were counterfeit.<sup>67</sup> It awarded an additional \$24,000 on claims under the General Business Law of New York ("GBL"), equal to \$1,000 per counterfeit bottle.<sup>68</sup> Finally, the jury awarded \$12,000,000 in punitive damages.<sup>69</sup>

On cross-motions, the court denied Greenberg's request for judgment as a matter of law and reduced both Koch's compensatory damages (from \$355,811 to \$212,699 due to his settlement with the Zachys defendants) and punitive damages (to \$711,622).<sup>70</sup> Koch

---

58. *Sam Francis Found.*, 784 F.3d at 1325 (quoting *Cal. Redev. Ass'n v. Matosantos*, 267 P.3d 580, 607 (Cal. 2011)).

59. *Id.* at 1326.

60. *Id.*

61. *Id.*

62. Jonathan Stempel, *Billionaire Koch defeats appeal in fake wine case*, REUTERS (Sept. 30, 2014), <http://www.reuters.com/article/2015/09/30/us-usa-life-fakewine-koch-idUSKCN0RU26D20150930#XhJ0oCSgIu89Smaq>.<sup>97</sup>

63. *Koch v. Greenberg*, et al, Civ. No. 07cv09600 (S.D.N.Y), Complaint ¶ 42, Oct. 26, 2007, ECF No. 1.

64. *Id.*

65. *Id.*

66. *Koch v. Greenberg*, et al, Civ. No. 07cv09600 (S.D.N.Y), Opinion and Order, p. 1, Mar. 31, 2014, ECF No. 508.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Koch v. Greenberg*, et al, Civ. No. 07cv09600 (S.D.N.Y), Opinion and Order, p. 1–2, 3, Mar. 31, 2014, ECF No. 508.

SPRING 2016

**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

448 THE YEAR IN REVIEW

had also requested attorney's fees and injunctive relief, which the court rejected, but it did grant his request for pre-and post-judgment interest.<sup>71</sup>

Greenberg appealed the final judgment, contending that the verdicts on the fraud and GBL claims should be reversed and punitive damages were inappropriate.<sup>72</sup> On September 30, 2015, the Second Circuit affirmed the ruling with a decision that could have an impact on future auctions of art and cultural property.

The court explained that a post-verdict renewed Rule 50(b) motion for judgment as a matter of law may be granted only if there is such a complete lack of evidence supporting the verdict that the findings of the jury could only have been the result of "sheer surmise and conjecture," or such an overwhelming amount of evidence in favor of the moving party that reasonable and fair-minded men could not arrive at a verdict against the moving party.<sup>73</sup> The court added that the same standard governs appellate review of a decision that denies judgment as a matter of law.<sup>74</sup>

Greenberg contended that the evidence overwhelmingly established that Koch did not justifiably rely on Greenberg's representations, which is an element of fraud.<sup>75</sup> Greenberg contended that Koch's reliance was unjustified because he relied on specifically disclaimed representations, and was able to learn the truth about the wine for himself.<sup>76</sup> Under New York law, "a party cannot justifiably rely on a representation that is specifically disclaimed in an agreement."<sup>77</sup>

Koch contended that he relied on the authenticity and provenance of Greenberg's wine. But, the auction catalog included a disclaimer stating that the wine was sold "as is" without any representations or warranties by Zachys.<sup>78</sup> Under New York law, a specific disclaimer will not undermine another party's allegation of reasonable reliance on the misrepresentations, if the allegedly misrepresented facts are peculiarly within the knowledge of the misrepresenting party.<sup>79</sup> Whether a defendant has peculiar knowledge that defeats a specific disclaimer and thus establishes justifiable reliance is a matter of fact for the jury to decide.<sup>80</sup>

The court found that the evidence in this matter supported a jury determination that although the authenticity and provenance of the wine was specifically disclaimed, Greenberg had peculiar knowledge of the facts that were the subject of that disclaimer.<sup>81</sup> Because there was evidence that inspecting all of the bottles of wine consigned by Greenberg would have taken more than 1,100 hours, the jury could have found that Koch did not have "the means available to him of knowing, by the existence of ordinary intelligence, the truth, or the real quality of the subject of the representation."<sup>82</sup> In

---

71. *Id.* at \*1-2.

72. Koch v. Greenberg, No. 14-1712-CV, 2015 WL 5711578, at \*1 (2d Cir. Sept. 30, 2015).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Koch v. Greenberg, No. 14-1712-CV, 2015 WL 5711578, at \*1 (2d Cir. Sept. 30, 2015) (quoting Dallas Aerospace, Inc. v. CIS Air Corp., 352 F.3d 775, 785 (2d Cir. 2003)).

78. *Koch*, 2015 WL 5711578, at \*1.

79. *Id.*

80. *Id.*

81. *Id.* at \*2.

82. *Id.*

VOL. 2016

**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

ART & CULTURAL HERITAGE 449

addition, the jury could have found that Greenberg had information that no amount of inspection could have revealed, such as the wine's provenance.<sup>83</sup> Therefore, there was not a complete absence of evidence to support the jury's determination that Koch justifiably relied on Greenberg's representations.<sup>84</sup>

Greenberg contended that there was insufficient evidence for the jury to conclude that he made misrepresentations because Zachys's intermediary role precluded his liability and because Koch failed to identify any actionable misrepresentations.<sup>85</sup> The court noted that, under New York law, a fraudulent misrepresentation made with notice in the circumstances of its making such that the person to whom it was made would communicate it to third parties will subject the person who made the misrepresentation to liability to the third party to whom it was communicated.<sup>86</sup>

The evidence demonstrated that Greenberg exerted influence in selecting bottles for the auction, worked with Zachys in drafting and preparing the auction catalog, and knew that his misrepresentations would be communicated to third parties.<sup>87</sup> Therefore, the information that was filtered through Zachys' own process of evaluation did not establish that it had too much discretion for Koch to rely on Greenberg's misrepresentations.<sup>88</sup> "Accordingly the jury did not act with a complete absence of evidence in rejecting [Greenberg's] contention that Zachys exercised independent discretion."<sup>89</sup> The court also found that there was sufficient evidence for the jury to find that Greenberg misrepresented facts to Zachys, which constitutes a fraudulent misrepresentation subjecting Greenberg to liability.<sup>90</sup>

Greenberg argued that Koch failed to provide sufficient evidence for a jury to conclude that he fraudulently concealed information about the wine because he did not owe Koch a duty to disclose.<sup>91</sup> The court held that, under New York law, a duty to disclose *does* exist when one party possesses superior knowledge that is not readily available to another party and knows that the other party is acting on the basis of mistaken knowledge, or when one party has made a partial or ambiguous statement.<sup>92</sup>

Greenberg contended that superior knowledge cannot exist when Koch had access to the necessary facts for determining the authenticity of the wine, and that he could not have known that Koch was acting on the basis of mistaken knowledge because the two of them had no direct business dealings.<sup>93</sup> The court found that the jury could have reasonably determined that Greenberg possessed information that no amount of inspection could have revealed, given his knowledge of the provenance of the wine.<sup>94</sup> The

---

83. *Id.*

84. Koch v. Greenberg, No. 14-1712-CV, 2015 WL 5711578, at \*2 (2d Cir. Sept. 30, 2015).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Koch v. Greenberg, No. 14-1712-CV, 2015 WL 5711578, at \*2 (2d Cir. Sept. 30, 2015).

91. *Id.* at \*3.

92. *Id.*

93. *Id.*

94. *Id.*

SPRING 2016

**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

450 THE YEAR IN REVIEW

court also found that there is no per se rule that fraudulent concealment requires that Greenberg and Koch have direct business dealings.<sup>95</sup>

The court also rejected Greenberg's assertion that Koch failed to provide sufficient evidence for a reasonable jury to conclude that his conduct was "consumer-oriented and materially misleading" under the General Business Law of New York ("GBL").<sup>96</sup> Greenberg contended that his conduct was not consumer-oriented because it involved a high-end collectible and Zachys was an expert intermediary.<sup>97</sup> The court found that the GBL interprets consumer-oriented conduct broadly and only requires that the conduct "have a broader impact on consumers at large."<sup>98</sup> The consumer-oriented conduct requirement was satisfied because Greenberg provided wine to be sold at an auction to other consumers similarly situated to Koch.<sup>99</sup>

Greenberg insisted that he made no materially misleading statements because the wine was sold with disclaimers, and Koch had the right to investigate the wine to obtain information regarding its authenticity.<sup>100</sup> The court held that disclaimers do not defeat liability under the GBL.<sup>101</sup> Conduct or advertising is materially misleading when it is "likely to mislead a reasonable consumer acting reasonably under the circumstances."<sup>102</sup> The court found that the evidence was sufficient for the jury to determine that although those attending the auction had the right to inspect the wines to be sold, a reasonable attendee of the auction would have been misled about Greenberg's wines.<sup>103</sup>

Although Greenberg claimed his actions were not aimed at the general public and did not reach the level of moral culpability necessary for an award of punitive damages, the court noted that to succeed on a motion for judgment as a matter of law, a movant must at least identify the specific element that it contends is insufficiently supported.<sup>104</sup> This, the court found, Greenberg had failed to do. The judgment of the district court was affirmed.<sup>105</sup>

**IV. Auction House Standard of Care to Art Consignor: *Thwaytes v. Sotheby's***

In 2006, Sotheby's was asked to advise on a copy of Caravaggio's "Cardsharps," one of three copies of the popular painting collected by a naval physician in the mid-twentieth century and owned by his heir.<sup>106</sup> Although an autographed Caravaggio work, "The Musicians," had been identified in the collection years before, the collection was not regarded as particularly distinguished. The painting was dirty, overpainted, and, in the

---

95. *Id.*

96. Koch v. Greenberg, No. 14-1712-CV, 2015 WL 5711578, at \*3 (2nd Cir. Sept. 30, 2015).

97. *Id.*

98. *Id.* (quoting Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741, 744 (1995)).

99. Koch v. Greenberg, No. 14-1712-CV, 2015 WL 5711578, at \*3 (2nd Cir. Sept. 30, 2015).

100. *Id.*

101. *Id.*

102. *Id.* (quoting Stutman v. Chem. Bank, 95 N.Y.2d 24, 709 N.Y.S.2d 452, 967 N.E.2d 675, 676 (2012)).

103. *Id.*

104. *Id.* at \*4.

105. *Id.*

106. Thwaytes v. Sotheby's, [2015] EWHC 36 (Ch), 2015 WL 113688.

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

ART & CULTURAL HERITAGE 451

view of Sotheby's experts, of uneven quality. Since the original autograph "Cardsharps," documented as having come from the collection of Caravaggio's early patron, is owned by the Kimbell Art Museum in Fort Worth,<sup>107</sup> and because Caravaggio was not known to have made copies of his own paintings, Sotheby's believed the painting to be a sixteenth-century copy by a hand other than Caravaggio. "Cardsharps" was widely copied, both in Caravaggio's own time, and later. This, Sotheby's believed, was one such copy.

Art historians and experts in art attribution distinguish between "copies," "variants," and "repetitions." The terms describe a spectrum from similarity (copy) to dissimilarity (repetition). A copy is a work that is virtually identical to another, presumably earlier work. The copy deliberately replicates that earlier work, and so frequently lack evidence of significant *pentimenti* or re-workings and revisions. Some artists are known to have made copies of their own works. Variants are two or more works by an artist that depict what is fundamentally the same scene, but in which the artist has made different choices (models, lighting, fabrics, color, etc.). On the other hand, a repetition is when an artist addresses the same subject in two or more quite distinct works. As the court noted,

It is accepted that Caravaggio painted repetitions of the same subject. For example *The Supper at Emmaus* in the National Gallery in London and the painting of the same name in Brera, Milan depict the same event where Christ appears to the two disciples after the resurrection. But the figures and the composition are very different and one is not intended to reproduce the other. It is also accepted that Caravaggio painted variants such as the two versions of *The Fortune Teller* painting, one in the Louvre, Paris and one in the Musei Capitolini in Rome. Those are both accepted as autograph paintings and show a young dandy having his palm read (and his gold ring surreptitiously removed) by an attractive peasant girl. Though the figures are similar and are dressed in the same clothing, they are clearly not intended to be identical.<sup>108</sup>

The painting, described as "after Caravaggio," sold for £42,000 at auction in December 2006.<sup>109</sup> It was acquired by a third party on behalf of Sir Denis Mahon, an eminent collector and historian of Italian art. After cleaning, restoration, and extensive investigation, Sir Denis announced in November 2007 that he believed the painting to be a copy made by Caravaggio himself. The seller, Mr. Thwaytes, brought suit against Sotheby's for negligence and breach of contract.<sup>110</sup>

In a significant and highly detailed decision, the High Court of Justice Chancery Division considered what standard of care is owed under English law by an auction house to a consignor in providing an opinion on the sale value of artworks. The court relied on an earlier decision, *Luxmoore-May and Another v. Messenger May Baverstock*, which had established the standard of care owed by a regional auction house. In *Luxmoore-May*, a consignor brought two small paintings of foxhounds to a regional auction house, which offered them for sale at a price of £40 for the pair.<sup>111</sup> The paintings sold for £840, and turned out to be sleepers—autographed works by George Stubbs—which after being

---

107. Caravaggio, "The Cardsharps" (c. 1595), KIMBELL ART MUSEUM, <https://www.kimbellart.org/collection-object/cardsharps>.

108. *Thwaytes*, 2015 WL 113688, at ¶ 7.

109. *Id.* at ¶ 2.

110. *Id.* at ¶ 3.

111. *Id.* at ¶ 72.

SPRING 2016

**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

452 THE YEAR IN REVIEW

attributed to Stubbs, resold for £88,000.<sup>112</sup> The consignor sued. The trial court found in favor of the consignor, holding that “it was the duty of a general practitioner to guard against his own want of specialist knowledge and to exercise proper caution in arriving confidently at his own conclusion. He must know his own limitations.”<sup>113</sup> The appellate court reversed, holding that a generalist does not owe the same standard of care as a specialist.

In contrast to the circumstances of *Luxmoore-May*, the *Thwaytes* court emphasized that a leading auction house is held to the higher standard of care of a specialist. This higher standard of skill and care is manifested in three areas: (1) “those who consign their works to a leading auction house can expect that the painting will be assessed by highly qualified people—qualified in terms of their knowledge of art history; their familiarity with the styles and oeuvres of different artists; and in terms of their connoisseur’s ‘eye’”;<sup>114</sup> (2) “a leading auction house must give the work consigned to it a proper examination devoting enough time to it to arrive at a firm view where that is possible”;<sup>115</sup> and (3) “it would be much more difficult for a leading auction house to rely on the poor condition of a painting as a reason for failing to notice its potential.”<sup>116</sup>

Assessing the evidence, consisting chiefly of extensive expert testimony on both sides, the court concluded that Sotheby’s was not negligent in assessing the painting, and that its analysis and conclusion were within the standard of skill and care required of a leading specialist auction house. The court held that Sotheby’s was entitled to rely upon the opinion of its own experts, and was not negligent in not obtaining the opinions of outside experts. “Sometimes,” the court noted, “even the attribution by a well-respected scholar can be rebuffed by the market.”<sup>117</sup>

---

112. *Id.*

113. *Id.* at ¶ 75.

114. *Thwaytes*, 2015 WL 113688, at ¶ 76.

115. *Id.* ¶ 77.

116. *Id.*

117. *Id.* at ¶ 185.

VOL. 2016

**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**