

April 2019

Cassirer v. Thyssen-Bornemisza Collection Foundation: The Holocaust Expropriated Art Recovery Act Was Unveiled But Congress Still Has Work To Do

Nicholas Joy

Golden Gate University School of Law

Follow this and additional works at: <https://digitalcommons.law.ggu.edu/ggulrev>

Part of the [Civil Law Commons](#), and the [Judges Commons](#)

Recommended Citation

Nicholas Joy, *Cassirer v. Thyssen-Bornemisza Collection Foundation: The Holocaust Expropriated Art Recovery Act Was Unveiled But Congress Still Has Work To Do*, 49 Golden Gate U. L. Rev. 3 (2019).
<https://digitalcommons.law.ggu.edu/ggulrev/vol49/iss1/4>

This Note is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized editor of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

NOTE

CASSIRER V. THYSSEN-BORNEMISZA COLLECTION FOUNDATION: THE HOLOCAUST EXPROPRIATED ART RECOVERY ACT WAS UNVEILED BUT CONGRESS STILL HAS WORK TO DO

*NICHOLAS JOY**

INTRODUCTION

Bella Jakubowicz Tovey, a Holocaust survivor who lived in Poland at the start of World War II (“WWII”), provided the following account:

In the fall of 1939, there was a knock on our door. And there was a German woman, and two SS men were with her . . . they came into our apartment, and she walked through the apartment and she turned to the SS men and she said . . . “I like it. All of it . . .” [A] day later . . . they brought in a truck and . . . took everything out of our [house].¹

On September 1, 1939, the German invasion of Poland set off a chain of events that led to the start of WWII in Europe.² Almost six years later, on May 9, 1945, the fighting in Europe came to an end when Ger-

* J.D. Candidate, Golden Gate University School of Law, May 2019; B.A. Anthropology, Saint Mary’s College of California, May 2013. Managing Editor, 2018-2019, *Golden Gate University Law Review*. The author would like to thank Professor Michael Daw and the entire *Golden Gate University Law Review* staff for their assistance in the writing and editing of this piece. Lastly, the author would like to thank everyone else who helped make this Note possible, including his father, partner, and other loved ones.

¹ Interview with Bella Jakubowicz Tovey, Holocaust Survivor (1990), https://www.ushmm.org/wlc/en/media_oi.php?ModuleId=0&MediaId=1102.

² U.S. Holocaust Mem’l Museum, *World War II in Europe*, HOLOCAUST ENCYCLOPEDIA, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005137> (last visited Sept. 24, 2018).

many surrendered.³ By the end of WWII over 60 million people had died and approximately 25 million people had been wounded.⁴ Few events had a greater impact on the number of lives lost during WWII than the rise of the Nazi Party under the leadership of Adolf Hitler.⁵ Once elected, Hitler began to dismantle Germany's political structure in order to develop a government where he had absolute discretion to carry out any act that he deemed necessary to protect Germany and its citizens.⁶

Hitler singled out Germany's Jewish population as the cause of Germany's economic decline after World War I, and he determined that it was necessary to annihilate "the Jews" before Germany could be restored to prominence.⁷ The Nazis initiated a campaign to separate Germany's Jewish population from the rest of society, through propaganda and legislation.⁸ The Nuremberg Laws, which were enacted in 1935, caused the plight of Germany's Jewish population to take a turn for the worse.⁹ The Nuremberg Laws labeled all Jewish people as impure and revoked their citizenship.¹⁰ Furthermore, the Nuremberg Laws gave Germany's courts the authority to charge someone as an enemy of the state, solely because of their race, ethnicity, or religious affiliation.¹¹ The Nazis' propaganda and legislative efforts were effective, and Germany's Jewish population was separated from the rest of society as a result.¹²

After the Nuremberg Laws were passed, the Nazi Party hierarchy gathered at the Wannsee Conference and drafted the *Final Solution*, which was its plan to eliminate Jewish people and their culture from history.¹³ The *Final Solution* detailed how the Nazis would kill Jewish citizens and other minority groups on a large scale through the use of

³ *Id.*

⁴ *Research Starters: Worldwide Deaths in World War II*, NAT'L WWII MUSEUM, <https://www.nationalww2museum.org/students-teachers/student-resources/research-starters/research-starters-worldwide-deaths-world-war> (last visited Sept. 24, 2018).

⁵ Jennifer Elisa Smith, A "Just and Fair Solution": Creating an Environment for Resolving Nazi Era Art Restitution Claims Equitably, 31 MD. J. INT'L L. 257, 259 (2016).

⁶ Joshua M. Greene, *The Second George S. Prugh Lecture in Military Legal History: Hitler's Courts: Betrayal of the Rule of Law in Nazi Germany*, 196 MIL. L. REV. 155, 158 (2008), available at https://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/196-summer-2008.pdf.

⁷ Lorraine Boissoneault, *The First Moments of Hitler's Final Solution*, SMITHSONIAN MAG. (Dec. 12, 2016), <https://www.smithsonianmag.com/history/first-moments-hitlers-final-solution180961387/#Hf4bITCzSZYgI07A.99.180961387/#Hf4bITCzSZYgI07A.99>.

⁸ Greene, *supra* note 6, at 159.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Christian Gerlach, *The Wannsee Conference, the Fate of German Jews, and Hitler's Decision in Principle to Exterminate All European Jews*, 70 J. MOD. HIST., 759, 793-94 (1998).

concentration camps.¹⁴ The Nazis also believed it was imperative that all remnants of Jewish culture were eliminated in order to fully achieve the goals laid out in the *Final Solution*.¹⁵ However, the elimination of Jewish cultural artifacts became a veil for Nazi officials to hide their true intentions behind, and they began to steal valuable possessions from affluent Jewish families for their own personal gain.¹⁶ Nazi officials kept the art in their private collections or sold the paintings to finance personal and military expenses.¹⁷ In total, the Nazis stole an estimated 650,000 pieces of art during WWII, which still is “the greatest displacement of art” in history.¹⁸

Today, the effort to seek out those responsible for the atrocities committed during the Holocaust continues. The pain and suffering caused by the systematic killing of millions can never be undone, but humanity must seize any remaining chance to remedy harms caused by the Holocaust.¹⁹ The restitution of artwork stolen by the Nazis provides humanity with such an opportunity.

Cassirer v. Thyssen-Bornemisza Collection Foundation exemplifies the difficulties a claimant faces when they bring a restitution claim in a U.S. court.²⁰ While it is undisputed that the Nazis used forcible means to take a painting that belonged to the Cassirers, the family has still had to fight for decades to prove that they are the rightful owners.²¹ In 2015, the United States District Court for the Central District of California (“district court”) granted the defendant’s motion for summary judgment, finding that they had satisfied the requirements for its adverse possession claim, and awarded them possession of the painting.²² The district court

¹⁴ Benno Müller-Hill, *The Idea of the Final Solution and the Role of Experts*, in *THE FINAL SOLUTION: ORIGINS AND IMPLEMENTATION* 62, 68 (David Cesarani ed., 1st ed. 1996).

¹⁵ See generally *The Nazi Regime*, PROJET ALADIN, <http://www.projetaladin.org/holocaust/en/history-of-the-holocaust-shoah/the-nazi-regime.html> (last visited Sept. 9, 2018).

¹⁶ Anne Rothfeld, *Nazi Looted Art*, 34 PROLOGUE MAG., no. 2, Summer 2002, <https://www.archives.gov/publications/prologue/2002/summer/nazi-looted-art-1.html> (last reviewed Dec. 12, 2017).

¹⁷ *Id.*

¹⁸ Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524.

¹⁹ U.S. Holocaust Mem’l Museum, *Documenting Numbers of Victims of the Holocaust and Nazi Persecution*, HOLOCAUST ENCYCLOPEDIA, <https://encyclopedia.ushmm.org/content/en/article/documenting-numbers-of-victims-of-the-holocaust-and-nazi-persecution> (last visited Sept. 23, 2018).

²⁰ See *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 957 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1992 (2018).

²¹ *Id.* at 955-56 (discussing that the Nazis forced the Cassirer family to sell the painting in 1939).

²² *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148, 1167-68 (C.D. Cal. 2015), *rev’d and remanded*, 862 F.3d 951 (9th Cir. 2017).

also held that the plaintiff's claim was untimely under the applicable statute of limitation, and was thus barred.²³

When *Cassirer* returned to the United States Court of Appeals for the Ninth Circuit in 2017, the court held that the district court's decision to grant the defendant's motion for summary judgment was improper.²⁴ The Ninth Circuit overturned the decision because a factual dispute existed as to whether the defendant knew the painting was previously stolen,²⁵ and under the recently enacted Holocaust Expropriated Art Recovery Act ("HEAR") the plaintiff's claim was timely.²⁶ If HEAR's effectiveness was judged solely on the Ninth Circuit's decision to reverse the district court's ruling, then the Act would be deemed a success.²⁷

Congress intended for HEAR to be a means of ensuring that American courts are able to account for the troubling historical context behind Holocaust-era art restitution cases.²⁸ Congress's intent behind HEAR will not be achievable unless the Act's provisions are amended so that the Act addresses other hurdles that commonly arise in art restitution cases, which can impact a claimant's chances at obtaining a just and fair resolution of his or her claim. If HEAR is not amended, Congress should establish an alternative form of dispute resolution for Holocaust-era art restitution cases because America's courts are not currently fit to ensure that these cases are resolved fairly or justly.²⁹

This Note examines the Ninth Circuit's discussion of HEAR's provisions, which highlight several problems that Congress failed to address when it enacted the Act and looks at whether the court could have interpreted the Act differently. Section I of this Note discusses the case's procedural history. Section II discusses the Cassirer family story and looks at the history of America's legislative efforts aimed at impacting

²³ *Id.* at 1168.

²⁴ *Cassirer*, 862 F.3d at 981.

²⁵ *Id.* at 973.

²⁶ *Id.* at 960 (quoting Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526) ("Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—(1) the identity and location of the artwork or other property; and (2) a possessory interest of the claimant in the artwork or other property.").

²⁷ *Id.* at 981.

²⁸ Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524-25.

²⁹ Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526-27 (general intention of the law). See also Jennifer Anglim Kreder, *Federal Holocaust-Era Art Cases Filed by Survivors & Heirs Since Austria Returned Klimts to Ms. Altman in 2006*, SSRN, <https://ssrn.com/abstract=1636295> (last updated Mar. 2018) (follow "Open PDF in Browser").

2019] *Cassirer v. Thyssen-Bornemisza Collection Foundation* 7

Holocaust-era art restitution litigation since the end of WWII. Section III discusses the Ninth Circuit’s application of HEAR and compares it to subsequent interpretations of the Act. Lastly, section IV discusses changes that Congress could make to HEAR that would help ensure that the Act has the impact that the legislature intended.

I. *CASSIRER V. THYSSEN-BORNEMISZA COLLECTION FOUNDATION*: PROCEDURAL HISTORY

This section discusses the phases of litigation in *Cassirer*, starting when Claude filed his complaint and ending with a discussion of the most recent decision by the Ninth Circuit. Part A will cover Claude’s discovery of the paintings in 2000; will look at Claude’s complaint, which was filed in 2005; and lastly, will go over the procedural posture of the case from 2005 to 2014. Part B examines the district court’s decision to award possession of the painting to Thyssen-Bornemisza Collection Foundation (“TBC”) in 2015. Lastly, part C describes the Ninth Circuit’s decision to reverse the district court’s findings and remand the case back to the lower court.

A. THE EARLY STAGES OF LITIGATION

It was not until 2000 that Claude became aware that the painting had not been destroyed during the war but was in fact on display at the Thyssen-Bornemisza Museum in Madrid, Spain.³⁰ Claude then petitioned the Spanish “Minister of Education, Culture and Sports, Pilar del Castillo Vera,”³¹ to return the painting, but Spain refused the request.³² Five U.S. Congressmen also wrote to the Minister to request that Spain return the painting, but the request was again denied.³³

On May 10, 2005, Claude Cassirer filed a lawsuit against Spain and TBC, in the Central District of California.³⁴ Claude sought the return of a painting that he alleged was unlawfully taken from his grandmother by the Nazis.³⁵ Claude’s complaint asserted “claims for declaratory relief,

³⁰ *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148, 1152 (C.D. Cal. 2015), *rev’d and remanded*, 862 F.3d 951 (9th Cir. 2017).

³¹ *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1161 (C.D. Cal. 2006), *aff’d in part, rev’d in part*, 580 F.3d 1048 (9th Cir. 2009), *rev’d en banc*, 616 F.3d 1019 (9th Cir. 2010).

³² *Cassirer*, 153 F. Supp. 3d at 1152.

³³ *Cassirer*, 461 F. Supp. 2d at 1161.

³⁴ *Cassirer v. Kingdom of Spain*, No. CV 05-3459 GAF (CTX), 2006 WL 8423211, at *1 (C.D. Cal. Apr. 27, 2006).

³⁵ *Id.*

imposition of a constructive trust, possession of personal property, and conversion.”³⁶

The early stages of litigation focused on whether the Foreign Sovereign Immunities Act (“FSIA”) prevented the court from exercising jurisdiction over Spain and TBC.³⁷ The plaintiff had the burden to show that the painting, or any property that had been exchanged for the painting, was in the U.S. due to the defendant’s commercial activity in the states.³⁸ In August 2006, the district court held that TBC’s commercial activity³⁹ in the U.S. was sufficient to trigger the expropriation exception to FSIA,⁴⁰ which allowed the court to exercise jurisdiction over the defendants.⁴¹

Cassirer came before the Ninth Circuit for the first time in September 2009, after the defendants had filed a request for an interlocutory appeal.⁴² The Ninth Circuit agreed with the district court’s findings and held that the defendant had engaged in enough commercial activity in the U.S. to trigger the expropriation exception to FSIA,⁴³ and the case was remanded back to the district court to determine whether the claimant was subject to an exhaustion of remedies requirement.⁴⁴ The Ninth Circuit then reheard the case en banc,⁴⁵ and the three-judge panel upheld the previous decision, finding again that the expropriation exception to FSIA

³⁶ *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. CV 05-3459-GAF (CTX), 2012 WL 12875771, at *3 (C.D. Cal. May 24, 2012), *aff’d in part, rev’d in part*, 737 F.3d 613 (9th Cir. 2013).

³⁷ *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 958 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1992 (2018).

³⁸ *Cassirer*, No. CV 05-3459 GAF (CTX), 2006 WL 8423211, at *2 (quoting 28 U.S.C. § 1605(a)(3)).

³⁹ 28 U.S.C. § 1603(d) (“A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”).

⁴⁰ *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1175-76 (C.D. Cal. 2006), *aff’d in part, rev’d in part*, 580 F.3d 1048 (9th Cir. 2009), *rev’d en banc*, 616 F.3d 1019 (9th Cir. 2010) (“The Court concludes that Defendants have engaged such numerous commercial contacts with the United States that the ‘commercial activity’ element of the expropriated property exception is easily established . . . [T]here are sales to United States residents of reproductions of the Painting, [] and hundreds of other contacts involving the purchase and sale of merchandise . . . some of which are directly related to Pissarro and even the Painting itself.”).

⁴¹ *Id.* at 1178.

⁴² *See Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009), *rev’d en banc*, 616 F.3d 1019 (9th Cir. 2010).

⁴³ *Id.* at 1059.

⁴⁴ *Id.* at 1051. *See also id.* at 1061 (The exhaustion of remedies requirement “generally provides that a state is not required to consider a claim, made by a person against a foreign state, and alleging a violation of international law ‘until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.’”).

⁴⁵ *Cassirer v. Kingdom of Spain*, 590 F.3d 981 (9th Cir. 2009).

2019] *Cassirer v. Thyssen-Bornemisza Collection Foundation* 9

had been triggered.⁴⁶ After the en banc decision was issued, Claude passed away;⁴⁷ his children, David and Ava Cassirer, along with the United Jewish Federation of San Diego County, substituted in as plaintiffs.⁴⁸ The new plaintiffs dismissed Spain from the case and in exchange, TBC dropped its personal jurisdiction challenge.⁴⁹

B. THE DISTRICT COURT AWARDS TBC POSSESSION OF THE PAINTING

Cassirer came back before the district court in June 2015, when TBC filed a motion for summary judgment, and David and Ava Cassirer, along with the United Jewish Federation of San Diego County, filed a motion for summary adjudication.⁵⁰ The plaintiffs' motion argued that California law must be used to decide the substantive issues in the case.⁵¹ Plaintiffs also argued that TBC's adverse possession claim should be barred because it was an accessory "to a crime against humanity or a crime against property in the event of [an] armed conflict."⁵² Lastly, plaintiffs alleged that "Spain's adverse possession laws violate[d] the European Convention on Human Rights," and should not be recognized.⁵³ Defendant's motion argued: that Spanish or Swiss law should be applied to determine who is the owner of the painting, that under either Spanish or Swiss law TBC was the rightful owner of the painting, and that the plaintiffs' claim was untimely under the applicable statute of limitations.⁵⁴

The district court conducted its choice-of-law analysis under both federal common law⁵⁵ and California law standards.⁵⁶ The district court

⁴⁶ *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1027 (9th Cir. 2010) (In addition to the commercial activity requirement, the FSIA expropriation exception requires that there be a taking in violation of international law before a foreign government's immunity can be overcome. The Ninth Circuit determined that "a taking offends international law when: it does not serve a public purpose, when it discriminates against those who are not nationals of the country, or when it is not accomplished with payment of just compensation.").

⁴⁷ *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 616 (9th Cir. 2013).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148, 1150 (C.D. Cal. 2015), *rev'd and remanded*, 862 F.3d 951 (9th Cir. 2017).

⁵¹ Plaintiffs' Motion for Summary Adjudication at 1, *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148 (C.D. Cal. 2015) (No. 2:05-cv-03459-JFW-E), 2015 WL 13648947, at *1.

⁵² *Cassirer*, 153 F. Supp. 3d at 1163.

⁵³ *Id.*

⁵⁴ Defendant's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148 (C.D. Cal. 2015) (No. 2:05-cv-03459-JFW-E), 2015 WL 13648946.

⁵⁵ *Cassirer*, 153 F. Supp. 3d at 1154 ("Federal common law follows the approach of the Restatement (Second) of Conflict of Laws . . . Restatement § 222 sets forth the general choice-of-

applied both tests because of the uncertainty caused by a recent Ninth Circuit decision,⁵⁷ and a true conflict existed because “each jurisdiction ha[d] an interest in having its own law applied.”⁵⁸ The district court concluded that Spanish law must be used to decide who is the owner of the painting.⁵⁹ The district court’s decision was critical because California law does not recognize claims of adverse possession for personal property.⁶⁰

The district court also held that TBC had satisfied the requirements for its adverse possession claim under Spanish law,⁶¹ and granted TBC’s motion for summary judgment.⁶² Since the district court found that TBC had satisfied all the requirements for an adverse possession claim under Spanish law and was the rightful owner of the painting, it did not “address whether the Baron acquired ownership of the [p]ainting by adverse possession under Swiss law . . . or whether Plaintiff’s claims [were] barred by laches.”⁶³ Furthermore, the court found no merit in either of the arguments that the plaintiff relied on to rebut TBC’s adverse posses-

law principle applicable to interests in both real and personal property: The interest of the parties in a thing are determined depending upon the circumstances, either by the ‘law’ or by the ‘local law’ of the state which, with respect to the particular issue, has the most significant relationship to the thing and the parties . . .”).

⁵⁶ *Id.* at 1155–56 (“California applies the three-step ‘governmental interest’ test to resolve choice-of-law issues: First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction’s interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state’s interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be more impaired if its law were not applied.”).

⁵⁷ *Id.* at 1154 (“Where, as here, federal court jurisdiction is premised on [FSIA] . . . the Ninth Circuit has held that federal common law choice-of-law rules govern. However, the Ninth Circuit recently called its holding into question in an en banc decision in *Sachs v. Republic of Austria*, 737 F.3d 584 (9th Cir.2013), stating that it may be permissible to apply the forum state’s choice-of-law rules. Although the Ninth Circuit in *Sachs* did not overrule its prior case law, the Court, out of an abundance of caution, will conduct a choice-of-law analysis under both federal common law and California law.”).

⁵⁸ *Id.* at 1156.

⁵⁹ *Id.* at 1154–60.

⁶⁰ *Id.* at 1156.

⁶¹ *Id.* at 1160.

⁶² *Id.* at 1168.

⁶³ *Id.* at 1154.

2019] *Cassirer v. Thyssen-Bornemisza Collection Foundation* 11

sion claim,⁶⁴ but did state that if TBC had helped to cover up the painting's theft then its adverse possession claim would have failed.⁶⁵

The Cassirers' claim was also found to be untimely pursuant to California Code of Civil Procedure section 338.⁶⁶ In 2010, the California Legislature added section 338(c),⁶⁷ which was designed to apply in cases like *Cassirer* and provided a statute of limitations period that only began to run after the claimant discovered the whereabouts of the artwork in question.⁶⁸ However, the district court ruled that a retroactive application of section 338(c) would violate TBC's due process rights because TBC had satisfied the requirements for its adverse possession claim before California's Legislature passed section 338(c).⁶⁹

Judge John F. Walter concluded his opinion with a plea aimed at TBC and Spain, and recommended that the defendants take some time before the next appeal to "pause, reflect, and consider whether it would be appropriate to work towards a mutually agreeable resolution."⁷⁰ Especially considering Spain's acceptance of the Washington Conference Principles ("principles"),⁷¹ which indicated that Spain was "commit[ed] to achiev[ing] 'just and fair solutions'" for Holocaust-era art restitution cases.⁷²

C. THE NINTH CIRCUIT REVERSED THE DISTRICT COURT'S DECISION TO AWARD TBC POSSESSION OF THE PAINTING

Cassirer came back before the Ninth Circuit for a third time in July 2017,⁷³ after the plaintiffs filed for an appeal.⁷⁴ After the Ninth Circuit

⁶⁴ *Id.* at 1163 (Plaintiff argued that "(1) Spanish Civil Code Article 1956 bars the application of adverse possession because the Foundation was an "accessory" to a crime against humanity or a crime against property in the event of armed conflict; and (2) Spain's adverse possession laws violate the European Convention on Human Rights.").

⁶⁵ *Id.* at 1163-64.

⁶⁶ *See id.* at 1168.

⁶⁷ *Id.*

⁶⁸ Cal. Civ. Proc. Code § 338(c)(3).

⁶⁹ *Cassirer*, 153 F. Supp. 3d at 1168.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 954 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1992 (2018).

⁷⁴ Appellants' Brief, *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951 (9th Cir. 2017) (No. 15-55550), 2016 WL 281340 (The appellants' brief raised four questions for the Ninth Circuit to consider: "1. Did the District Court err in holding TBC owned the Painting via acquisitive prescription when the Court incorrectly defined *encubridor* under Spanish Civil Code Article 1956; and/or TBC is a perpetrator under Spanish law when all facts are viewed in the light most favorable to Plaintiffs? 2. Does Spain's Historical Heritage law prohibit TBC from acquiring the Painting through acquisitive prescription? 3. Did the District Court err in applying Spanish law in

consolidated the parties' arguments, there were several issues left for the court to decide.⁷⁵ These issues can be summarized into two points: first, whether the district court erred in finding that TBC had satisfied all the requirements necessary to succeed on their adverse possession claim under Spanish law; and second, whether the Cassirer's claim was timely.⁷⁶ The Ninth Circuit held that the plaintiff's claim was timely under the newly enacted HEAR⁷⁷ and reversed the district court's decision to award TBC possession of the painting.⁷⁸ The Ninth Circuit remanded the case back to the district court to determine whether TBC had known that the painting was stolen and helped cover up the theft for its own benefit. If so, the defendant would be labeled as an *encubridor* under Spanish law—essentially an accessory after the fact—and its adverse possession claim would fail.⁷⁹ This section will look at the Ninth Circuit's application of HEAR in *Cassirer* and will discuss the issues that remain unresolved after the appeal.

1. *The Cassirer's Claim Was Found to be Timely Under HEAR*

Congress passed HEAR in December 2016,⁸⁰ and *Cassirer* was the first time that the Act was before a U.S. Circuit Court for review.⁸¹ HEAR created “a six-year statute of limitations period that commences on the date of actual discovery of the artwork's location by the claimant.”⁸² HEAR controlled what the applicable statute of limitations was in *Cassirer* for two reasons: one, Lilly was forced to turn over the painting to the Nazis in 1939, so the taking fell within the Act's “covered period;”⁸³ and two, HEAR can be applied retroactively “to any claims that [were] pending on the date of HEAR's enactment” even if the claim was on appeal.⁸⁴ The Ninth Circuit held that the plaintiffs' claim was timely under HEAR because Claude discovered the location of the painting by

a manner that violates The European Convention on Human Rights? 4. Did the District Court err in failing to apply California law?”).

⁷⁵ *Cassirer*, 862 F.3d at 981.

⁷⁶ *Id.* at 959.

⁷⁷ *Id.* at 959-60.

⁷⁸ *Id.* at 981.

⁷⁹ *Id.*

⁸⁰ Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524.

⁸¹ David W. Bowker et al., *Ninth Circuit Applies the Holocaust Expropriated Art Recovery Act of 2016 to Revive Previously Dismissed Nazi-Era Art Appropriation Case*, LEXOLOGY (Aug. 2, 2017), <https://www.lexology.com/library/detail.aspx?g=10498290-74c4-4522-b9fe-a620813155a7>.

⁸² § 5, 130 Stat. at 1526.

⁸³ *Cassirer*, 862 F.3d at 960 (quoting Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 4, 130 Stat. 1524, 1526) (“The term ‘covered period’ means the period beginning on January 1, 1933, and ending on December 31, 1945.”).

⁸⁴ *Id.* (quoting § 5, 130 Stat. at 1527).

2000, and subsequently filed his complaint on May 10, 2005; therefore, the lawsuit had been filed “within six-years of actual discovery.”⁸⁵

Since *Cassirer* marked the first time that HEAR was raised before a U.S. Circuit Court,⁸⁶ the court allocated a portion of its opinion to discuss HEAR’s provisions.⁸⁷ This allowed the court to clarify some misconceptions that the parties had about the newly passed Act.⁸⁸ The Cassirers argued that Spanish law should not be used to decide the substantive issues in the case because its application would lead to an unjust and unfair outcome, which would contradict HEAR’s intended purpose.⁸⁹ The court determined that regardless of any policy objectives that Congress referenced, HEAR’s operative provisions only provided an increased statute-of-limitations period, and therefore the Act could “not alter the [court’s] choice of law analysis.”⁹⁰ The court also informed the parties that HEAR did not affect TBC’s ability to assert a claim for adverse possession because the Act does not “bar claims based on the substantive law that vests title in a possessor.”⁹¹

HEAR allowed the Ninth Circuit to overturn the district court’s ruling and hold that the Cassirers’ claim was timely,⁹² but there are issues unaddressed by the Act that can impact whether *Cassirer* can be resolved justly and fairly.⁹³

2. *Several Issues Remained Unresolved After the Ninth Circuit’s Decision*

In addition to the timeliness of the Cassirers’ claim, the Ninth Circuit had to rule on several other issues, including whether the district court was correct to rule that Spanish law must be used to decide who is the owner of the painting; whether the Baron had vested title in the painting before he donated his art collection to TBC; whether the Cassirer’s restitution claim was barred by laches or by Lilly’s acceptance of a settlement with Germany; and whether Spain’s Historical Heritage Law or

⁸⁵ *Id.*

⁸⁶ Bowker et al., *supra* note 81.

⁸⁷ *Cassirer*, 862 F.3d at 959-60.

⁸⁸ *Id.* at 964.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 965 (“Read in context, HEAR’s § 5(a) language that the six-year statute of limitations applies “notwithstanding any defense at law relating to the passage of time” is 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.”).

⁹² *Id.* at 960.

⁹³ *See id.* at 981.

the European Convention on Human Rights prevented TBC from obtaining title.⁹⁴

Whether the Baron had acquired vested title in the painting before he transferred it to TBC was found to be an issue not fit for summary judgment because the “evidence indicates there is a triable issue of fact” as to whether the “Baron was a good faith possessor under Swiss Law.”⁹⁵ The court also ruled that the 1958 settlement agreement between Lilly and the German government did not prevent the Cassirers from bringing future claims because the agreement only settled mutual claims between the parties and Lilly never waived her right to pursue restitution if the painting was ever found.⁹⁶ Next, the court prohibited the plaintiff from asserting that Spain’s Historical Heritage Law prevented TBC from arguing that it had “acquired title to the [p]ainting through” adverse possession because the issue was not raised at the district court.⁹⁷

Lastly, the Ninth Circuit found no error in the district court’s decision to apply Spanish law but did find an error in the lower court’s interpretation of the Spanish Civil Code.⁹⁸ The district court determined that TBC’s adverse possession claim was not affected by Article 1956 of the Spanish Civil Code because they were “not an accessory to the crimes committed by Scheidwimmer and the Nazis.”⁹⁹ However, the Ninth Circuit conducted a further review of Article 1956 and of the term *encubridor*, and determined that “someone who knowingly receives and benefits from stolen property can qualify as an” *encubridor* under Article 1956 of the Spanish Civil Code.¹⁰⁰ The Ninth Circuit remanded the case back to the district court because a further factual examination was necessary to establish whether TBC was aware that the painting had been stolen and if it helped to cover up the theft;¹⁰¹ either of which would impact TBC’s ability to succeed on its adverse possession claim.¹⁰²

⁹⁴ *Id.* at 955-56.

⁹⁵ *Id.* at 976.

⁹⁶ *Id.* at 977.

⁹⁷ *Id.* at 979.

⁹⁸ *Id.* at 976.

⁹⁹ *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148, 1165 (C.D. Cal. 2015), *rev’d and remanded*, 862 F.3d 951 (9th Cir. 2017).

¹⁰⁰ *Cassirer*, 862 F.3d at 970.

¹⁰¹ *Id.* at 981.

¹⁰² *Id.* at 965 (“When the court looked at the surrounding statutes in the Spanish Civil Code, it found that Spain cannot have obtained possession of the painting if they were an ‘*encubridor*’ or had acted in bad faith. Thus, TBC did not meet its burden under a summary judgment motion because a ‘triable issue of fact’ remained as to whether TBC knew the painting had been stolen from its original owners.”).

2019] *Cassirer v. Thyssen-Bornemisza Collection Foundation* 15

II. FACTUAL AND LEGISLATIVE BACKGROUND

Part A provides an account of the Cassirer family story and discusses events that occurred before, during, and after WWII. Part B examines America's legislative efforts after the war, many of which were influential in the development of HEAR, including the Nuremberg Trials, The Washington Conference on Holocaust-era Assets, and The Holocaust Victims Redress Act. Lastly, part C looks at the legislative intent behind HEAR and discusses why the Act was enacted.

A. THE CASSIRER FAMILY STORY

The Cassirers were a well-respected, affluent Jewish family who lived in Germany at the start of WWII.¹⁰³ Julius Cassirer had several successful businesses, and the family's great wealth provided them with the means to accumulate a large art collection.¹⁰⁴ One of the Cassirer family's prized paintings, *Rue St. Honoré, après midi, effet de pluie*,¹⁰⁵ was painted by Camille Pissarro, the "Father of Impressionism," in 1897.¹⁰⁶ Julius bought the painting in 1898 from Durand-Ruel, a renowned art dealer and friend of Pissarro.¹⁰⁷ Julius passed away in 1924 and bequeathed the painting to his son, Fritz Cassirer.¹⁰⁸ Fritz passed away two years later and his wife Lilly became the sole owner of the painting.¹⁰⁹

Lilly was forced to leave Germany in 1939 because the country had become increasingly hostile towards its Jewish citizens.¹¹⁰ In order to obtain an exit visa and safe passage out of Germany, Lilly was forced to sell the painting to Jakob Scheidwimmer—an art appraiser that worked for the Nazis—for approximately \$360.¹¹¹ Scheidwimmer then traded the painting to an anonymous art dealer, who snuck the painting out of Germany and into the Netherlands.¹¹² The Gestapo eventually found the

¹⁰³ *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1052 (9th Cir. 2009), *rev'd en banc*, 616 F.3d 1019 (9th Cir. 2010).

¹⁰⁴ Complaint, *Cassirer v. Kingdom of Spain*, (C.D. Cal. 2005) (No. CV 05-3459 GAF), 2005 WL 3986996.

¹⁰⁵ *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148, 1151 (C.D. Cal. 2015), *rev'd and remanded*, 862 F.3d 951 (9th Cir. 2017).

¹⁰⁶ *Biography of Camille Pissarro*, CAMILLE-PISSARRO.ORG, <https://www.camille-pissarro.org/biography.html> (last visited Aug. 27, 2018).

¹⁰⁷ Complaint, *Cassirer v. Kingdom of Spain*, (C.D. Cal. 2005) (No. CV 05-3459 GAF), 2005 WL 3986996; *see also* *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1052 (9th Cir. 2009).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*; *see also* *Cassirer*, 580 F.3d at 1052.

¹¹⁰ *Id.*

¹¹¹ *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1023 (9th Cir. 2010).

¹¹² *Cassirer*, 580 F.3d at 1052-53.

painting and brought it back to Germany.¹¹³ By the end of WWII, the painting had been auctioned off several times and ended up in a private gallery in the United States (“U.S.”).¹¹⁴

When Lilly returned to Germany after WWII, she filed a claim for restitution against the German government.¹¹⁵ The German government had incorrectly determined that the painting was destroyed, and this misinformation led Lilly to agree to a settlement.¹¹⁶ As part of the settlement, Lilly received 120 thousand Deutsche Marks¹¹⁷ but *reserved* her right to take further legal action if the painting was ever discovered.¹¹⁸ Lilly passed away in 1962 and bequeathed all of her possessions to her grandson,¹¹⁹ Claude Cassirer.¹²⁰

In 1976, Baron Hans Heinrich Thyssen-Bornemisza (“Baron”) purchased the painting “at a price far below market value” even though there was “virtually no provenance research and no documentation accounting for the [p]ainting’s whereabouts” for the previous 40 years.¹²¹ The Baron, who was one of the world’s preeminent art collectors at the time, seemingly ignored the torn-gallery label on the back of the painting; the label “was unique to the Cassirers[’] [gallery] in Germany” and partially listed the gallery’s address.¹²² The painting remained in the Baron’s private gallery until 1988 when the Baron leased his art collection to Spain.¹²³ Spain later agreed to buy the Baron’s art collection for approximately \$327 million.¹²⁴ As part of the agreement, Spain converted the

¹¹³ *Id.*

¹¹⁴ *Id.* at 1053.

¹¹⁵ *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148, 1151 (C.D. Cal. 2015), *rev’d and remanded*, 862 F.3d 951 (9th Cir. 2017).

¹¹⁶ *Id.*

¹¹⁷ *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. CV 05-3459-JFW (EX), 2015 WL 12672087, at *2 (C.D. Cal. Mar. 13, 2015).

¹¹⁸ *Cassirer*, 153 F. Supp. 3d at 1151; *see also Cassirer*, No. CV 05-3459-JFW (EX), 2015 WL 12672087, at *2 (“The 1958 Settlement Agreement did not include a comparable waiver, or any waiver, of Lilly’s right to restitution of the Pissarro Painting [. . .] the 1958 Settlement Agreement merely provides: ‘This Settlement settles all mutual claims among the parties, including any claims which might exist in accordance with Art. 47 REG.’”).

¹¹⁹ Complaint at 7, 10, *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157 (C.D. Cal. 2006) (No. CV05-3459 GAF (CTX)), 2005 WL 3986996 (explaining that Claude’s mother, Eva Cassirer, died from influenza in 1921, Claude was only four-months old at the time and was predominantly raised by his grandmother, Lilly).

¹²⁰ *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 616 (9th Cir. 2013).

¹²¹ Brief for Appellant at 7, *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951 (9th Cir. 2017) (No. 15-55550) 2016 WL 281340, at *7.

¹²² Brief for Respondent in Opposition to Petition for Writ of Certiorari at 8, *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951 (9th Cir. 2017) (No. 15-55550), 2018 WL 1729149, at *8.

¹²³ *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1053 (9th Cir. 2009), *rev’d en banc*, 616 F.3d 1019 (9th Cir. 2010).

¹²⁴ *Id.*

2019] *Cassirer v. Thyssen-Bornemisza Collection Foundation* 17

Villahermosa Palace in Madrid into a museum to house the Baron's art collection.¹²⁵ The painting remains on display at the Thyssen-Bornemisza Museum.¹²⁶

B. SINCE WWII, AMERICA'S LEGISLATIVE EFFORTS TO RIGHT THE WRONGS OF THE HOLOCAUST HAVE BEEN LIMITED

When WWII ended it was no secret that much of the world had sustained massive damage and unprecedented casualties. However, many people remained unaware of the full extent of the horrendous crimes the Nazis had carried out during the Holocaust.¹²⁷ Rebuilding efforts began shortly after the war ended when a group of world powers—including the U.S., United Kingdom (“U.K.”), France, and the Soviet Union—developed a plan to ensure that those responsible for the Holocaust would be made to answer for their crimes.¹²⁸ Six months after the Nazis surrendered, the Nuremberg Trials (“Trials”) began.¹²⁹ The aim of the Trials was to ensure “the just and prompt trial and punishment of the major war criminals of the European Axis.”¹³⁰ The Trials marked America's first attempt to bring justice to Holocaust victims, survivors, and their families.

America revitalized its efforts to bring justice to Holocaust survivors at the tail end of the 20th century. Beginning with the Clinton administration, the restitution of Holocaust-era artwork became a political focus in the U.S.¹³¹ By the end of the 20th century, the U.S. had become instrumental in the resurgence of global restitution efforts.¹³² In December 1998, the U.S. organized the Washington Conference on Holocaust-era Assets (“Conference”), which was attended by 44 countries and 13 non-governmental organizations.¹³³

¹²⁵ *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148, 1151 (C.D. Cal. 2015), *rev'd and remanded*, 862 F.3d 951 (9th Cir. 2017).

¹²⁶ *Rue Saint-Honoré in the Afternoon. Effect of Rain*, MUSEO NACIONAL THYSSEN-BORNEMISZA, <https://www.museothyssen.org/en/collection/artists/pissarro-camille/rue-saint-honore-afternoon-effect-rain> (last visited Aug. 8, 2018).

¹²⁷ Iris Kesternich et al., *The Effects of World War II on Economic and Health Outcomes Across Europe*, 96 REV. ECON. & STAT. 103 (2014).

¹²⁸ David Scheffer, *Nuremberg Trials*, 39 STUD. TRANSNAT'L LEGAL POL'Y 155 (2008).

¹²⁹ *Id.*

¹³⁰ *Id.* at 156.

¹³¹ Jessica Mullery, *Fulfilling the Washington Principles: A Proposal for Arbitration Panels to Resolve Holocaust-Era Art Claims*, 11 CARDOZO J. CONFLICT RESOL. 643, 649-51 (2010).

¹³² *Id.* at 449.

¹³³ *Holocaust Restitution: Summary of the Washington Conference on Holocaust-Era Assets*, JEWISH VIRTUAL LIBR. (Nov. 24, 1999), <http://www.jewishvirtuallibrary.org/summary-of-the-washington-conference>.

The goal of the Conference was to develop a set of principles that would help guide the legislative efforts of the countries in attendance, with the hope that each of the attendees could establish a system in their country of origin that would help to ensure Holocaust-era art restitution claims were handled justly and fairly.¹³⁴ The principles called for attendees to increase their country's efforts to identify art that was stolen by the Nazis.¹³⁵ Attendees were also asked to be mindful of the fact that the historical record in these disputes is not always clear before making decisions on ownership.¹³⁶ Countries were encouraged to implement these principles, "especially as they relate to alternative dispute resolution," but since the principles were only suggestions and non-binding, attendees were not required to take any further action.¹³⁷

The Conference helped kick-start the resurgence of global efforts to return art looted by Nazis to its rightful owners,¹³⁸ but in the 20 years since, Congress has only passed one piece of legislation that attempted to implement the recommendations laid out in the principles: The Holocaust Victims Redress Act.¹³⁹ The Act encouraged states "to make good faith efforts to return art looted by the Nazis" and gave the President the authority to allocate finances towards the development of a strategy that would help move restitution efforts forward.¹⁴⁰ The Act led to the formation of the Presidential Advisory Commission on Holocaust Assets in the United States ("Commission").¹⁴¹ The Commission reviewed what had "happened to the assets of victims of the Holocaust that ended up in the possession of the United States Federal government."¹⁴² The Commis-

¹³⁴ WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS, NOVEMBER 30-DECEMBER 3, 1998, PROCEEDINGS (Message from the Editor) (J.D. Bindenagel, ed. 1999) (presenting a record of all statements and information provided during the Washington Conference), *available at* <https://1997-2001.state.gov/regions/eur/holocaust/heaca.pdf>.

¹³⁵ WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS, NOVEMBER 30-DECEMBER 3, 1998, PROCEEDINGS 912 (J.D. Bindenagel, ed. 1999) (listing the eleven Washington Principles on Nazi-Confiscated Art), *available at* <https://1997-2001.state.gov/regions/eur/holocaust/heacappen.pdf>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Mullery, *supra* note 131, at 649.

¹³⁹ Holocaust Victims Redress Act, Pub. L. No. 105-158, § 202, 112 Stat. 15, 17 (1998) ("It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.").

¹⁴⁰ Lauren F. Redman, *A Wakeup Call for a Uniform Statute of Limitations in Art Restitution Cases*, 15 UCLA ENT. L. REV. 203, 222-23 (2008).

¹⁴¹ *Id.* at 223.

¹⁴² *Presidential Advisory Commission on Holocaust Assets*, CLINTON DIGITAL LIBR., <https://clinton.presidentiallibraries.us/collections/show/20> (last visited Nov. 7, 2018).

2019] *Cassirer v. Thyssen-Bornemisza Collection Foundation* 19

sion's final report made a number of recommendations but none of them were ever implemented into legislation.¹⁴³

C. THE DEVELOPMENT AND PURPOSE OF HEAR

When HEAR was enacted it attracted wide support from Democrats and Republicans alike,¹⁴⁴ and was generally heralded as a huge step forward.¹⁴⁵ The president of the World Jewish Congress at the time said that HEAR would “have a major effect on the future” of Holocaust-era art restitution litigation.¹⁴⁶ Congress had intended for HEAR “[t]o provide the victims of the Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis.”¹⁴⁷ Congress’s findings highlighted the importance of HEAR and discussed the extent of Nazi looting during WWII, America’s previous efforts aimed at impacting Holocaust-era art restitution cases, and the low rate of success that claimants seeking restitution had experienced in U.S. courts.¹⁴⁸

Congress passed HEAR in response to the *Von Saher v. Norton Simon Museum of Art at Pasadena* decision.¹⁴⁹ In *Von Saher*, the plaintiff, Marei Von Saher, sought the return of several paintings that the Nazis had stolen from her family.¹⁵⁰ When Ms. Saher discovered that her family’s paintings were on display at the Norton Simon Museum of Art in Pasadena, she requested that the museum return the paintings.¹⁵¹ The museum refused to comply with the request and Ms. Saher filed a lawsuit.¹⁵² Ms. Saher’s claim was eventually dismissed before the court had an opportunity to rule on who the rightful owner was because the statute of limitations had run before she filed her claim.¹⁵³

Statutes of limitations are supposed to ensure that claims are filed promptly, that the art’s current possessor is protected from having his or her title challenged by “bad evidence,” and that commerce is not hin-

¹⁴³ Redman, *supra* note 140, at 223.

¹⁴⁴ Emmarie Huetteman, *Senate Bill Would Help Recover Art Stolen by Nazis*, N.Y. TIMES (June 7, 2016), <https://www.nytimes.com/2016/06/08/arts/design/senate-bill-would-help-recover-art-stolen-by-nazis.html>.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524, 1524.

¹⁴⁸ § 2, 130 Stat. at 1524-25.

¹⁴⁹ *Id.*

¹⁵⁰ *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 957 (9th Cir. 2010).

¹⁵¹ Brief for Appellant at 7, *Von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016 (9th Cir. 2009) (No. 07-56691), 2009 WL 644327.

¹⁵² *See id.*

¹⁵³ *Von Saher*, 592 F.3d at 968-69.

dered by a fear of inadequate legal protection.¹⁵⁴ Yet, when HEAR was enacted in 2016, statute-of-limitations defenses had become one of the biggest hurdles for claimants seeking restitution of art looted by the Nazis, and it often resulted in the case's dismissal.¹⁵⁵

Congress saw HEAR as a means of ensuring that art restitution cases were resolved on the merits of each party's claim and not because of an insurmountable procedural hurdle.¹⁵⁶ To help claimants overcome this hurdle, HEAR created a six-year statute of limitations for Holocaust-era art restitution claims that began to run after the claimant discovered the location of the art in question.¹⁵⁷ However, HEAR failed to address other hurdles that commonly arise in Holocaust-era art restitution cases that impact a claimant's chances at obtaining a just and fair resolution of his or her claim. The legislative intent and purpose discussed in HEAR will not be fully achievable unless Congress addresses these other hurdles.

III. THE NINTH CIRCUIT CORRECTLY INTERPRETED HEAR'S SUBSTANTIVE PROVISIONS BUT MISSED AN OPPORTUNITY TO HIGHLIGHT THE ACT'S SHORTCOMINGS

This Note takes the position that the Ninth Circuit correctly interpreted and applied HEAR's substantive provisions in *Cassirer*. The Act's operative provisions are stated clearly and are rather limited, which left little room for alternate interpretation.¹⁵⁸ However, HEAR's stated purpose is not readily attainable based on the Act's substantive provisions alone. The discrepancies between HEAR's intended purpose and the Act's operative provisions creates an ambiguity, and the Ninth Circuit missed an opportunity to alert Congress to the fact that the Act's provisions are insufficient to satisfy its stated purpose.

Since the Ninth Circuit reviewed HEAR in 2017, other courts have had an opportunity to interpret the Act. The New York Supreme Court case, *Reif v. Naggy*, provides an example of a court taking an alternate approach to interpreting HEAR.¹⁵⁹ Similar to *Cassirer*, *Reif* is a case in which a plaintiff sought the restitution of artwork that the Nazis stole from his family in WWII.¹⁶⁰ Justice Ramos, who decided the case, ruled

¹⁵⁴ Redman, *supra* note 140, at 211.

¹⁵⁵ *Id.* at 210.

¹⁵⁶ Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 3, 130 Stat. 1524, 1526.

¹⁵⁷ § 5, 130 Stat. 1524, 1526 (“The term ‘actual discovery’ means knowledge,” and “[t]he term ‘knowledge’ means having actual knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to actual knowledge thereof.”).

¹⁵⁸ *Id.* at 1526-28.

¹⁵⁹ *Reif v. Naggy*, 80 N.Y.S.3d 629, 633 (N.Y. Sup. Ct. 2018).

¹⁶⁰ *Id.* at 629.

2019] *Cassirer v. Thyssen-Bornemisza Collection Foundation* 21

that HEAR could be used by the plaintiff to defeat the defendant's laches defense.¹⁶¹ This decision was rather alarming because laches is an equitable defense and the terms of HEAR state that it only acts as a shield from "defense[s] at law relating to the passage of time."¹⁶² Judge Ramos seemingly ignored HEAR's substantive provisions and interpreted the Act in a manner that took account of what Congress's intended purpose was when it passed the Act.¹⁶³

While the Ninth Circuit did not err in its interpretation and application of HEAR's substantive provisions, the court did waste an opportunity to alert Congress to HEAR's shortcomings. The two varying methods of interpreting HEAR highlight the ambiguity that is created by the wide discrepancy between the Act's intended purpose and actual impact. Hopefully, Congress will be made aware of HEAR's shortcomings and will add provisions to the Act that allow U.S. courts to resolve Holocaust-era art restitution cases justly and fairly.

IV. SOLUTIONS

This Note argues that Congress must amend HEAR to make it better suited to deal with the hurdles that claimants, like the Cassirer family, commonly face when they seek restitution. In *Cassirer*, many of the procedural and legal issues that came before the court appear frequently in Holocaust-era art restitution cases.¹⁶⁴ If Congress wants HEAR to achieve its stated objective—to ensure the fair and just resolution of Holocaust-era art restitution claims based on the merits of each side's claim—then it should look to the trial record in *Cassirer* to better understand the hurdles that a claimant may face that could prevent such a resolution.

The necessity of this expansion is shown in the trial record of Holocaust-era art restitution cases in the U.S., where there have been very few favorable verdicts issued for a claimant over the last decade.¹⁶⁵ If Congress does not broaden the scope of HEAR, then the Cassirer family could face the same outcome that the majority of claimants have faced: a slim chance at settlement or a dismissal of their claim.¹⁶⁶ Alternatively, if

¹⁶¹ *Id.* at 635.

¹⁶² Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526.

¹⁶³ *Reif*, 80 N.Y.S.3d at 633.

¹⁶⁴ See generally Kreder, *Federal Holocaust-Era Art Cases Filed by Survivors & Heirs Since Austria Returned Klimts to Ms. Altman in 2006*, SSRN, <https://ssrn.com/abstract=1636295> (last updated Mar. 2018) (follow "Open PDF in Browser").

¹⁶⁵ *Id.*

¹⁶⁶ See generally *id.*

Congress does not expand the scope of HEAR, then *Cassirer* and other Holocaust-era art restitution cases should be resolved through alternate means of dispute resolution, as addressed by the Act.¹⁶⁷ Part A of this section will discuss ways that Congress can remedy HEAR's shortcomings. Part B will discuss a model for alternative dispute resolution that Congress should implement if HEAR is not amended.

A. AMENDMENTS CONGRESS SHOULD MAKE TO HEAR THAT WOULD ALLOW THE ACT TO FULFILL ITS STATED PURPOSE

Congress's aim in passing HEAR was to tackle a key issue—statute-of-limitations defenses—that had greatly limited a plaintiff's ability to have his or her restitution claim decided justly and fairly.¹⁶⁸ Yet, HEAR fails to address several issues and hurdles that arose in *Cassirer*, all of which can impact the ability of the case to be resolved justly and fairly. HEAR should be expanded to include provisions that address whether claims for adverse possession of personal property will be recognized and that establish a uniform method for how choice-of-law analysis will be conducted in these cases.

One of the key issues left to be decided in *Cassirer* is whether TBC's claim for adverse possession will be successful.¹⁶⁹ If Congress wants to ensure that *Cassirer* and other Holocaust-era art restitution cases are resolved fairly and justly, then claims of adverse possession for personal property should be prohibited. Adverse possession seeks to punish an owner who "slept upon their rights,"¹⁷⁰ but if TBC's adverse possession claim is successful, then the Cassirers, who have pursued restitution for three generations, would be treated the same as a negligent owner. Congress should expand HEAR's provisions with the goal of establishing procedures that ensure that the Cassirers and other similar claimants are not treated like negligent owners, and have their claims resolved in a manner that considers the complex historical context from which these claims stem.¹⁷¹ Prohibiting adverse possession claims for personal property in Holocaust-era art restitution cases could anger defendants, but without this provision the Cassirer family would face an

¹⁶⁷ Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524, 1525.

¹⁶⁸ § 2, 130 Stat. at 1524-25.

¹⁶⁹ *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 981 (9th Cir. 2017).

¹⁷⁰ *Bowman v. Wathen*, 42 U.S. 189, 189 (1843).

¹⁷¹ § 2, 130 Stat. at 1524-25.

2019] *Cassirer v. Thyssen-Bornemisza Collection Foundation* 23

insurmountable task in having to locate the painting before TBC satisfied the statutory time requirement for its adverse possession claim.¹⁷²

Another issue previously addressed in *Cassirer*, which HEAR does not address, was the court's choice-of-law analysis and subsequent decision that Spanish law must be used to decide the substantive issues in the case. This decision could be very influential in *Cassirer*, especially if TBC's adverse possession claim is found to be successful when the case comes back before the district court.¹⁷³ Since HEAR did not establish a process for choice-of-law analysis in Holocaust-era art restitution cases, the court reverted to its default choice-of-law analysis.¹⁷⁴ The Ninth Circuit's ultimate decision to apply Spanish law to the substantive issues in the case could have reached a different outcome if the case was brought in a different circuit.¹⁷⁵ Yet, close call or not, the court's decision to apply Spanish law allowed TBC to bring an adverse possession claim for personal property that otherwise would have been prohibited. The decision also put the court in a situation where it had to interpret Spanish law, and international law is "more difficult for a federal court to discern, determine, and apply."¹⁷⁶

By adding a provision to HEAR, which establishes that all substantive issues in a Holocaust-era art restitution case must be resolved under the forum's laws, judicial proceedings could be expedited; the difficult task of interpreting foreign laws could be avoided; and in *Cassirer*, the court could have circumvented having to decide adverse possession claims for personal property.¹⁷⁷ Furthermore, defendants as well as plaintiffs would benefit from the increased uniformity that this change would provide because there would no longer be questions over how the court will conduct its choice-of-law analysis.¹⁷⁸

B. IF CONGRESS DOES NOT AMEND HEAR'S PROVISIONS THEN IT MUST ESTABLISH A METHOD FOR ADR

The ideal resolution to HEAR's shortcomings would be for Congress to amend the Act, but if Congress fails to broaden HEAR's scope then procedures for ADR should be established because America's

¹⁷² *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148, 1152 (C.D. Cal. 2015).

¹⁷³ *Cassirer*, 862 F.3d at 963.

¹⁷⁴ *Id.* at 960-61.

¹⁷⁵ *Id.* at 962-63.

¹⁷⁶ *Id.* at 963.

¹⁷⁷ See generally Hannelore Sklar, Note, *Choice of Law Under the Foreign Sovereign Immunities Act: Cassirer v. Thyssen-Bornemisza Collection Foundation and the Unresolved Disagreement Among the Circuits*, 47 GEO. J. INT'L L. 1197 (2016).

¹⁷⁸ *Id.*

courts have been an unfavorable venue for claimants seeking restitution for art taken during the Holocaust.¹⁷⁹ The idea of establishing ADR for Holocaust-era art restitution cases is discussed in the Washington Conference Principles, which called for Conference attendees to implement procedures for ADR.¹⁸⁰ While there are advantages and disadvantages to both traditional litigation and ADR, ideally, both could coexist. This would allow a claimant to have options as to where they will pursue their claim.¹⁸¹

One model for ADR that Congress could look to for inspiration is the U.K.'s Spoliation Advisory Panel approach. The U.K. has a history of success in resolving restitution disputes through ADR,¹⁸² and adopted a Spoliation Advisory Panel ("Panel") approach to ADR in 2000.¹⁸³ Under the Panel approach, the Secretary of State acts as a chairman and is tasked with appointing the other members of the Panel.¹⁸⁴ Parties have the option to pursue ADR before the Panel instead of traditional litigation.¹⁸⁵ Yet, the Panel's recommendations are not legally binding unless the claimant accepts the Panel's recommendation.¹⁸⁶ If the claimant accepts the recommendation, then it is treated as a "full and final settlement of the claim."¹⁸⁷

The process for ADR usually begins when the parties meet with an independent mediator, who "sets the ground rules" and identifies the issues that are in dispute.¹⁸⁸ Ideally, both sides can reach an agreement and settle the dispute without having to go to court.¹⁸⁹ Even if the parties fail to reach an agreement, the process can still be beneficial because it forces the parties to have a preliminary discussion regarding their dispute.

ADR could have been very beneficial in the early stages of *Cassirer*. The parties' motion practice went back and forth for almost a decade and having a controlled setting for preliminary discussions could have allowed both sides to reach an agreement and avoid lengthy and costly

¹⁷⁹ See generally Kreder, *supra* note 164.

¹⁸⁰ Alternative Dispute Resolution is defined as "any procedure for settling a dispute by means other than litigation." *Alternative Dispute Resolution*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁸¹ See generally Mullery, *supra* note 131, at 649-51.

¹⁸² *Government Bodies: Spoliation Advisory Panel*, LOOTED ART, <http://www.lootedart.com/MFEU4P88744> (last visited Mar. 19, 2018).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Smith, *supra* note 5, at 273.

¹⁸⁹ *Id.*

2019] *Cassirer v. Thyssen-Bornemisza Collection Foundation* 25

litigation. If a dual system with both traditional litigation and ADR had been available, then the Cassirer family would have had the opportunity to test the waters in mediation or arbitration before pursuing traditional litigation, which is far more expensive and takes considerably more time.

V. CONCLUSION

In an interview, David Cassirer discussed the toll that the drawn-out litigation had taken on him and his family: “the battle is very long already, with the result that my father died on the way, now my sister Ava has just died, both died without seeing the recovery of the painting.”¹⁹⁰

HEAR brought fresh life to the Cassirers’ chances but another trial now stands between them and the painting they wish to recover.¹⁹¹ While the Ninth Circuit may have missed an opportunity to highlight HEAR’s shortcomings, the issue is one that can only be resolved by the legislature. Congress must act now to ensure that *Cassirer* and similar cases are resolved based on the merits of the parties’ claims and in a manner that is just and fair. This Note has stated two solutions that could bring HEAR’s substantive provisions in line with its stated purpose. First, Congress should add provisions to HEAR that address the common hurdles claimants face when they seek restitution. In the alternative, Congress should implement a process for ADR in order to establish an alternative venue for these claims to be resolved.

When Congress enacted HEAR, it was widely celebrated as a great step towards achieving justice.¹⁹² Congress must take a thorough look at the full scope of issues a claimant, like the Cassirers, can face and change HEAR’s provision so that the Act’s goal of achieving a just and fair resolution of these restitution claims can be achievable.¹⁹³

¹⁹⁰ Aldo Mas, *El Heredero Judío Que Lucha Contra España y el Thyssen Por Recuperar un Cuadro Familiar Robado por los Nazis* [*The Jewish Heir Who Fights Against Spain and the Thyssen for Recovering a Family Picture Stolen by the Nazis*], EL DIARIO (May 2, 2018, 8:32 PM), https://www.eldiario.es/cultura/arte/heredero-Espana-Thyssen-recuperar-familiar_0_767123355.html.

¹⁹¹ *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 981 (9th Cir. 2017).

¹⁹² Huetteman, *supra* note 144.

¹⁹³ *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148, 1155 (C.D. Cal. 2015), *rev’d and remanded*, 862 F.3d 951 (9th Cir. 2017).

