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## Case Schiele Drawing – Grunbaum Heirs v. David Bakalar

*Fritz and Elizabeth Grunbaum – David Bakalar – Artwork/oeuvre d'art – Nazi looted art/spoliations nazies – Judicial claim/action en justice – Judicial decision/décision judiciaire – Choice of law/droit applicable – Expropriation – Ownerhips/propriété – Procedural issue/limites procédurales – Request denied/reject de la demande*

*In 1938, the Nazi expropriated the art collection of Fritz Grunbaum while he was detained in Dachau concentration camp. In 1963, David Bakalar purchased a Schiele drawing that had belonged to the Grunbaum family from a gallery in Bern. In 2004, Bakalar consigned the drawing to Sotheby's for sale. Upon discovering an issue in title, the auction house froze the sale. Balakar filed suit, seeking judgment that he was the legal owner of the drawing while the Heirs counterclaimed with a suit for replevin and damages. Eventually Balakar was declared the legal owner of the drawing.*

*I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.*

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## I. Chronology

### Nazi looted art

- **1 April 1938:** The Nazis arrested **Fritz Grunbaum**, a Jewish art collector residing in Vienna, and placed him in **Dachau concentration camp**.<sup>1</sup> It remains unclear what happened to Fritz Grunbaum's collection after his entry into the concentration camp. Many artworks, including many paintings by Austrian expressionist artist Egon Schiele, resurfaced at the **Kornfeld Gallery** in Bern, Switzerland. **Eberhard Kornfeld**, the gallery owner, maintained that from 1952 to 1955 Mathilde Lukacs-Herzl, Fritz Grunbaum's sister-in-law, delivered numerous artworks to him for auction or private sale.<sup>2</sup> Many of these works were sold to a New York art dealer.
- **16 July 1938:** While in Dachau, **Fritz Grunbaum was forced to sign a power of attorney**<sup>3</sup> that authorized his wife, Elisabeth Grunbaum, "to file for me the legally required statement of assets and to provide on my behalf all declarations and signatures required for their legal effect according to the statutory provisions, and to represent me in general in all my affairs".
- **20 July 1938:** **The Nazis evicted Elisabeth Grunbaum** from her Vienna apartment. Subsequently, Dr. Franz Kieslinger, a Nazi agent, **inventoried and appraised the collection of the Grunbaums**. The inventory included over 450 individual artworks, including 81 by Schiele, but only 5 of the Schiele works were identified by title.<sup>4</sup>
- **1 August 1938:** Records show that **Elisabeth signed a list of assets** for her husband. The valuation she placed on it was identical to Kieslinger's.
- **1941: Fritz passed away and Elisabeth was forced to sign his death certificate**, stating that "there is no estate [...] [and] in the absence of an estate, there are no estate-related proceedings".
- **5 October 1942:** Elisabeth was arrested and died shortly thereafter in a concentration camp.<sup>5</sup>
- **12 November 1963:** David **Bakalar purchased the Schiele drawing "Seated Woman with Bent Left Leg (Torso)"** (the "Drawing") from a New York art dealer for \$4,300.<sup>6</sup>
- **6 February 2002:** An Austrian Court declared relatives **Milos Vavra and Leon Fischer** as the legal heirs to the Grunbaum estate (the "Heirs").
- **2004: Bakalar consigned the Drawing to Sotheby's** for sale.<sup>7</sup>
- **February 2005:** Sotheby's auctioned the Drawing in London for approximately US \$726,000, but froze the sale after the Heirs challenged Bakalar's title.<sup>8</sup>

<sup>1</sup> *Bakalar v. Vavra*, 237 F.R.D. 59, 61-62 (S.D.N.Y. 2006).

<sup>2</sup> At trial the Heirs attempted to show that the drawing had been seized or sold illegally by presenting evidence that casted doubt on Kornfeld's acquisition of the Collection. Herbert Gruber, the Heirs' genealogical consultant, attested that "[o]ver time, Kornfeld has told many inconsistent stories to the press and in correspondence about what Matilde [sic] Lukacs told him about the provenance of the works that she allegedly sold to him". *Bakalar*, 237 F.R.D. at 62.

<sup>3</sup> A power of attorney is a document with which one party gives to another party the authority to represent him in one or more legal affairs.

<sup>4</sup> *Bakalar v. Vavra*, 619 F. 3d 136 (2d Cir. 2010).

<sup>5</sup> *Ibid.*, at 138.

<sup>6</sup> *Ibid.*, 139.

<sup>7</sup> *Bakalar*, 237 F.R.D. at 61.

- **21 March 2005: Bakalar filed suit** to quiet title in Federal Court in New York seeking a **declaratory judgement** that he was the Drawing's legal owner.<sup>9</sup> The Heirs counterclaimed, filing a suit for declaratory judgment, replevin and damages.
- **30 May 2008: The District Court found in favor of Bakalar.** The Heirs appealed.
- **2 September 2010:** The Second Circuit vacated the decision and remanded the case back to District Court for consideration under **New York law**. The Second Circuit also directed the District Court to consider **Bakalar's laches defense**.<sup>10</sup>
- **17 August 2011:** On remand, the District Court concluded that Bakalar failed to establish good title to the Drawing, but held he prevailed on the defense of laches.<sup>11</sup>
- **11 October 2012:** The Second Circuit **affirmed the District Court's award of the Drawing to Bakalar** based on laches.<sup>12</sup>
- **29 April 2013:** The United States Supreme Court denied the Heirs' petition for writ of certiorari.

## II. Dispute Resolution Process

### Judicial claim – Judicial decision

- Originally, the plaintiffs attempted to convert the suit into a class action by attaching numerous possessors and borrowers of the works from the Grunbaum collection. However, this strategy was rejected by the District Court. The Heirs' counterclaims involved more than 450 individual pieces of art from the original collection. By the time the Heirs filed suit, each work has its own unique provenance or history and for the past sixty-eight years had been transferred at different times, under different circumstances and in various jurisdictions.<sup>13</sup>

## III. Legal Issues

### Choice of law – Expropriation – Ownership – Procedural issue

- Typical of Nazi-looted art cases, the Drawing passed through many jurisdictions before arriving in New York. Thus, the *Bakalar* court was faced with the difficult question of which choice of law to apply in determining who maintained ownership of the Drawing: the law of Austria, where the Grunbaums lost possession; the law of Switzerland, where the

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid., at 61.

<sup>10</sup> *Bakalar*, 619 F.3d 136. See Patty Gerstenblith et al., "International Art and Cultural Heritage," *International Lawyer* 47 (Spring 2013) 432.

<sup>11</sup> Patty Gerstenblith et al., *ibid.*

<sup>12</sup> *Bakalar v. Vavra*, No. 11-4042-ev, 2012 WL 4820801 (2nd Cir. Oct. 11, 2012).

<sup>13</sup> *Bakalar*, 237 F.R.D. at 67.

- Drawing allegedly passed from Elisabeth's sister to the Gallery; or the law of New York, where Bakalar purchased the painting and commissioned it for auction.<sup>14</sup>
- After briefly analyzing relevant Austrian law relating to the restitution of property, the court held that Austria had no competing interests in the present circumstances.<sup>15</sup> Under Article 934 of the Swiss Civil Code, a buyer acting in good faith will acquire valid title to stolen property after a period of five years.<sup>16</sup> After this period, the previous owner of the stolen object is no longer entitled to request its return from the good faith possessor. The Civil Code does not impose a general duty upon the purchaser to inquire about a seller's authority to sell the object or about its origins unless suspicious circumstances exist.<sup>17</sup> Moreover, Swiss law presumes that the purchaser acts in good faith, and that a plaintiff seeking to reclaim stolen property has the burden of establishing that a purchaser did not act in good faith. Therefore, Bakalar maintained title to the Drawing under Swiss law unless the Heirs could prove that suspicious circumstances had existed of which Bakalar was aware, or that each party tracing back to the Grunbaums had failed to act in good faith upon purchasing the Drawing. Unlike Swiss law, a thief cannot pass good title under New York law.<sup>18</sup> Thus under New York law, Bakalar could never have obtained good title if the Drawing was originally stolen. Moreover, New York places the burden of establishing that art is not stolen on the current possessor.<sup>19</sup>
  - In his statement of assets, Grunbaum had been required to list all property. This information was then used to impose confiscatory taxes and penalties of various kinds.<sup>20</sup> The Heirs contended that the appraiser had been "acting as an instrumentality of the Nazis and . . . expropriating [Grunbaum] property".<sup>21</sup> Indeed, Nazi law forced Austrian Jews to sign property declarations listing their assets for assessment by Nazi appraisers, a manner which "reflected their practice of camouflaging theft with a veneer of legality".<sup>22</sup> Even so, Kornfeld contended that he learned the Lukacs artwork had come from the Grunbaum collection only after the Grunbaums' relatives approached him in 1998.<sup>23</sup>

<sup>14</sup> See Laurie Frey, "Bakalar v. Vavra and the Art of Conflicts Analysis in New York: Framing a Choice of Law Approach for Moveable Property," *Columbia Law Review* 112 (June 2012) 1055.

<sup>15</sup> The Court found that allowing the claims to go forward under New York law was consistent with the principles underlying the relevant legislature and its interpretation by the Supreme Court of Austria. Further, the Court noted that the present case did not involve a claim against any citizen of Austria. Therefore, Austria's interests did not compete with the other applicable choice of law nations. *Bakalar*, 619 F. 3d at 146.

<sup>16</sup> Patty Gerstenblith et al., "International Art and Cultural Heritage," *International Lawyer* 47 (Spring 2013) 432.

<sup>17</sup> *Bakalar*, 2008 WL 4067335, at 7.

<sup>18</sup> See *Bakalar*, citing *Menzel v. List*, 49 Misc.2d 300, 267 N.Y.S.2d 804 (1966).

<sup>19</sup> See *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 550 N.Y.S.2d 618 (1990).

<sup>20</sup> "Of particular significance is the ordinance dated April 26, 1938, which required Jews to register their assets and which covered both those who sought to leave the Reich and those who remained, with the Reich seeking to appropriate their domestically as well as their externally held assets". See Claims Resolution Tribunal: Deposited Assets Claims: Selected Laws, Regulations, and Ordinances Used by the Nazi Regime to Confiscate Jewish Assets Abroad (at [http://www.crt-ii.org/\\_nazi\\_laws/](http://www.crt-ii.org/_nazi_laws/), accessed 16 August 2013), *Bakalar*, 619 F. 3d, note 15.

<sup>21</sup> *Bakalar v. Vavra*, 237 F.R.D. 59, 62.

<sup>22</sup> *Bakalar*, 619 F. 3d, note 16.

<sup>23</sup> *Bakalar v. Vavra*, 237 F.R.D. at 62.

- In the original suit, Bakalar claimed that Swiss substantive law applied since the Drawing had initially entered the art market in Switzerland. Conversely, the Heirs claimed that the Drawing had been unlawfully taken from their ancestors by Nazis, and argued that Austrian law should control the dispute.<sup>24</sup> Applying New York State's choice of law rules, the District Court concluded that Swiss substantive law governed the dispute, but that New York law applied to the procedural issues, like the bona fide purchaser defense and the statute of limitations period. This meant that the Heirs maintained the burden to prove the Drawing had not passed ownership under good faith pursuant to Swiss law. However, the Heirs could not do so due to a lack of evidence. Further, the District Court found that no suspicious circumstances had existed that would have required investigation at the time of the purchase. In conclusion, the District Court held Bakalar had purchased the Drawing in good faith and therefore held its lawful title.<sup>25</sup>
- On appeal this conclusion was reversed and the decision was remanded to the District Court. The Second Circuit held that the lower court had erred in its choice of law analysis and in determining that the Heirs had failed to produce any "concrete evidence that the Nazis looted the drawing or that it was otherwise taken from Grunbaum".<sup>26</sup> Instead, the Appellate Court held that New York law should have controlled since the compelling New York interest to preserve the integrity of transactions and prevent the State from becoming a marketplace for stolen goods". It also affirmed that Swiss law maintained a tenuous interest.<sup>27</sup> This meant that the burden of proof regarding the Drawing's title effectively shifted to Bakalar. Further, the Appellate Court instructed the lower court to consider the Heirs' delay in contesting ownership under Bakalar's defense of laches.<sup>28</sup>
- On remand, the Heirs presented two competing theories of the Drawing's theft. First, the Heirs argued the Drawing may have been confiscated by Nazis. Second, even if the Drawing had remained in the family, the Heirs argued that Mathilde Lukacs-Herzl, Elisabeth's sister, had acquired possession in a manner that did not allow her to convey title during its original sale. The District Court found that, based upon the record, it could reasonably infer that the Nazis had not seized the Drawing. However, the court held that Bakalar could not establish "that Grunbaum voluntarily relinquished possession of the painting, or that he did so intending to pass title".<sup>29</sup> Even so, the Court found that Bakalar had failed to establish good title to the Drawing, but held that he prevailed based on the laches defense.<sup>30</sup> The District

<sup>24</sup> The Austrian Nullification Act had provided that "[a]ny paid and unpaid legal transactions and other legal business which occurred during the German occupation of Austria will be considered null and void if they were contracted as a consequence of any political or economic influence exercised by the German Reign in order to deprive individuals or entities of property assets or interests owned by or due them as of March 13, 1938.) NichtigkeitsG [Austrian Nullification Act] No. 106/1946, § 1 Austria. Claims for expropriation of property had expired due to the enforcement of a time limit, but the principles continue to be an integral part of Austrian law". *Bakalar*, 619 F. 3d at 146.

<sup>25</sup> *Bakalar*, 2008 WL 4067335, at 8-9.

<sup>26</sup> *Bakalar*, 619 F. 3d at 139.

<sup>27</sup> *Ibid.*, at 145.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Bakalar*, 819 F. Supp 2d 293, 299 (S.D.N.Y 2011).

<sup>30</sup> "In order prove laches, Bakalar must show that: (1) Defendants were aware of their claim, (2) they inexcusably delayed in taking action; and (3) Bakalar was prejudiced as a result". *Bakalar*, 2006 WL 2311113, at 3. See also *Ikelionwu v. United States*, 150 F.3d 233, 237 (2d Cir.1998).

Court reasoned that, at some point, the Heirs' ancestors knew or should have known of their potential intestate rights to Grunbaum's property and that they had been "bound by the knowledge of their respective families". Accordingly, the Heirs' nearly fifty-year delay in bringing suit had prejudiced Bakalar by making it difficult for Bakalar to garner evidence to vindicate his rights.<sup>31</sup> The Heirs appealed, once again.

- On appeal, the Second Circuit rejected each of the Heirs' arguments and affirmed the District Court's decision. First, the Court held that, given Bakalar's ability to trace provenance to Elisabeth's sister, the Heirs had failed to demonstrate that the District Court's finding that the Drawing had not been stolen was clearly erroneous. Second, the Court affirmed the lower court's decision to impute knowledge of potential intestate rights to the Heirs' ancestors, observing "it was obviously necessary for the court to do that" because "the alternative was to reset the clock for each successive generation". The Court stressed that the duty to gather evidence rested with the first generation and did not reset with each consecutive generation. Finally, the Court agreed that the deaths of at least two generations of family members had prejudiced Bakalar by depriving him of key witnesses.

#### **IV. Adopted Solution**

##### **Request denied**

- On 12 October 2012, the United States Second Circuit Court of Appeals affirmed the District Court's decision, holding that Bakalar maintained title and ownership to the Schiele Drawing. On 29 April 2013, the United States Supreme Court denied the Heirs' petition for writ of certiorari, thereby finalizing the Second Circuit's decision.

#### **V. Comment**

- The ruling that the first generation of heirs should have known of their intestate rights, and acted upon them, is significant because it precludes claims by heirs who recently discovered evidence supporting their claims in favour of good faith buyers in New York. While the court reasoned that the Grunbaum collection may have remained in the family but for the atrocities of the Holocaust, it held the Heirs were bound by the lack of due diligence of their ancestors, who were aware of, or should have been aware of, their potential intestate rights to the Grunbaums. Thus, even though the Heirs before the court did not acquire knowledge of their claims to the artwork until fifty years later, Bakalar would suffer prejudiced by a ruling in favour of the Heirs.
- The Bakalar case is especially interesting because it involved the application of New York's choice of law rules – rules that are especially important in their application to stolen art

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<sup>31</sup> *Bakalar*, 819 F. Supp 2d 293, 299.

- cases because of New York's status as an international art hub. Currently, New York courts are moving away from a location-based approach and to an interest-based approach.<sup>32</sup>
- Also interesting, is the lack of access to discovery. Instead of allowing a claim to go forward and proceed to discovery, courts often settle suits on pre-trial motions, like in the present case. In some cases, access to discovery may be crucial to a plaintiff's hope at proving her claim. However, courts must also take into account the length of time that has expired between the original divestment and the present suit. Such passage of time results in deceased witnesses, faded memories, lost documents and hearsay testimony of questionable value. Of the greatest significance to the present case was the death of Mathilde Lukacs in 1979, perhaps the only person who could have explained the manner in which she came to possess the Drawing, or indeed, whether she owned it at all.<sup>33</sup>
  - Going forward, the Second Circuit's expansive application of laches could impose additional hurdles to recovery of stolen artwork. Property rights issues regarding Nazi-looted property make it difficult for potential claimants to establish that their ancestors, often family members that they have never known, who may have lived post-war conditions that prohibited recovery, were suitably diligent in searching for their property.<sup>34</sup> The same applies to good faith purchasers who must establish provenance. Regardless of the outcome, courts will remain "in the unenviable position of determining who gets the artwork, and who will be left with nothing despite the plausible claim of being unfairly required to bear the loss".<sup>35</sup>

## VI. Sources

### a. Bibliography

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### b. Court decisions

- *Menzel v. List*, 49 Misc.2d 300, 267 N.Y.S.2d 804 (1966).
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- *Bakalar v. Vavra*, 237 F.R.D. 59, 61 (S.D.N.Y. (2006).

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<sup>32</sup> See Laurie Frey, "Bakalar v. Vavra and the Art of Conflicts Analysis in New York: Framing a Choice of Law Approach for Moveable Property," *Columbia Law Review* 112 (June 2012) 1055.

<sup>33</sup> *Bakalar*, 819 F. Supp 2d 293, 306.

<sup>34</sup> Patty Gerstenblith et al., "International Art and Cultural Heritage," *International Lawyer* 47 (Spring 2013) 432.

<sup>35</sup> *Bakalar*, 819 F. Supp 2d at 305.

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c. Legislation

- NichtigkeitsG [Austrian Nullification Act] No. 106/1946, § 1 Austria.