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THE AAMD AND NAZI-ERA CLAIMS – A PRINCIPLED RESPONSE

The AAMD recognizes and deplores the unlawful confiscation of art that constituted one of the many horrors of the Holocaust and World War II. In 1997, the AAMD convened a task force to draft guidelines for the investigation and resolution of Nazi-era claims. First published in 1998 and supplemented in 2001, the *Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945)* (the "Task Force Report")[1] provided the first set of principled guidelines in the world for art museums to address Nazi-era looted art issues.

In the seventeen years since the Task Force Report, American art museums have voluntarily settled or resolved through restitution more than 43 claims or potential claims, involving 50 works of art, plus an additional three claims, involving three works of art, settled after litigation was commenced. This number does not include cases that were resolved confidentially.

When American art museums are presented with claims, they first make a determination made on the "facts and merits", even though in most cases museums could simply deny the claims based on statute of limitations or other legal principles. Instead, museums research those claims, share the results and, if there is a valid claim, work to arrive at a just and fair solution. Only when the claim is not supported by the facts and litigation is imminent or commenced do they invoke defenses that are deeply embedded in the American legal system.

The AAMD 1998 Task Force Report.

The Task Force Report encouraged AAMD member museums proactively and publicly to investigate the provenance of works in their collections and to disclose voluntarily works that might reasonably have been in Continental Europe after 1932 and before 1946 and have a gap in their provenance during that period. The AAMD's Task Force Report also called on AAMD member museums to investigate promptly and thoroughly any Nazi-era claims of contested title, while recognizing that "[e]ach claim presents a unique situation which must be thoroughly reviewed on a case-by-case basis."

If a provenance investigation, often conducted in cooperation with the claimant, revealed a meritorious claim to an object looted during the Nazi-era, then AAMD members agreed to "offer to resolve the matter in an equitable, appropriate, and mutually agreeable manner."

The AAMD's Task Force Report served as the basis for the *Washington Conference Principles on Nazi-Confiscated Art* (the "Washington Principles"), a product of the 1998 Washington Conference on Holocaust Era Assets. The Washington Principles echoed the Task Force Report, providing that when valid restitution claims exist, "steps should be taken expeditiously to achieve a just and fair solution, *recognizing this may vary according to the facts and circumstances surrounding a particular case*." (emphasis added).

[1] The 1998 Task Force Report used 1933-1945 in its title to identify the Nazi-era. In its 2001 Addendum to the Task Force Report, the AAMD clarified that the period involved is after 1932 and before 1946.

The AAM 1999 Guidelines.

In 1999, the American Alliance of Museums (then known as the American Association of Museums) (the "AAM") issued its *Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era* (the "AAM Guidelines"). Informed by both the AAMD's Task Force Report and the Washington Principles, the AAM Guidelines reiterated the need to address "questions of provenance on a case-by-case basis in light of the complexity of this problem," and counseled that "[w]here competing interests may arise, museums should strive to foster a climate of cooperation, reconciliation, and commonality of purpose." The AAM Guidelines "acknowledged that in order to achieve an equitable *and appropriate* resolution of claims, museums *may* elect to waive certain available defenses." (emphasis added). The AAM Guidelines did *not* mandate or require that museums agree to legal defenses in the face of restitution claims: rather only that when presented with a claim, a museum may, when "equitable *and* appropriate", agree to waive a particular defense. This sentence was intended to protect museums and their trustees. Generally, in the ordinary course of litigation, an institution would invoke a statute of limitations defense when the action is time barred. Not to do so exposes the museum to needless litigation effort and expense and could be questioned as a breach of fiduciary duty. To address this concern in the case of Nazi-era claims, which present complex and extraordinary issues, the AAM Guidelines sought to clarify that trustees, in the pursuit of an equitable and appropriate resolution to a meritorious claim, need not feel compelled to invoke a statute of limitations defense, even though the claim (as is usually the case) is time barred. The provision was not intended to expose museums to expensive and time-consuming litigation in the face of an unsupported claim.

Museums Lead by Example.

AAMD member museums regularly conduct provenance research on their collections, but after the Task Force Report, they began a focused review to find – and publish – works in their collections that were or might reasonably have been in Continental Europe after 1932 and before 1946 and had a gap in their provenance during that period. The museums created separate sections on their websites where they could describe the research they were doing, publish works that could have been in Europe during WWII as they were identified and disclose restitutions and settlements. The intensive research required to review the collection for relevant works, as well as respond responsibly to claims, is hampered by its cost, the relative scarcity of qualified researchers and the many archives around the world that remain inaccessible to researchers.

In 2001, the Presidential Advisory Commission on Holocaust Assets recommended a central database for the results of provenance research. In response, the American museum community, in conjunction with the Conference on Jewish Material Claims Against Germany, established the Nazi-Era Provenance Internet Portal ("NEPIP"). Museums around the country use this database by posting the same objects that they post on their own websites, but with the advantage for claimants that a central database exists for research. To date, more than 175 American museums have voluntarily posted over 29,000 objects on NEPIP. Just as is the case with their own Nazi-era provenance websites, American art museums have voluntarily disclosed works that have gaps in their post-1932 pre-1946 provenance, thereby inviting interested parties to come

forward and, if there is a claim, discuss that claim in an open and informed way with the museum involved.

The key to understanding whether a claim exists and whether it is supported by the facts is provenance research, and provenance research depends upon the availability of qualified researchers. Recognizing this need, the AAMD in conjunction with the National Archives and Record Administration has undertaken in-depth training sessions for researchers. These sessions are helping to educate those who will be contributing to the provenance research efforts of American museums for decades to come.

Museums Have Borne the Burden of Research and Publication.

When the Presidential Advisory Commission issued its report in 2001, the Commission acknowledged that provenance research is "difficult, costly and time consuming" and that "few, if any, museums have the resources now to accomplish this." The Commission proposed creating and funding a foundation to accomplish many things, including assisting the museum community in its provenance research efforts. That foundation was never created.

In spite of all these good intentions, American museums have borne the burden of hiring the staff, performing the provenance research, publishing the findings and investigating and resolving claims. This commitment, voluntarily assumed, is the foundation for the museum community's position with respect to claim resolution. And that position on claim resolution is simple. The American art museum community on its own initiative and virtually without outside assistance has undertaken the process of bringing to light works that may have been looted by the Nazis. Furthermore, unlike virtually every other country that has undertaken substantial restitutions, they have done so without the creation of or intervention by any government commission and, except for those few museums that are owned by the government, at no cost to the taxpayer.

Museums Have Not Used "Technical" Defenses.

As the facts about restitutions and settlements by American museums amply demonstrate, when museums, after conducting enormous amounts of research, find merit to claims, there is no question that they waive defenses otherwise available to them. They do this because it is the right thing to do. By waiving those defenses, the parties can develop a just and fair solution based on the facts. Defenses such as the statute of limitations or the initiation of declaratory judgments, occur only in circumstances where the claims have been found, after detailed research by a museum, to lack merit. Museums have fiduciary obligations to preserve their assets for the benefit of the public, not to expose them to unsubstantiated claims. This is at the very core of the fiduciary duty of trustees and at the very core of what the law requires from those who become trustees of our nonprofit museums.

The use of the defenses such as the statute of limitations is deeply embedded in not only our American judicial system, but in most recognized systems around the world. In fact, statutes of limitations, and similar responses are not "technical" defenses, a misnomer that implies some trap for the unwary. They are fundamental to our judicial system. As the United States Court of

Appeals, in a case involving Nazi-era art (*Museum of Fine Arts Boston v. Seger-Thomschitz*) said:

> Yet, statutes of limitation cannot be fairly characterized as technicalities, and they serve important interests . . . .[2]

There is no doubt that Nazi-looted art claims deserve special consideration, consideration that American museums have amply provided. Of the decisions that went to court, four resulted in a court granting a motion to dismiss or summary judgment in favor of museums asserting a statute of limitations or laches defense, thereby resolving the cases before they would proceed to trial.[3] These cases were brought by the museum in order to resolve claims that were not supported by the facts, but which the claimants refused to acknowledge even after all the provenance research was provided to them. For example, the court in *Toledo Museum of Art v. Ullin* concluded *after accepting all of the claimant's allegations as true* that "[i]n short, this sale occurred outside Germany by and between private individuals who were familiar with each other. The painting was not confiscated or looted by the Nazis, the sale was not at the direction of, nor did the proceeds benefit, the Nazi regime." The *Detroit Institute of Art v. Ullin* case was based upon the same facts and the same claimants.

As the above decisions suggest, there may be good reason for a museum to question a restitution claim. The ability to assert time-honored defenses when used judiciously, as the statistics show American museums have done, avoids lengthy and costly court proceedings.

Conclusion.

American art museums have made tremendous efforts to find and publish works that might have been spoliated during the Nazi era. They have responsibly, and often proactively, restituted or settled claims to those works and they have exhibited leadership in the field of Nazi-era spoliation of works of art. American art museums will continue this effort and will continue to seek ways to resolve claims without court intervention.

- Museums have a fiduciary responsibility to protect the collections that they hold in trust for the American public.
- American art museums have invested tremendous resources in Nazi-era issues, including due diligence, provenance research, publication, settlements and restitution.
- Statutes of limitations and other equitable defenses are not mere procedural obstacles or technical defenses; they are time-honored, widely-used norms of jurisprudence.
- 176 museums have voluntarily listed over 29,000 works that could have been in Europe during World War II and that have a gap in their provenance.

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[2] *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 13 (1st Cir. 2010)

[3] These decisions include (1) *Toledo Museum of Art v. Ullin*; (2) *Detroit Institute of Arts v. Ullin*; (3) *Grosz v. Museum of Modern Art*; and (4) *Museum of Fine Arts, Boston v. Seger-Thomschitz*.

- Over a 17-year period, American art museums have settled or restituted works in at least 50 instances. Most of these claims were probably barred by defenses such as the statute of limitations, but were settled anyway. In an additional seven cases (three of which settled), museums did raise defenses deeply embedded in our legal system.