

New York Law Journal

Monday, May 24, 2004

ASSET VALUATION

Looted Art Carries Its Own Set of Problems

Be Sensitive to Provenance and Title, and Terms of Appraisal Engagement and Reports

**BY LAWRENCE M. KAYE
AND HOWARD N. SPIEGLER**

THERE HAS BEEN much publicity in recent years about the theft of cultural property, ranging from the smuggling of antiquities from foreign countries (including the artifacts recently looted from the Baghdad Museum) to the plunder of art by the Nazis during the Holocaust. The possibility that pieces of cultural property may be stolen or that there may be questions about their ownership history, or "provenance," naturally affects the marketability of such items and may directly impact the assessment of their value.

Therefore, appraisers — and attorneys who work with them — should understand the legal issues surrounding the theft, looting, and smuggling of cultural property, particularly to ascertain whether there is a question as to good title. This understanding should lead to greater vigilance on the part of appraisers to these issues. And it should encourage greater sensitivity on their part to the importance of including express qualifications and contractual provisions protecting themselves from liability for



incorrect appraisals resulting from questionable ownership and provenance concerns, both in their letters of engagement and in their appraisal reports.

Stolen Property Is of Two Types

There are essentially two different kinds of stolen cultural property. The first comprises objects that are clearly identifiable as having been taken from a documented or catalogued public or private collection. In such cases, it is often relatively easy to trace the ownership or ascertain whether they have been stolen. The theft of an object from a documented collection (either public or private) will likely have been reported. The Art Loss Register (ALR) maintains a large database of stolen items to assist private individuals and professionals in their search and recovery efforts.

The second type of stolen cultural property consists of objects that have been pillaged from

unexcavated archaeological or sacred sites and then removed from the country of origin before archaeologists or museum officials have viewed, inventoried, or documented them.

Industry Standards

Before examining appraisal issues that arise in connection with antiquities and Nazi-looted art, the professional standards that come into play when appraisals are prepared deserve brief note.

Although there is no formal licensing procedure for appraisers of personal property, one indicator that an individual is a qualified appraiser is membership in one or more of the major appraisers' associations: the Appraisers Association of America, the American Society of Appraisers, and the International Society of Appraisers.

Each of these associations has its own code of ethics and guidelines to which its members must adhere. Each of those codes, in turn, requires that members follow the standards set forth in the Uniform Standards of Professional Appraisal Practice (USPAP), which is published by the Appraisal Foundation, a not-for-profit organization headquartered in Washington, D.C.

The USPAP's Standards Rule 7-1(b) states that "In developing a personal property appraisal, an appraiser must ... not commit a substantial error of omission or commission that significantly affects an appraisal[.]" The comment that follows this rule offers some

Lawrence M. Kaye and **Howard N. Spiegler** are partners at *Herrick, Feinstein, Frank K. Lord IV*, an associate at the firm, assisted in the preparation of this article. *Herrick, Feinstein* represented the Republic of Turkey in the case of *Republic of Turkey v. OKS Partners* discussed in this article.

further explanation:

In performing appraisal services, an appraiser must be certain that the gathering of factual information is conducted in a manner that is sufficiently diligent ... to ensure that the data that would have a material or significant effect on the resulting opinions or conclusions are identified and, when necessary, analyzed.

Questionable title would have an obvious impact on the results of an appraisal, so to meet the USPAP's standards, an appraiser must make a "sufficiently diligent" inquiry into both the manner in which a piece of cultural property was acquired and its provenance.

The American Association of Appraisers gives its members more specific instructions regarding provenance. Members are required to make a "reasonable inquiry" and forego an engagement if it is "readily apparent" that the item(s) to be appraised may have been improperly acquired. Members are further instructed to contact the "appropriate authorities" if they have "clear and convincing evidence" that they may be dealing with stolen property.

Two different questions follow from these industry standards. One is whether the object might be stolen or of doubtful provenance; the other is what constitutes "sufficient diligence" or making a "reasonable inquiry" into an object's provenance. In order fully to comprehend these standards a basic understanding of certain legal principles is helpful.

Applicable Legal Principles

A basic tenet of U.S. law that distinguishes it from that of most civil law countries is that no one, not even a good faith purchaser, can obtain good title to stolen property. From this rule follows a single simple question that forms the core of every case involving title to cultural property: is the person currently in possession the true owner or authorized by the true owner to deal with the property?

At the same time, pieces of cultural property are also unique objects with long, often complicated histories that are imbued with a cultural significance that other, more mundane objects may lack. Many countries have consequently given cultural property distinctive legal protections, and therefore, objects are sometimes counted as stolen in

circumstances that those unfamiliar with the trade and practice in this area might find unexpected. These so-called "patrimony laws" vest ownership of previously undiscovered antiquities in the foreign nation in which they were found. U.S. courts have long held that claims for the recovery of objects whose ownership is vested in a foreign state through patrimony laws will be honored, just as private ownership claims are.

A basic tenet of international law is that recognition should be given to a sovereign nation's laws governing interests in property found within its territory. Once a government decrees that it owns all cultural property found in or under the ground, then



that government is the owner and its ownership rights will be given the same protection in American courts as the private owner of any other property. This is true even though, for the most part, private property rights in the United States dictate the opposite result, i.e., anything found on or under privately owned real estate is owned by the property owner, not the government.

The legal status of Nazi-looted art implicates yet additional legal concepts. Claims to artworks looted by the Nazis continue to be brought by the families from which they were taken. Appraisers must be attentive to the possibility that an artwork was looted and should take this into account when undertaking an appraisal.

The validity of ownership claims may also (and usually does) turn on the resolution of technical defenses such as statutes of limitations, which vary in content and application from state to state. For example, in California the statute of limitations defense otherwise available has been suspended for certain Holocaust claims until Dec. 31, 2010.¹ Of course, appraisers should

not make determinations or give opinions involving legal analysis of these sometimes complicated issues. Nevertheless, for the appraiser, knowledge of these legal principles should inform the investigation into whether a possessor of cultural property has good title. The challenge is to determine how these principles interact with an appraiser's responsibility to make a sufficiently diligent inquiry within the context of a particular appraisal.

Antiquities

In one of the most important recent cultural property cases, *U.S. v. Schultz*,² the Second Circuit affirmed the conviction of a prominent New York antiquities dealer, Frederick Schultz, on charges of conspiracy to receive stolen property that had been transported in interstate and foreign commerce, a violation of the National Stolen Property Act. A key to the conviction was that the objects at the heart of the conspiracy were found to be the property of the Egyptian government pursuant to that country's patrimony law.

Schultz and his co-conspirators had implemented a scheme to smuggle antiquities out of Egypt to England and then on to the U.S. In England, the objects were enhanced by forged documents saying they were from a private English collection dating to the 1920s and restored in a manner that was consistent with the conservation techniques of that period.³

The circumstances under which the pieces were offered for sale illustrate the difficulties that appraisers face when working with cultural property. A "sufficiently diligent" inquiry into the provenance of Schultz's pieces would likely have yielded no incriminating information. An appraiser might have asked the right questions and proceeded according to a stringent interpretation of the rules and nonetheless prepared an appraisal for stolen property.

In other cases, however, despite carefully forged documents, the tainted provenance might still be "readily apparent." This point was demonstrated in *The Republic of Croatia v. The Trustee of the Marquess of Northampton 1987 Settlement*,⁴ which was litigated during the 1980s and 1990s. That case involved a collection of Roman silver known as the "Sevso Hoard" after the name of the original Roman owner inscribed on one of the pieces. Many pieces were acquired by Lord

Northampton and his partners for several million dollars. They intended to resell them for a hefty profit but quickly ran into trouble. They first offered the pieces to the Getty Museum accompanied by export certificates indicating that the government of Lebanon had acquiesced to their departure from that country, which was once part of the Roman Empire and could reasonably have been the source country for the silver.

Where someone provides a seemingly valid export certificate from a country that issues such documents, that might be enough to lead a collector or appraiser to believe that the objects had been legitimately acquired. In this case, however, there were enough obvious problems to raise warning flags for anyone with expertise in Roman art.

The silver itself was perhaps the most important sign that something was amiss. It was unquestionably a great archaeological find; there are few hoards of Roman silver of similar importance. There was, however, no scholarly documentation of the silver predating its appearance on the market.

If the silver was suspect, then the export certificates should have been as well. Indeed, when the Getty was offered the silver, it investigated the certificates and determined that they were forgeries.

A public auction for the silver was finally planned, but no sale was ever held because a lawsuit was commenced to determine ownership. Lebanon, Croatia, and Hungary, whose territories had each formerly been part of the Roman Empire, asserted claims for the silver. Ultimately, Lord Northampton was able to keep it because no single claimant could prove that the silver had come from within its borders.

The rarity of a piece of cultural property may itself make it "readily apparent" that it was stolen. *The Republic of Turkey v. OKS Partners*,⁵ involved a collection of ancient coins, the "Elmali Hoard," that had been unearthed in an illegal excavation in Turkey. In the hoard were 14 Athenian Decadrachms. These coins from Ancient Greece are exceedingly rare: until the Elmali Hoard was discovered, only 13 were known to exist. Because they are so rare, being presented with a single example outside of a documented collection should be enough to suggest to any expert in numismatics

that the piece was of doubtful provenance and likely stolen.

Nazi-Looted Art

The phenomenon of Nazi-looted art raises its own special set of issues for the appraiser.

When investigating whether a piece might have been illegally taken during the Nazi era, one telling sign is an unexplained gap in provenance from 1933 to 1945. But key names should also raise questions.

In recent years, lists of dealers who collaborated closely with officials of the German government and Nazi Party members have been generally circulated. These dealers purchased from the Nazis and then resold pieces of modern art that the Nazis had termed "degenerate" and for which they had no use, except to convert them to hard currency to support the Nazi regime.

One example of a looted painting that had a gap in its provenance is the Matisse *Odalisque* that was eventually returned to the heirs of Paul Rosenberg, formerly a prominent Parisian art dealer, by the Seattle Museum of Art in 1999.⁶ The Rosenberg collection was looted by the Nazis; some pieces reached the open market but could not readily be recovered after the War despite the family's efforts. The *Odalisque* is a classic case: the Nazis had looted the work in 1941, and there was a startling gap in its provenance between that date and 1954, the year it was purchased by the family that donated it to the museum. Extensive research into the painting's provenance provided enough evidence to convince the museum that the painting should be returned to the Rosenbergs.⁷

A case involving a notorious dealer is that of *Goodman v. Searle*.⁸ The Goodman family brought suit against Daniel Searle, a collector and important patron of the Art Institute of Chicago, to recover a small landscape by Degas that had been illegally seized during the war. The tell-tale evidence in the piece's provenance was the name Hans Wendland, one of the Nazi-collaborating dealers. In this case, the Goodmans and Searle reached an out-of-court settlement that, among other things, placed the landscape in the Art Institute and gave both the Goodmans and Searle

credit for the donation.

These two cases do not provide a bright-line rule that appraisers might follow in determining how far to take their inquiries into a piece's provenance, but they do at least demonstrate that increased attention must be paid to the possibility that an artwork was looted during the Nazi era.

Conclusion

Given the guidelines that their own professional organizations provide, appraisers and the attorneys with whom they work must be sensitive to issues surrounding looted art and antiquities and be certain that each time they undertake an appraisal they have made the requisite effort to ensure that the objects they examine do not have tainted provenance.

Sometimes making that determination may be a simple task, but that will not always be true. The *Schultz* case is a prime example of a situation in which a "sufficiently diligent" investigation might not locate all the relevant information.

In light of the sometimes difficult issues that arise, appraisers' letters of engagement and appraisal reports should be carefully drafted — and reviewed by counsel — to limit the responsibilities of the appraiser with respect to title issues to the extent possible.



1. Cal. Code Civ. Proc. §354.3 (2002).

2. *U.S. v. Frederick Schultz*, 333 F.3d 393 (2d Cir. 2003), cert. denied, *Frederick Schultz v. U.S.*, 2004 U.S. LEXIS 70 (U.S., 2004).

3. *U.S. v. Schultz*, 333 F.3d 393, 396 (2d Cir. 2003).

4. *The Republic of Croatia v. The Trustee of the Marquess of Northampton 1987 Settlement*, 610 N.Y.S.2d 263 (N.Y. App. Div. 1994).

5. *Republic of Turkey v. OKS Partners*, 1994 U.S. Dist. LEXIS 17032 (D. Mass. 1994). Herrick, Feinstein represented the Republic of Turkey in this case.

6. *Rosenberg v. Seattle Art Museum*, 124 F. Supp. 2d 1207 (W.D. Wash. 2000).

7. Felicia Lee, "Museum to Return Looted Work," *New York Times*, June 16, 1999, at E4.

8. Judith Dobrzynski, "Settlement in Dispute Over a Painting Looted by Nazis," *New York Times*, Aug. 14, 1998, at A17.