

---

---

# Articles

JENNIFER ANGLIM KREDER\*

## The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?

### TABLE OF CONTENTS

Introduction .....	38
I. Lesser-Known Historical Background About the Art Market During the Nazi Era .....	47
II. The Origins of the Modern Nazi-Era Art Restitution Movement.....	52

---

\* Assistant Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University; J.D., Georgetown University Law Center; B.A., University of Florida. The author was a litigation associate at Milbank, Tweed, Hadley & McCloy LLP, where she worked on art disputes and inter-governmental Holocaust negotiations and litigation before entering academia. She, along with former ambassador Stuart Eizenstat, Of Counsel (President Clinton's Deputy Secretary of the Treasury, who spearheaded the treaty negotiations that largely resolved the Holocaust class actions in the late 1990s), and Edward McGlynn Gaffney, Jr., Co-Counsel (Professor and former Dean, Valparaiso University School of Law), recently filed an amicus brief on behalf of well-known leaders of Jewish community organizations, Holocaust educators, artists, and art historians in *Bakalar v. Vavra*, a case before the U.S. Court of Appeals for the Second Circuit. The author wishes to thank Benjamin Bauer, Carol Bredemeyer, Zan Burkhardt, and Hanna Young for their assistance and Raymond J. Dowd, Howard N. Spiegler, and Lawrence M. Kaye for providing helpful feedback on the draft version of this Article.

III.	The First Declaratory Judgment Action .....	56
IV.	Statutes of Limitations Get Teeth.....	59
V.	Museum-Driven Declaratory Judgment Actions .....	61
	A. Museums Against Nathan Heirs .....	62
	B. The Schoeps Cases .....	65
	C. Seger-Thomschitz Claims .....	72
VI.	One Declaratory Judgment Case Goes to Trial and Is Appealed.....	75
VII.	Looking Toward the Future.....	78
	A. Proper Choice-of-Law Analysis.....	78
	B. Limitations Period, Laches, and Burdens of Proof .....	82
	C. Factual Evidence of Involuntariness .....	83
	Conclusion.....	84
	Appendix .....	86

#### INTRODUCTION

With President Barack Obama in the White House and former Senator Hillary Clinton appointed as Secretary of State, the administration has begun to address the “unfinished business”<sup>1</sup> remaining after President Clinton’s presidency concerning Holocaust-era restitution.<sup>2</sup> The U.S. State Department’s Special Envoy for Holocaust Issues, Ambassador J. Christian Kennedy, has held a series of meetings at the State Department in relation to the 2009 diplomatic conference, which was held in Prague, about looted art and immovable property never restituted after World War II.<sup>3</sup> Secretary Clinton appointed Ambassador Stuart E. Eizenstat to head the U.S. delegation to the conference, which the State Department regarded as “the most important opportunity of the decade to address the wrongs committed during the Nazi era.”<sup>4</sup> The declaration that resulted from the conference, known as the “Terezin Declaration,” was limited to

<sup>1</sup> See STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* (2003) (coining the term “unfinished business”).

<sup>2</sup> *E.g., id.* at 68–70 (providing a history of diplomatic negotiations during the Clinton administration).

<sup>3</sup> Preparations for Holocaust Era Assets Conference—Looted Art & Immovable Property, 74 Fed. Reg. 7533-02 (Feb. 17, 2009); Press Release, Museum Security Group, International Conference “Holocaust Era Assets,” June 26–30 2009, Terezín, Prague (Mar. 29, 2009) (on file with author).

<sup>4</sup> Press Release, U.S. Dep’t of State, Secretary Clinton Appoints Stuart E. Eizenstat as Head of U.S. Delegation to the Prague Holocaust Era Assets Conferences, June 26–30, 2009 (May 19, 2009), <http://www.state.gov/r/pa/prs/ps/2009/05/123653.htm>.

encouraging participating nations to engage in “intensified systematic provenance research” and to attempt to “facilitate just and fair solutions with regard to Nazi-confiscated and looted art” within their legal systems.<sup>5</sup> The Terezin Declaration is very similar to the 1998 Washington Conference Principles on Nazi-Confiscated Art, and both are non-binding.<sup>6</sup> Significantly, the Terezin Declaration specifically calls upon both governmental and private actors to resolve cases “on the facts and merits,” as opposed to legal technicalities.<sup>7</sup> Perhaps the most noteworthy development at the conference was not included in the declaration itself, but rather announced by Ambassador Eizenstat: the possible creation of a formal U.S. body to assist claimants and present owners of potentially looted works, which could be modeled after the United Kingdom’s Spoliation Advisory Commission.<sup>8</sup>

Previously classified archives, which were opened in recent years, have revealed the inadequacy of post-war restitution, and, as a result, an increasing number of claims have been filed in U.S. courts by heirs of Jews whose art and other assets were subject to theft, forced sales, infamous “Jew auctions,” and Aryanizations.<sup>9</sup> Many of the claimants, present-day possessors, and artworks themselves are located in the United States.<sup>10</sup> These claims demonstrate one tragic sliver of the

<sup>5</sup> PRAGUE HOLOCAUST ERA ASSETS CONFERENCE: TEREZIN DECLARATION (2009), <http://www.state.gov/p/eur/rls/or/126162.htm>.

<sup>6</sup> *Id.*; U.S. STATE DEP’T, *Washington Conference Principles on Nazi-Confiscated Art*, in WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS PROCEEDINGS 971, 971 (1998) [hereinafter *Washington Principles*], available at <http://www.state.gov/www/regions/eur/holocaust/heacappen.pdf> (non-binding statement signed by forty-four governments encouraging nations to resolve claims without litigation).

<sup>7</sup> PRAGUE HOLOCAUST ERA ASSETS CONFERENCE: TEREZIN DECLARATION, *supra* note 5.

<sup>8</sup> Stuart E. Eizenstat, Head of the U.S. Delegation to the Prague Holocaust Era Assets Conference, Open Plenary Session Remarks at Prague Holocaust Era Assets Conference (June 28, 2009), <http://www.state.gov/p/eur/rls/rm/2009/126158.htm> (“I believe that the U.S. should work with all interested stakeholders, including museums, auction houses, dealers, attorneys, art experts, and Holocaust survivors, in creating formal group [sic] to provide assistance to claimants and current holders of artworks in determining their proper ownership. The new UK spoliation advisory commission can serve as a model.”); Catherine Hickley, Eizenstat Favors U.S. Nazi Loot Panel to Advise on Disputed Art (June 28, 2009), [http://www.bloomberg.com/apps/news?pid=20601088&sid=aB\\_A3zMb02Ko](http://www.bloomberg.com/apps/news?pid=20601088&sid=aB_A3zMb02Ko).

<sup>9</sup> *E.g.*, Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal*, 73 BROOK. L. REV. 155, 155 n.1 (2007) [hereinafter Kreder, *Tribunal*] (providing extensive list of cases); *see also* von Saher v. Norton Simon Museum of Art at Pasadena, No. 07-56691, 2009 WL 2516336 (9th Cir. Aug. 19, 2009).

<sup>10</sup> *See generally* Janice Arnold, *Seventh Stern Painting Restored to Estate*, CANADIAN JEWISH NEWS, May 14, 2009, available at <http://www.cjnews.com/index.php?option=>

victimization of Jews during the Holocaust era: the systematic targeting of prominent Jews to steal vast numbers of high-value artworks, often to sell in neutral Switzerland for foreign currency.<sup>11</sup>

Because museums, as non-profit institutions, should benefit society and are commonly said to hold objects in trust for the public,<sup>12</sup> deaccessioning an object—removing it from a museum’s collection—“must only be undertaken with a full understanding of the significance of the item, its character (whether renewable or non-renewable), legal standing, and any loss of public trust that might result from such action.”<sup>13</sup> Fiduciary obligations arise under state statutory law, common law, or both and, at least in a theoretical sense, these obligations also arise as a consequence of seeking not-for-profit corporate status and tax treatment.<sup>14</sup> Further, ethics codes are voluntarily accepted by museums when they seek membership in various organizations, such as the Association of Art Museum

---

com\_content&task=view&id=16868&Itemid=86; Associated Press, *U.S. Recovers Painting Stolen by Nazis*, Apr. 20, 2009, available at [http://www.myfoxny.com/dpp/news/090420\\_US\\_Recovers\\_Painting\\_Stolen\\_by\\_Nazis](http://www.myfoxny.com/dpp/news/090420_US_Recovers_Painting_Stolen_by_Nazis); Steve Chawkins, *Hearst Castle to Give Up Nazi Loot*, L.A. TIMES, Apr. 9, 2009, at 6; *Italian Painting Stolen by Nazis Recovered*, CANADIAN PRESS, May 6, 2009, available at [http://seattletimes.nwsource.com/html/nationworld/2009185822\\_apusnaziart.html](http://seattletimes.nwsource.com/html/nationworld/2009185822_apusnaziart.html); *Grosz Heirs File Suit Against MoMA for Artworks Unlawfully Taken During Nazi Era*, MMD NEWSWIRE, Apr. 13, 2009, <http://www.mmdnewswire.com/grosz-heirs-art-4904.html>; News Release, U.S. Immigration & Customs Enforcement, ICE Returns Painting Stolen During Holocaust (Apr. 21, 2009), <http://www.ice.gov/pi/nr/0904/090421newyork.htm>.

<sup>11</sup> See, e.g., HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD’S GREATEST WORKS OF ART 184–89* (1997). For more recent works analyzing Nazi plunder, see GÖTZ ALY, *HITLER’S BENEFICIARIES: PLUNDER, RACIAL WAR, AND THE NAZI WELFARE STATE* (Jefferson Chase trans., Metro Books 2005); MARTIN DEAN, *ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST, 1933–1945* (2008); RICHARD J. EVANS, *THE THIRD REICH IN POWER, 1933–1939*, at 322–411 (2005).

<sup>12</sup> E.g., ASS’N OF ART MUSEUM DIRECTORS, *REPORT OF THE AAMD TASK FORCE ON THE SPOILIATION OF ART DURING THE NAZI/WORLD WAR II ERA (1933–1934)* (1998) [hereinafter *AAMD GUIDELINES*], available at <http://www.aamd.org/papers/guideln.php> (“AAMD has developed the following guidelines to assist museums in resolving claims, reconciling the interests of individuals who were dispossessed of works of art or their heirs together with the fiduciary and legal obligations and responsibilities of art museums and their trustees to the public for whom they hold works of art in trust.”); Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT’L & COMP. L. 409 (2003); see also Verified Complaint ¶¶ 165–168, *Grosz v. Museum of Modern Art*, No. 09 Civ. 3706 (S.D.N.Y. Apr. 10, 2009).

<sup>13</sup> INT’L COUNCIL OF MUSEUMS, *ICOM CODE OF ETHICS FOR MUSEUMS* § 2.13 (2006), <http://icom.museum/ethics.html> [hereinafter *ICOM PRINCIPLES*].

<sup>14</sup> E.g., Gerstenblith, *supra* note 12, at 416–17.

Directors (AAMD), the American Association of Museums (AAM), or the International Council of Museums (ICOM).<sup>15</sup> Museums also self-regulate by adopting their own bylaws.<sup>16</sup>

By the end of 1998, it appeared that the art community was beginning to adopt the idea that statutes of limitations should not bar an otherwise valid claim.<sup>17</sup> Forty-four nations, including the United States, signed the aforementioned Washington Conference Principles on Nazi-Confiscated Art in December 1998 (Washington Principles),<sup>18</sup> which, although not binding, “called on museums, governments, commercial galleries, and auction houses to cooperate in tracing looted art through more stringent research into the provenance of every item” and “provide[d] international attention and legitimacy to the return of [Nazi-looted] art.”<sup>19</sup> The AAMD and the AAM have parallel guidelines, which provide that museums should strive to conduct provenance research to identify and publicize objects with questionable ownership histories.<sup>20</sup> Both encourage the use of mediation, and the AAM Guidelines expressly state that museums “may elect to waive certain available defenses” to resolve claims on the merits.<sup>21</sup> Settlement of such claims is in accordance with, but not commanded by, these museum guidelines and the

<sup>15</sup> *Id.* at 424.

<sup>16</sup> *Id.*

<sup>17</sup> Many writers maintain that moral considerations should trump legal defenses in displaced art cases. *E.g.*, Daniel Range, *Deaccessioning and Its Costs in the Holocaust Art Context: The United States and Great Britain*, 39 *TEX. INT’L L.J.* 655, 665–66 (2004) (“[T]o truly assist claimants in recovering their art objects, the discussion needs to be taken out of an exclusively legal context and elevated to a moral and political level.” (quoting Monica Dugot, *The Holocaust Claims Processing Office’s Handling of Art Claims*, 25 *FORDHAM INT’L L.J.* 133, 137 (2001))); *see also* Emily J. Henson, Comment, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners—Can Moral Obligations Be Translated into Legal Duties?*, 51 *DEPAUL L. REV.* 1103 (2002); Julia Parker, Note, *World War II & Heirless Art: Unleashing the Final Prisoners of War*, 13 *CARDOZO J. INT’L & COMP. L.* 661 (2005).

<sup>18</sup> *Washington Principles*, *supra* note 6, at 971. The nations reaffirmed the Washington Principles in Vilnius, Lithuania in 2000. Vilnius Forum Declaration, Commission for Looted Art in Europe (Oct. 5, 2000), *available at* <http://www.lootedartcommission.com/vilnius-forum>.

<sup>19</sup> EIZENSTAT, *supra* note 1, at 198–99.

<sup>20</sup> AM. ASS’N OF MUSEUMS, GUIDELINES CONCERNING THE UNLAWFUL APPROPRIATION OF OBJECTS DURING THE NAZI ERA, §§ 1–3 (amended Apr. 2001) [hereinafter AAM GUIDELINES], *available at* [http://aam-us.org/museumresources/ethics/nazi\\_guidelines.cfm](http://aam-us.org/museumresources/ethics/nazi_guidelines.cfm); AAMD GUIDELINES, *supra* note 12, ¶ I.A.1.

<sup>21</sup> AAM GUIDELINES, *supra* note 20, § 4(f). The guidelines provide, in part, that museums should investigate their collections and facilitate access to information about any works that seem to have gaps in provenance related to World War II. *Id.* § 3.

Washington Principles, which call for nations to reach “just and fair” solutions.<sup>22</sup> Such solutions “may vary according to the facts and circumstances surrounding [each] case,”<sup>23</sup> but the guidelines give no further direction as to what is “just and fair” in the difficult cases where the evidence is not 100% clear.<sup>24</sup>

Despite the international pronouncement to reach “just and fair” solutions and the leeway authorized to waive defenses, there is often significant opposition to restituting art from museum collections.<sup>25</sup>

Quite recently, Sir Norman Rosenthal, the child of Jewish refugees from Nazi-occupied Europe and former Exhibitions Secretary of the British Royal Academy of Arts, criticized the current restitution movement, asserting that no more art displaced during the Nazi era should be returned.<sup>26</sup> He stated: “If valuable objects have ended up in

---

<sup>22</sup> *Washington Principles*, *supra* note 6, ¶ 8, at 971 (“If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.”).

<sup>23</sup> *Id.*

<sup>24</sup> When speaking to the delegates at the Washington Conference, esteemed diplomat and Holocaust scholar Stuart Eizenstat stated: “We can begin by recognizing this as a moral matter—we should not apply the ordinary rules designed for commercial transactions of societies that operate under the rule of law to people whose property and very lives were taken by one of the most profoundly illegal regimes the world has ever known.” Stuart E. Eizenstat, Under Sec’y for Econ. & Bus. Affairs, U.S. Dep’t of State, In Support of Principles of Nazi-Confiscated Art, Presentation at the Washington Conference on Holocaust-Era Assets (Dec. 3, 1998), [http://www.state.gov/www/policy\\_remarks/1998/981203\\_eizenstat\\_heac\\_art.html](http://www.state.gov/www/policy_remarks/1998/981203_eizenstat_heac_art.html).

<sup>25</sup> Tony Paterson & David Cox, *German Crisis Meeting Called on Nazi Art Sales*, SUNDAY TELEGRAPH (London), Nov. 12, 2006, at 28, available at <http://www.telegraph.co.uk/news/worldnews/1533955/German-crisis-meeting-called-on-Nazi-art-sales.html> (describing German museum community’s publicly stated fears that its heritage is being “spirited away from public view and sold off for millions to private collectors” at the expense of the public’s right to view the work); see also Alexander Pulte, *German Angst over Return of Kirchner Painting*, IFAR J., 2007, at 11; Michael Kimmelman, *Klimts Go to Market; Museums Hold Their Breath*, N.Y. TIMES, Sept. 19, 2006, at E1; Stevenson Swanson, *It’s ‘Our Mona Lisa,’* CHI. TRIB., July 14, 2006, at 1; Matthias Weller, *About Nazi-Confiscated Art: The Return of Ernst Ludwig Kirchner’s Berliner Strabenszene—A Case Study*, KUNSTRSP 2007, Feb. 2007, at 51, available at <http://www.aedon.mulino.it/archivio/2007/2/weller/htm>; Catherine Hickley, *Culture Minister Urges Munich to Review Return of Looted Klee*, BLOOMBERG, May 18, 2009, <http://www.bloomberg.com/apps/news?pid=20601088&sid=adg1y5luyMdQ&refer=muse> (discussing the mayor of Munich’s denial of a claim because the painting in question was stolen for a Nazi exhibition of “degenerate art,” which, he argued, precludes the painting from falling within the international guidelines for the restitution of art).

<sup>26</sup> Sir Norman Rosenthal, Editorial, *The Time Has Come for a Statute of Limitations*, ART NEWSPAPER, Dec. 2008, at 30, 30, available at <http://www.theartnewspaper.com/>

the public sphere, even on account of the terrible facts of history, then that is the way it is.”<sup>27</sup> His basic philosophy is that, because those who lost art collections generally were wealthy, they are not entitled to restitution today as “[t]he vast majority of individuals, who were beaten up or killed during the Nazi period—or indeed by other oppressors in different parts of Europe—did not have art treasures that their children and grandchildren can now claim as compensation.”<sup>28</sup> He cynically characterized the current movement as being premised on a “market-driven hypocrisy” and asserted that “it is well known that lawyers and auction houses are trying to drum up trade in this way.”<sup>29</sup> In conclusion, he stated:

There should now surely be a statute of limitations on this kind of restitution. If we were still in 1950 and the people who owned the Manet or the Monet were still alive, then it would surely be correct to give these paintings back, but not now and not to grandchildren and great-grandchildren. The world should let go of the past and live in the present. Of course, the best of the past needs to be looked after, but we should not be overly obsessive about the worst of the past—it is not useful either to individuals or society as a whole. Each person should invent him or herself creatively in the present, and not on the back of the lost wealth of ancestors.<sup>30</sup>

Sir Rosenthal’s view ignores the significance of history, discussed in Part I below, and opens the door for other unsubstantiated criticism of the claimants.<sup>31</sup> “The claimant’s initial decision to make a claim—

---

article.asp?id=16627; see also Ulrike Knöfel, *A Question of Morality: An End to Restitution of Nazi Looted Art?*, SPIEGEL ONLINE, Apr. 9, 2009, <http://www.spiegel.de/international/germany/0,1518,618400,00.html> (discussing Norman Rosenthal’s opposition to restitution); *SPIEGEL Interview with British Art Expert: “We Must Live in the Present,”* SPIEGEL ONLINE, Apr. 9, 2009, <http://www.spiegel.de/international/germany/0,1518,618399,00.html> (interviewing Norman Rosenthal regarding his controversial opposition to the return of art stolen by the Nazis). But see Catherine Hickley, *Germany Rejects Call for End to Restitution of Nazi-Looted Art*, BLOOMBERG, Apr. 9, 2009, <http://www.bloomberg.com/apps/news?pid=20601088&sid=aQDSmUKhn7XU> (quoting German Culture Minister Bernd Neumann’s statement that the German government remains committed to restitution despite Norman Rosenthal’s *Der Spiegel* interview).

<sup>27</sup> Rosenthal, *supra* note 26, at 30.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* Similar arguments have been made in regard to reparations for other historical wrongs. E.g., Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357 (2009) (American Indian land claims).

<sup>31</sup> Jonathan Jones, *Norman Rosenthal Is Right About Looted Art*, <http://www.guardian.co.uk/artanddesign/jonathanjonesblog/2009/jan/09/looted-art-norman-rosenthal/> (Jan. 9, 2009, 14:36 GMT) (stating that “nothing in today’s art world is more absurd and insidiously destructive” than restitution of art displaced during the Nazi era) (Jones is the

whether to pursue restitution of a material object—is usually based on deep emotion,” not simply—and often not at all—on the desire for financial gain.<sup>32</sup> Some promised their parents or grandparents that they would pursue recovery with such vigor that “it becomes an almost sacred duty.”<sup>33</sup> In fact, many claimants

believe they owe it to the memory of their family to pursue a measure of justice, and that the recovery of property, particularly that which demonstrates the education and taste of their forebears, allows present and future generations to connect to an ancestral world that was disrupted and destroyed by Hitler.<sup>34</sup>

Adam Zamoyski, an heir to the Czartoryska-Dzialynska Collection located at Goluchów Castle in Poland, replied to Sir Rosenthal’s comments as follows:

Many direct victims of Nazi looting tried to reclaim their property in the late 1940s and early 1950s. But they came up against a wall of dishonesty and contempt on the part of collectors, auction houses, museum curators and dealers, who ducked and delayed in the hope that the problem would go away.

In many cases, that is still their attitude, and the reason claims are still being brought. If justice had been done then, there would be no cause for revindication now. Nor is it entirely fair to say, as he does, that the claimants are all rich people: many are living in very humble circumstances—and most claims are not made for reasons of material benefit.

....

The material advantage to us [the Zamoyski family] would be negligible. The winners would be the art world and the public; the only losers would be the vaults of museums throughout Europe and a few dealers and collectors who know they are in possession of

---

art critic for the *Guardian* newspaper in London); see also Robin Cembalest, *Inconvenient Truths: The Trouble with Placing Time Limits on War-Loot Claims*, ART NEWS, Mar. 2009, at 60, available at [http://artnews.com/issues/article.asp?art\\_id=2640](http://artnews.com/issues/article.asp?art_id=2640) (criticizing Norman Rosenthal’s call to end restitution as ignoring the “stonewalling, obfuscation, and legal obstacles” faced during initial efforts to determine the history of supposedly “heirless” art); Jeffrey Goldberg, *Holocaust Art and the Statute of Limitations*, [http://jeffreygolberg.theatlantic.com/archives/2009/02/holocaust\\_art.php](http://jeffreygolberg.theatlantic.com/archives/2009/02/holocaust_art.php) (Feb. 23, 2009, 11:22 EST).

<sup>32</sup> Constance Lowenthal, *Recovering Looted Jewish Cultural Property*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES 139, 139 (Int’l Bureau of the Permanent Court of Arbitration ed., 2004).

<sup>33</sup> *Id.* at 139–40.

<sup>34</sup> *Id.* at 139; accord Daniel Shapiro, *Repatriation: A Modest Proposal*, 31 N.Y.U. J. INT’L L. & POL. 95, 105 (1998) (“[R]epatriation claims ultimately come down to emotions and beliefs—not things.”).



stolen goods and cannot respectably sell them, or even show them.<sup>35</sup>

Several members of the House of Lords responded to Sir Rosenthal as follows:

“The public interest must surely be in upholding the rule of law, rather than promoting an international free-for-all through the unrestricted circulation of tainted works of art. Do we really wish to educate our children to have no respect for history, legality and ethical values by providing museums with the opportunity freely to exhibit stolen property?”<sup>36</sup>

The truth is that the public and some innocents will be forced to give up art, but justice and public trust in the sanctity of museums command restitution of looted art.<sup>37</sup> Until virtually all relevant research is publicly available at very low or no cost, a statute of limitations would block some claims before the claimants are even aware of infringement on their rights and the correct entity to sue.<sup>38</sup> Following such a course would give incentive to a new generation of possessors of looted art to sit back and wait until more claimants die off before attempting to show or sell the art at issue.

Failure of certain museums and collectors to perform more of the costly provenance research and retribute those objects that were forcibly taken means the public will unwittingly benefit from the horrendous crimes of the Holocaust, which is akin to “building on top of Auschwitz.”<sup>39</sup> But the museums need a significant amount of

---

<sup>35</sup> Adam Zamoyski, Editorial, *Restitution Will Benefit the Public More Than the Heirs*, THE INDEPENDENT, Jan. 9, 2009, at 10, available at <http://www.independent.co.uk/opinion/commentators/adam-zamoyski-restitution-will-benefit-the-public-more-than-the-heirs-1242589.html>.

<sup>36</sup> See *Stolen Art Works*, TIMES (U.K.), Nov. 28, 2006, at 18.

<sup>37</sup> See AAM GUIDELINES, *supra* note 20, at general princs. (“AAM, AAM/ICOM, and the American museum community are committed to continually identifying and achieving the highest standard of legal and ethical collections stewardship practices. The AAM Code of Ethics for Museums states that the ‘stewardship of collections entails the highest public trust and carries with it the presumption of rightful ownership, permanence, care, documentation, accessibility, and responsible disposal.’”).

<sup>38</sup> Leon Symons, *No Time Limit for Art Claims*, JEWISH CHRON. (London), Dec. 18, 2008, at 3, available at <http://www.thejc.com/articles/no-time-limit-art-claims>; see also Lawrence M. Kaye, *Cultural Property Theft During War: Application of the Statute of Limitations*, in LEGAL ASPECTS OF INTERNATIONAL TRADE IN ART 217, 222 (Martine Briat & Judith A. Freedberg eds., 1996) (arguing that statutes of limitations should not apply to the “plunder of cultural property” because it is a war crime).

<sup>39</sup> See generally Peter Mostow, “*Like Building on Top of Auschwitz*”: *On the Symbolic Meaning of Using Data from the Nazi Experiments, and on Non-Use as a Form of Memorial*, 10 J.L. & RELIGION 403, 404, 411 (1993–1994) (discussing the symbolic

money to finance the research. During a recent two-day conference held in Berlin to mark the tenth anniversary of the Washington Principles entitled “Taking Responsibility,” the German Federal Commissioner for Culture, Bernd Neumann, both announced that the German government had rejected calls from some museums fearing a “rush to get items back” to impose deadlines and discussed how some German museums and collections had been dragging their heels on provenance research.<sup>40</sup> Moreover, Hermann Parzinger, officiator of the conference and new president of the Prussian Cultural Heritage Foundation (*Stiftung Preussischer Kulturbesitz*), made a very significant and new point in the restitution debate—that the German government has taken an official position that post-war compensation to claimants for art that could not be located did not block a claimant’s potential restitution claim today, although the compensation would need to be returned.<sup>41</sup>

The current wave of claims in Germany and the United States is testing the limits of the aforementioned principles and guidelines. What level of evidence of Nazi-era looting and failure of post-war restitution should convince a museum simply to turn art over to a claimant? Who should bear the burden of establishing title? Should a respectable museum ever use a technicality like the statute of limitations or good faith purchaser defenses under Swiss law to defeat a Nazi-era claim? Does asserting a time-bar defense against a claim perceived to be weak preclude historical honesty and justice, or does it reflect proper stewardship of museum collections, which are held in trust for the public?

In contrast to the optimistic hopes in 1998 to settle all claims expressed, we have seen a new trend emerge whereby current possessors of art displaced during the Holocaust, including museums, have been the first to file suit to quiet title, raising technical defenses.<sup>42</sup> This Article will explore this recent trend, the reasons for it, and the consequences resulting from it. Part I will provide lesser-known historical background missing from the mainstream legal literature. Parts II through VI will lay out the reasons for and

---

implications of refusing to utilize data collected in Nazis’ cruel pseudo-medical experiments in concentration camps).

<sup>40</sup> Symons, *supra* note 38, at 3.

<sup>41</sup> Marilyn Henry, Editorial, *Metro Views: Digging Out the Provenance*, JERUSALEM POST, Dec. 24, 2008, at 15, available at <http://www.jpost.com/servlet/Satellite?cid=1229868834494&pagename=JPost%2FJPArticle%2FShowFull>.

<sup>42</sup> See *infra* Part V.

progression of the restitution and declaratory judgment movement in Nazi-era art cases. Part VII discusses the consequences of the movement and offers best practices for the future for both claimants and present-day possessors.

## I

### LESSER-KNOWN HISTORICAL BACKGROUND ABOUT THE ART MARKET DURING THE NAZI ERA

Claims to art displaced during the Nazi era by definition involve more than sixty years of history and evidence. It is necessary to employ archival researchers to prove that the art claimed is the same as that which had been possessed by the claimant, or the claimant's predecessor, and that the art claimed was both actually looted or subjected to a forced sale and never restituted after the war.<sup>43</sup> Moreover, many pieces were laundered through Switzerland into the international art market, implicating the laws of multiple jurisdictions.<sup>44</sup> Foreign legal experts must be employed to explain the applicable historical legal doctrine.<sup>45</sup> Sovereign immunity may also be an issue.<sup>46</sup> These cases are extremely expensive to litigate because of the need to demonstrate to judges how legal doctrines should be

---

<sup>43</sup> *E.g.*, Henry, *supra* note 41, at 15 (indicating that most of the onus currently falls on claimants to conduct this research because of inadequate museum provenance research). For additional information about Nazi-era provenance research, see generally NANCY H. YEIDE ET AL., *THE AAM GUIDE TO PROVENANCE RESEARCH* (2001).

<sup>44</sup> *E.g.*, Bakalar v. Vavra, No. 05 Civ. 3037(WHP), 2008 WL 4067335, at \*6 (S.D.N.Y. Sept. 2, 2008) (performing choice-of-law/conflicts analysis and applying Swiss law).

<sup>45</sup> In 1998, the overwhelming consensus appeared to be that the injustice perpetuated through the market trafficking of Nazi-looted art must be undone—even if the present-day possessors of such art truly were innocent, bona fide purchasers for value. That consensus, however, is a fragile one, with a fundamental crack in the foundation as to whether bona fide purchasers for value should be compensated. Under U.S. law, bona fide purchasers have absolutely no right to compensation, whereas, under civil law, they do. *See generally* Brief for Bernard Beliak et al. as Amici Curiae Supporting Defendants-Counter-Claimant-Appellants, Bakalar v. Vavra, No. 08-5119-cv (2d Cir. Feb. 12, 2009) (discussing choice-of-law/conflicts analysis); Brief for Israelitische Kultusgemeinde Wien (Jewish Community Vienna) et al. as Amici Curiae Supporting Reversal, Bakalar v. Vavra, No. 08-5119-cv (2d Cir. Feb. 12, 2009) (analyzing Swiss law).

<sup>46</sup> *See* Austria v. Altmann, 541 U.S. 677, 700–02 (2004) (holding that the Foreign Sovereign Immunity Act authorized exercising jurisdiction over a foreign sovereign in a modern-day suit for failure to retribute Klimt masterpieces after World War II); Cassirer v. Spain, 461 F. Supp. 2d 1157 (C.D. Cal. 2006) (resolving sovereign immunity issues); *see also* Sue Choi, Comment, *The Legal Landscape of the International Art Market After Republic of Austria v. Altmann*, 26 NW. J. INT'L L. & BUS. 167 (2005) (discussing sovereign immunity).

interpreted in light of the intricate history.<sup>47</sup> However, because of the value of some of the art, the potential financial benefit may be worth the risk.

The vastness of art looting by Nazis has been well documented and will not be repeated in full here, but a few key historical facts, particularly lesser-known facts, must be noted to understand recent and currently pending litigation.<sup>48</sup> It must not be forgotten that one core part of the Nazis' "Final Solution" was the destruction of Jewish culture and the targeted pillaging of its art.<sup>49</sup> The Nazis maintained "that Jews had intentionally duped the German people into embracing nontraditional aesthetic styles" and "that they had promoted modern art as a ploy to reap huge profits."<sup>50</sup> Hitler, the failed artist, sought to eliminate Jewish culture from the Third Reich, including modern art, which he deemed "degenerate."<sup>51</sup> The Nazi regime targeted such art to destroy it, trade it for other works, or sell it, often through Swiss dealers, to raise foreign currency.<sup>52</sup> The Nazis, incredibly in retrospect, documented much of their theft and persecution.<sup>53</sup>

On April 26, 1938, "the Nazis passed a law requiring Jews within the Nazi Reich (including Austria) with more than 5,000 Reichmarks ('RM') in property to periodically declare and inventory assets,

---

<sup>47</sup> See *infra* Part VII.

<sup>48</sup> For widely accepted histories of Nazi looting and its impact on the international art market, see FELICIANO, *supra* note 11, at 184–89; PETER HARCLERODE & BRENDAN PITTAWAY, *WORLD WAR II AND THE LOST MASTERS: THE LOOTING OF EUROPE'S TREASUREHOUSES* (1999); MICHAEL J. KURTZ, *AMERICA AND THE RETURN OF NAZI CONTRABAND: THE RECOVERY OF EUROPE'S CULTURAL TREASURES* 15 (2006); LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994); NORMAN PALMER, *MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES AND PRACTICE* 6–8 (2000); JONATHAN PETROPOULOS, *ART AS POLITICS IN THE THIRD REICH* 54 (1996) [hereinafter PETROPOULOS, *ART AS POLITICS*]; JONATHAN PETROPOULOS, *THE FAUSTIAN BARGAIN: THE ART WORLD IN NAZI GERMANY* (2000) [hereinafter PETROPOULOS, *FAUSTIAN BARGAIN*].

<sup>49</sup> KURTZ, *supra* note 48, at 15. See generally FELICIANO, *supra* note 11, at 185.

<sup>50</sup> PETROPOULOS, *ART AS POLITICS*, *supra* note 48, at 54.

<sup>51</sup> KURTZ, *supra* note 48, at 13 (citing PETROPOULOS, *ART AS POLITICS*, *supra* note 48, at 7); see also Holocaust Victims Redress Act, Pub. L. No. 105-158, § 201(4), 112 Stat. 15, 17 (1998) ("The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage . . ."); PALMER, *supra* note 48, at 8.

<sup>52</sup> See PALMER, *supra* note 48, at 7–9; PETROPOULOS, *ART AS POLITICS*, *supra* note 48, at 60–61.

<sup>53</sup> Brief for Bernard Beliak et al. as Amici Curiae Supporting Defendants-Counter-Claimant-Appellants, *supra* note 45, at 6; see also ALY, *supra* note 11, at 136; WILLIAM L. SHIRER, *20TH CENTURY JOURNEY: THE NIGHTMARE YEARS, 1930–1940*, at 30 (1984).

including art collections.”<sup>54</sup> After registration, property “could not be sold without notice to the Nazi Property Control Office.”<sup>55</sup> “Nazis systematically expropriated Jewish property by putting one spouse in a concentration camp and forcing the remaining spouse to liquidate remaining assets by a power of attorney.”<sup>56</sup> Interestingly, the Nazis were particular about documenting their thefts to “insure [their] ‘legality’ under the Nuremberg and pre-War laws” in an effort “to make involuntary transactions appear ordinary and legal, such as by allowing payment for seized assets—but into blocked accounts.”<sup>57</sup>

Much art was Aryanized,<sup>58</sup> or subjected to forced sales for prices significantly below market value (if any value ever actually materialized for the seller),<sup>59</sup> and some art was sold at infamous “Jew auctions,” which are now universally recognized as illegal.<sup>60</sup> But some sales before April 26, 1938, were legitimate and for fair market value or close thereto.<sup>61</sup> Some people were able to voluntarily sell art on the open market, albeit not much modern art after Hitler declared it “degenerate”.<sup>62</sup> Additionally, because so many Jews were compelled

<sup>54</sup> Appellant Brief at 7, *Bakalar v. Vavra*, No. 08-5119-cv (2d Cir. Feb. 3, 2009); see also ALY, *supra* note 11, at 42; HAROLD JAMES, *THE DEUTSCHE BANK AND THE NAZI ECONOMIC WAR AGAINST THE JEWS* 51 (2001).

<sup>55</sup> Appellant Brief, *supra* note 54, at 7.

<sup>56</sup> *Id.*

<sup>57</sup> Brief for Bernard Beliak et al. as Amici Curiae Supporting Defendants-Counter-Claimant-Appellants, *supra* note 45, at 6.

<sup>58</sup> Property that was owned by Jews was “Aryanized” when the Nazi regime either forced the Jewish owners to sell it to an Aryan—as defined under Nazi law—or confiscated the property from the Jewish owner and gave it to an Aryan. See THE OXFORD ENGLISH DICTIONARY 672 (2d ed. 1989); Michael J. Bazzyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 107 n.441 (2000).

<sup>59</sup> See, e.g., Douglas C. McGill, *Met Painting Traced to Nazis*, N.Y. TIMES, Nov. 24, 1987, at C19.

<sup>60</sup> See, e.g., PALMER, *supra* note 48, at 17.

<sup>61</sup> *Id.* at 59–60; Judy Dempsey, *Germany Tracing Artwork and Its Nazi Past*, INT’L HERALD TRIB., Dec. 22, 2008, available at <http://www.nytimes.com/2008/12/22/world/europe/22iht-letter.4.18871861.html> (“‘There is the issue of enforced transactions of every sale of every Jewish collection that happened during the Nazi times,’ said [Sean] Rainbird, a former curator of the Tate Modern in London. ‘There were cases where individuals were allowed to take their collections out of the country, and there were some dealers, in a gesture of solidarity, who helped them and were dealing with them in an honest way.’”). See generally PETROPOULOS, *FAUSTIAN BARGAIN*, *supra* note 48.

<sup>62</sup> PALMER, *supra* note 48, at 59–60; see also Adam Zagorin, *Saving the Spoils of War*, TIME, Dec. 1, 1997, at 87 (discussing opposition to compensating claimants for works sold in the 1930s at what seemed to have been fair prices in that market and noting that the art market in New York “continued to function even as fighting raged in Europe”).

to forfeit “flight asset[s]”<sup>63</sup> to pay for their passage out of the Reich, the European art market reflected depressed prices.<sup>64</sup>

Sorting the legitimate transaction from the illegitimate sixty or seventy years later can be extremely difficult. Post-war restitution legislation presumed that all sales and transfers of property from a Jew to a non-Jew after the enactment of the Nuremberg laws in 1935 were forced sales unless certain conditions were satisfied, most commonly that the purchaser, or subsequent good faith purchaser, had to demonstrate that the sale was for fair market value.<sup>65</sup> Under these laws, acts taken to liquidate a spouse’s property pursuant to forcibly induced powers of attorney also would be void if challenged.<sup>66</sup>

Switzerland has played a major role in the laundering of looted art—although it recently changed its laws.<sup>67</sup> In 1943, the Allies issued a warning, known as the “London Declaration,”<sup>68</sup> to Switzerland against laundering property out of Nazi-controlled territory, which stated the following:

---

<sup>63</sup> See, e.g., Andrew Adler, *Expanding the Scope of Museums’ Ethical Guidelines with Respect to Nazi-Looted Art: Incorporating Restitution Claims Based on Private Sales Made as a Direct Result of Persecution*, 14 INT’L J. OF CULTURAL PROP. 57, 65 (2007).

<sup>64</sup> See Zagorin, *supra* note 62, at 87 (“The paintings came to America because for more than 10 years during and after the war there was no place else to sell them . . . .” (quoting Willi Korte, a consultant on Holocaust losses to the Senate Banking Committee)).

<sup>65</sup> Karen Heilig, *From the Luxembourg Agreement to Today: Representing a People*, 20 BERKELEY J. INT’L L. 176, 188 n.69 (2002) (citing German *Gesetz zur Regelung offener Vermögensfragen*, v.28.9.1990 (BGB1. II S. 889, 1159), §1, ¶ 6); see also Ardelia R. Hall, *The Recovery of Cultural Objects Dispersed During World War II*, 25 DEP’T ST. BULL. 337 (1951) (discussing post-war laws).

<sup>66</sup> See, e.g., PALMER, *supra* note 48, 119–23; see also *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829, 843 (E.D.N.Y. 1981) (holding that Military Government Law 59 superseded German law and “rendered void any transfer of cultural property”); *United States v. Portrait of Wally, A Painting By Egon Schiele, No. 99 Civ. 9940(MBM)*, 2002 WL 553532, at \*20 n.17 (S.D.N.Y. Apr. 12, 2002) (“an Austrian law enacted in 1946 declared coerced transfers absolutely void”).

<sup>67</sup> E.g., Michele Kunitz, Comment, *Switzerland & the International Trade in Art & Antiquities*, 21 NW. J. INT’L L. & BUS. 519, 520 (2001); see also Brief for Israelitische Kultusgemeinde Wien (Jewish Community Vienna) et al. as Amici Curiae Supporting Reversal, *supra* note 45, at 6–15 (clarifying Swiss law); Marc-André Renold, *An Important Swiss Decision Relating to the International Transfer of Cultural Goods: The Swiss Supreme Court’s Decision on the Giant Antique Mogul Gold Coins*, 13 INT’L J. CULTURAL PROP. 361 (2006) (regarding recent change in Swiss law).

<sup>68</sup> Ursula Kriebaum, *Restitution Claims for Massive Violations of Human Rights During the Nazi Regime: The Austrian Case*, in HUMAN RIGHTS IN DEVELOPMENT YEARBOOK 2001, REPARATIONS: REDRESSING PAST WRONGS 165, 172–73 (George Ulrich & Louise Krabbe Boserup eds., 2003).

[The Allies] “[h]ereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

Accordingly the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including juridical persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.”<sup>69</sup>

Following the London Declaration, Switzerland issued warnings to Swiss art dealers that transactions in property from Nazi-occupied territories had no presumption of good faith acquisition.<sup>70</sup> The warnings were not rescinded, and the dealers remained on notice that diligence in investigating provenance of property from Nazi-occupied Austria remained in effect through the 1950s.<sup>71</sup>

Claims by heirs of Austrian Jews are essential to the new wave of Nazi-era art claims. The extent of victimization of Austrian Jews did not receive the same attention, immediately after World War II, as the victimization of Jews in other European countries because, at that time, Austria was still viewed as “the first free country to fall a victim to Hitlerite aggression.”<sup>72</sup> The historical record of occupied and neutral nations’ complicity with the Nazi regime has been newly examined, and significant, previously classified evidence has been

---

<sup>69</sup> U.S. Dep’t of State, Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory (Jan. 5, 1943), in 8 DEP’T ST. BULL. 21, 21–22 (1943).

<sup>70</sup> Appellant Brief, *supra* note 54, at 12.

<sup>71</sup> *Id.*; see also Milton Esterow, *Europe Is Still Hunting its Plundered Art*, N.Y. TIMES, Nov. 16, 1964, at 1; Dr. Gottfried Weiss, Summary of Address Delivered at the University of Zurich 3 (July 15, 1945) (transcript available at the National Archives and Records Administration in College Park, Maryland).

<sup>72</sup> U.S. Dep’t of State, The Tripartite Conference in Moscow (Nov. 1, 1943) in 9 DEP’T ST. BULL. 307, 310 (1943). (The Moscow Declaration, signed by the United States, the United Kingdom, and the Soviet Union, included the “Declaration on Austria,” which characterized the 1938 *Anschluss* (annexation) of Austria in this way.). This view of the *Anschluss* has been all but uniformly discredited. See, e.g., Hannah Lessing & Fiorentina Azizi, *Austria Confronts Her Past*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 226, 230–31 (Michael J. Bazyler & Roger P. Alford eds., 2006).

revealed.<sup>73</sup> Most of the nonart cases premised on the newly available historical evidence have since been resolved en masse to achieve “rough justice,”<sup>74</sup> but mass dispute resolution for Nazi-era stolen art claims has been impossible to achieve thus far.<sup>75</sup> As a result, claimants and present-day possessors of stolen art are forced to wrestle with each claim to each tainted piece of art individually—and expensively and emotionally.<sup>76</sup>

## II

### THE ORIGINS OF THE MODERN NAZI-ERA ART RESTITUTION MOVEMENT

The first modern Nazi-looted art case officially began on January 7, 1998, when the New York County District Attorney’s office, as part of a criminal investigation, served a grand jury subpoena on the Museum of Modern Art in New York for the painting *Portrait of Wally* by Egon Schiele.<sup>77</sup> Subsequently, the United States commenced civil forfeiture proceedings against the painting under the National Stolen Property Act.<sup>78</sup> Although criticized on many grounds by many commentators, including by this author,<sup>79</sup> it cannot be denied that the federal case highlighted the extreme inadequacy of Austrian post-war restitution efforts and launched the modern wave of Holocaust-art restitution claims.<sup>80</sup>

---

<sup>73</sup> See generally, e.g., Paulina McCarter Collins, Comment, *Has “The Lost Museum” Been Found? Declassification of Government Documents and Report on Holocaust Assets Offer Real Opportunity to “Do Justice” for Holocaust Victims on the Issue of Nazi-Looted Art*, 54 ME. L. REV. 115 (2002).

<sup>74</sup> See EIZENSTAT, *supra* note 1, at 353. See generally *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir. 2005) (class action concerning Austrian Nazi-era conduct not constituting art theft).

<sup>75</sup> E.g., Kreder, *Tribunal*, *supra* note 9, at 184.

<sup>76</sup> E.g., *Austria v. Altmann*, 541 U.S. 677 (2004) (holding that the Republic of Austria was subject to jurisdiction in the United States for its expropriation of Gustav Klimt paintings from an Austrian family and noting \$135,000 filing fee to seek justice in Austrian courts).

<sup>77</sup> *In re Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 719 N.E.2d 897, 898–99 (N.Y. 1999).

<sup>78</sup> *United States v. Portrait of Wally, A Painting by Egon Schiele*, No. 99 Civ. 9940(MBM), 2002 WL 553532, at \*1 (S.D.N.Y. Apr. 12, 2002).

<sup>79</sup> See Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT’L L. 1199 (2005).

<sup>80</sup> For an extensive sample of post-2000 claims, see Jennifer Anglim Kreder, *The Holocaust, Museum Ethics and Legalism*, 18 S. CAL. REV. L. & SOC. JUST. 1, 2 n.2 (2008).



In 1997, the Leopold Museum-Privatstiftung (“Leopold”) lent *Portrait of Wally* to the New York Museum of Modern Art for exhibition.<sup>81</sup> By this time, the painting was valued at over \$2 million.<sup>82</sup> Three days after the exhibition ended, the New York County District Attorney’s Office served the subpoena for the painting, but it was quashed because a New York anti-seizure statute for works exhibited by nonresidents, such as the Leopold, prohibited the painting’s seizure at the state level.<sup>83</sup> However, a U.S. magistrate judge issued a warrant to seize the painting under federal law a few hours later, and the federal government began the civil forfeiture proceedings.<sup>84</sup> The judge issued the warrant based on a finding of probable cause that the Leopold had violated the National Stolen Property Act, a federal law, by transporting the painting in foreign commerce while knowing that it was stolen property.<sup>85</sup>

In response to continued criticism that Austria had failed to adequately retribute Nazi-looted art and compensate Holocaust victims after the war,<sup>86</sup> the Austrian government enacted legislation in 1995 giving the Austrian Jewish community ownership of “heirless” art looted by Nazis, which had been simply sitting in

---

<sup>81</sup> *Portrait of Wally*, 2002 WL 553532, at \*4.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (citing *In re Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 719 N.E.2d 897 (N.Y. 1999)). The New York Arts and Cultural Affairs Law prohibited seizure of any work of fine art on loan to any museum or other non-profit exhibitor of art in the state of New York. N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney Supp. 2009). At the time, the law provided in full:

No process of attachment, execution, sequestration, replevin, distress or any kind of seizure shall be served or levied upon any work of fine art while the same is enroute to or from, or while on exhibition or deposited by a nonresident exhibitor at any exhibition held under the auspices or supervision of any museum, college, university or other nonprofit art gallery, institution or organization within any city or county of this state for any cultural, educational, charitable or other purpose not conducted for profit to the exhibitor, nor shall such work of fine art be subject to attachment, seizure, levy or sale, for any cause whatever in the hands of the authorities of such exhibition or otherwise.

*Id.* After *Portrait of Wally* was decided, the New York legislature eliminated the protection against seizure in criminal forfeiture proceedings, at least temporarily. See Collins, *supra* note 73, at 139. The amendment eliminating the protection against criminal forfeiture proceedings, as it was written, was “deemed repealed on June 1, 2002.” § 12.03. Research indicates that the amendment expired quietly on that date.

<sup>84</sup> *Portrait of Wally*, 2002 WL 553532, at \*4.

<sup>85</sup> See *id.*

<sup>86</sup> See generally Eric Rosand, *Confronting the Nazi Past at the End of the 20th Century: The Austrian Model*, 20 BERKELEY J. INT’L L. 202 (2002).

storage since the war.<sup>87</sup> The art was auctioned to benefit Holocaust survivors and their heirs.<sup>88</sup> Then, “[i]n January and February of 1998, a series of articles by Hubertus Czernin appeared in the Viennese newspaper, *Der Standard*, reviewing the methods by which Austrian National Museum personnel virtually extorted art from Jews who, having survived, chose to leave Austria after the War.”<sup>89</sup> On December 4, 1998, in response to continued exposure regarding Austria’s post-war exploitation of gifts from survivors in exchange for export permits, the Austrian Parliament enacted legislation to provide for “restitution notwithstanding such legal obstacles as the statute of limitations.”<sup>90</sup>

“Elisabeth Gehrler, [then] Austria’s Minister of Culture, . . . set up a museum panel to identify the works that [should] be returned.”<sup>91</sup> One consequence was that the Rothschild family retrieved 200 pieces of

---

<sup>87</sup> Kelly Ann Falconer, Comment, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U. PA. J. INT’L ECON. L. 383, 416 (2000) (citing *CNN Newsroom: A Sale of Art Confiscated from Jews During World War II Closes a Chapter in the History of the Holocaust* (CNN television broadcast Nov. 26, 1996) (“[T]he Austrian government, the people in general, either forgot about them or didn’t know what to do with them. They’re basically heirless pieces of art.”)).

<sup>88</sup> *Id.* This auction is referred to as the Mauerbach auction.

<sup>89</sup> Constance Lowenthal, *Edited Presentation*, 31 N.Y.U. J. INT’L L. & POL. 133, 135 (1998).

<sup>90</sup> U.S. STATE DEP’T, *Concluding Statement: United States, in WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS*, *supra* note 6, at 125, 127 (1998), available at <http://www.state.gov/www/regions/eur/holocaust/heac2.pdf>; see also 1390 der Beilagen zu den Stenographischen Protokollen des Nationalrates XX.GP [Federal State Act on the Return of Cultural Objects from Austrian Federal Museums and Collections], Dec. 4, 1998, available at <http://www.lootedart.com/MFEU4438589>, reprinted in PALMER, *supra* note 48, at 178–79; Styrian Provincial Law of 14 March 2000 on the Return or Taking to Account of Works of Art or Cultural Assets Confiscated from Their Owners During the Nazi Regime (Austria), available at <http://www.lootedart.com/InformationByCountry/Austria/Laws> (follow “Styrian Provincial Law of 14 March 2000” hyperlink); Resolution of the Vienna City Council of 29 April 1999 on the Return of Artistic and Cultural Property from the Museums, Libraries, Archives, Collections and Other Holdings of the City of Vienna (Austria), available at <http://www.lootedart.com/InformationByCountry/Austria/Laws> (follow “Resolution of the Vienna City Council of 29 April 1999” hyperlink); Alan Riding, *Entr’acte: Whatever Happened to the Art the Nazis Stole?*, INT’L HERALD TRIB., May 13, 2004, available at [http://www.nytimes.com/2004/05/13/news/13iht-entracte\\_ed3\\_.html](http://www.nytimes.com/2004/05/13/news/13iht-entracte_ed3_.html) (“[I]n 1998 [Austria] passed an Art Restitution Act and since then it has reviewed its national collections and resolved 92 restitution cases involving 2,659 works of art . . .”).

<sup>91</sup> Lowenthal, *supra* note 89, at 135.

art that were auctioned at Christie's for \$90 million.<sup>92</sup> But many do not believe Austria went far enough in its recent attempts to rectify its Nazi past. In fact, the 2000 U.S. Presidential Commission on Holocaust-Era Assets reported "that Austria's 'restrictive [post-war] restitution process impeded the return of assets to victims.'" <sup>93</sup>

Lawrence M. Kaye, a plaintiff's attorney and partner in the Manhattan firm of Herrick, Feinstein, LLP, which has an internationally known art law practice and represents the Bondi family in *U.S. v. Portrait of Wally, A Painting by Egan Schiele (Wally)*, summed up the case as follows in 1999:

To say that the subpoena created an uproar is to put it mildly. Museums claimed to be "shocked," expressing concern that such actions would slow or stem the international flow of artwork into New York. The Austrian government also expressed outrage. Various organizations made statements supporting one side or the other, and the media weighed in on both sides. But, to the victims of the Holocaust, the subpoena symbolized a willingness to provide a much-needed forum to redress past wrongs. In my view, the District Attorney's actions were a proper and welcome exercise of his powers.<sup>94</sup>

It can be safely said that *Wally* launched a new wave of Holocaust-era art research and claims. Hundreds of those cases have since been resolved<sup>95</sup> while *Wally* and others lumber on.<sup>96</sup>

<sup>92</sup> Carol Vogel, *At \$90 Million, Rothschild Sale Exceeds Goals*, N.Y. TIMES, July 9, 1999, at A6, available at <http://www.nytimes.com/1999/07/09/world/at-90-million-rothschild-sale-exceeds-goals.html>.

<sup>93</sup> Robert Landauer, *Outrageous Behavior Needs Redress*, OREGONIAN, June 12, 2004, at B5.

<sup>94</sup> Lawrence M. Kaye, *A Quick Glance at the Schiele Paintings*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 11, 13 (1999). The author would like to note that, although she criticizes *Wally*, she admires the excellent advocacy skills of Howard N. Spiegler and Lawrence M. Kaye, partners in the firm of Herrick, Feinstein, LLP, and she is thankful for their willingness to discuss the case.

<sup>95</sup> Mike Boehm, *Panel Ponders Legalties of Reclaiming Art*, L.A. TIMES, Nov. 18, 2004, at 17 ("The number of claims today 'is probably in the hundreds'. . . . Most of those are being settled without going to court . . ."); Mark Stryker, *Shadow of Holocaust Hangs over Museums' Fight for Paintings*, DETROIT FREE PRESS, Mar. 26, 2006, at E2 ("There have been about 30 claims made on U.S. museums for Nazi-looted art in the last decade, a dozen of which resulted in the pieces being returned or in restitution, according to the American Association of Museums. Most cases are resolved through quiet compromise.").

<sup>96</sup> Martha Lufkin, *US Lawsuit to Confiscate Schiele's Portrait of Wally Suspended*, ART NEWSPAPER, Dec. 29, 2008, <http://www.theartnewspaper.com/articles/US%20lawsuit%20to%20confiscate%20Schiele%27s%20Portrait%20of%20Wally%20Suspended/16693>.

## III

## THE FIRST DECLARATORY JUDGMENT ACTION

The first declaratory judgment case filed involving Nazi-looted art was *Alsdorf v. Bennigson*.<sup>97</sup> The case involved a Jewish art collector forced to flee Nazi Germany and the subsequent questions as to what happened to her art collection.<sup>98</sup> After the Nazis' takeover of Berlin, Carlota Landsberg, a Jewish woman living in Berlin, sent *Femme en Blanc* by Pablo Picasso to a Paris art dealer, Justin Thannhauser.<sup>99</sup> After *Kristallnacht*, November 9–10, 1938, Landsberg and her daughter fled Europe, eventually settling in New York in 1940 or 1941.<sup>100</sup> The Nazis stole the painting in Paris in 1940 and, as they usually did when looting art, they kept precise records of the painting and its last possessor.<sup>101</sup>

After the war, Ms. Landsberg, in accordance with the restitution mechanisms in place at that time, filed a claim for the painting.<sup>102</sup> In 1958, before his death, Mr. Thannhauser sent her a letter detailing his knowledge of the looting and his persistent efforts to locate the painting since the war.<sup>103</sup> It should also be noted that, as stated in Mr. Thannhauser's letter, the painting was illustrated in a book about Picasso's work, as well as in the *Repertoire des Biens Spolies en France Durant la Guerre 1939–1945 (List of Property Removed from France During the War 1939–1945)*, recorded under Mr. Thannhauser's name.<sup>104</sup> This book, published in 1947,<sup>105</sup> is very well known and is referred to in art circles as the "*Repertoire*." The evidence was overwhelming: the case was one of clear-cut looting, and, in 1969, the Berlin Restitution Office paid Ms. Landsberg DM 100,000, approximately \$27,300, without prejudice to her right to recover the painting if it ever was located—presumably with the understanding that she would have to return the money if she

---

<sup>97</sup> No. 04 C 5953, 2004 WL 2806301 (N.D. Ill. Dec. 3, 2004).

<sup>98</sup> *Id.* at \*1–2.

<sup>99</sup> Second Amended Complaint ¶ 2, *Bennigson v. Alsdorf*, 2004 WL 803616 (Cal. Ct. App. Jan. 9, 2004) (No. BC287294) [hereinafter Second Amended Complaint, *Bennigson*].

<sup>100</sup> Howard Reich, *Whose Picasso Is It?*, CHI. TRIB., Jan. 19, 2003, at 1, available at <http://www.museum-security.org/03/007.html>.

<sup>101</sup> Second Amended Complaint, *Bennigson*, *supra* note 99, ¶ 2.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* ¶ 8.

<sup>104</sup> Reich, *supra* note 100, at 1.

<sup>105</sup> *Id.*

successfully recovered the painting.<sup>106</sup> “Despite decades-long correspondence with the post-war governments of France and Germany and with a variety of European art dealers, Landsberg was unable to locate the Picasso” before she died in 1994.<sup>107</sup>

Meanwhile, in 1975, exactly thirty years after the end of all World War II hostilities, New York art dealer Stephen Hahn purchased the painting from Maurice Covo, owner and manager of the Renou & Poyet art gallery in Paris, France.<sup>108</sup> Significantly, the French statute of repose is thirty years.<sup>109</sup> A few months later, Mr. Hahn sold the painting to Marilyn and James Alsdorf, Chicago art connoisseurs who have often acted philanthropically by donating paintings to museums.<sup>110</sup> This information must be viewed in light of the fact that, during the war, the Renou & Poyet gallery “was known as Renou & Colle, and a report from the United States’ Office of Strategic Services on that Paris gallery called it a ‘firm of art dealers who handled looted art, notably from the Paul Rosenberg Collection.’”<sup>111</sup>

In 2002, the Alsdorfs attempted to sell the painting through an agent who shipped the art to Geneva, Switzerland, where it was viewed by a Paris art dealer on behalf of a potential client.<sup>112</sup> As part of his due diligence, the dealer contacted the Art Loss Register in

---

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> CODE CIVIL [C. CIV.] art. 2262 (Fr.), available at [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_civil\\_textA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm); see also *Greek Orthodox Patriarchate of Jerusalem v. Christie’s, Inc.*, No. 98 Civ. 7664(KMW), 1999 WL 673347, at \*6 (S.D.N.Y. Aug. 30, 1999) (noting that the French Civil Code bars actions for real and personal property after thirty years of prescriptive possession). *But see* *Warin v. Wildenstein & Co.*, 746 N.Y.S.2d 282, 282 (App. Div. 2002) (declining to “take judicial notice of the subject French Ordinances for lack of information sufficient to enable [the court] to determine their scope and effect”).

<sup>110</sup> Reich, *supra* note 100, at 1. It should also be noted that James Alsdorf, now deceased, “was a board member of the International Foundation for Art Research (IFAR), which was created in 1969 to educate the public about problems and issues in the art world,’ [and] ‘IFAR helped expand the Art Loss Register’s data base [sic] of lost artworks.’” *Id.* (quoting Alsdorf’s statements in a court declaration). Additionally, Marilyn Alsdorf presently is head of the Art Institute of Chicago’s committee on European painting, and the “Alsdorf Foundation is currently a financial supporter of IFAR.” *Id.* (quoting Alsdorf’s statements in a court declaration).

<sup>111</sup> Reich, *supra* note 100, at 1.

<sup>112</sup> Cross Complaint of Claimant Thomas G. Bennigson ¶ 15, *United States v. One Oil Painting Entitled “Femme en Blanc” by Pablo Picasso*, 362 F. Supp. 2d 1175 (C.D. Cal. 2005) [hereinafter Complaint, *Femme en Blanc*].

London, England,<sup>113</sup> which ran a report that revealed the painting's tainted past.<sup>114</sup>

The Art Loss Register continued to investigate and initially thought that the sole heir to the painting was the Silva Casa Foundation, a Swiss foundation related to the Thannhauser family.<sup>115</sup> The Art Loss Register began negotiating on the foundation's behalf—first with the dealer and then with the Alsdorfs' Los Angeles attorney.<sup>116</sup> Around May 2002, the Art Loss Register discovered that Mr. Thannhauser had been holding the painting on behalf of Ms. Landsberg.<sup>117</sup> The Art Loss Register later discovered that Ms. Landsberg had passed away and it located her sole heir, Thomas C. Bennigson.<sup>118</sup>

The *Femme en Blanc* litigation started as a civil replevin case filed by Mr. Bennigson in a California state court.<sup>119</sup> The day after the case was filed, the Alsdorfs shipped the painting back to Chicago, Illinois,<sup>120</sup> which had less favorable law for claimants than California.<sup>121</sup> Because the painting was no longer in California, the California court granted a motion to dismiss on personal jurisdiction grounds filed by the Alsdorfs.<sup>122</sup> While Mr. Bennigson was seeking relief in the California Supreme Court, the Alsdorfs filed a

---

<sup>113</sup> *Id.* ¶ 16.

<sup>114</sup> *Id.* ¶ 22. This also indicates that, at least for present-day purchases of high-quality art created before World War II, seeking information about a painting's provenance during and after World War II is expected of one afforded bona fide purchaser status.

<sup>115</sup> Brief of Respondent Marilyn Alsdorf at 5, 2004 WL 803616 (Cal. Ct. App. Apr. 15, 2004) (No. B168200).

<sup>116</sup> See Complaint, *Femme en Blanc*, *supra* note 112, ¶ 20.

<sup>117</sup> *Id.* ¶ 21.

<sup>118</sup> *Id.* ¶ 23.

<sup>119</sup> Bennigson v. Alsdorf, No. B168200, 2004 WL 803616, at \*1 (Cal. Ct. App. Apr. 15, 2004).

<sup>120</sup> *Id.* at \*2.

<sup>121</sup> California's legislature extended the statute of limitations until 2010 for Holocaust-era art litigation against museums and galleries. CAL. CIV. PROC. CODE § 354.3(c) (West 2004). The statute was later held unconstitutional by the Ninth Circuit, which identified its broad scope as follows:

The scope of the statute as enacted belies California's purported interest in protecting its residents and regulating its art trade. The amended version of § 354.3 suggests that California's real purpose was to create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the state.

von Saher v. Norton Simon Museum of Art at Pasadena, No. 07-56691, 2009 WL 2516336, at \*8 (9th Cir. Aug. 19, 2009).

<sup>122</sup> *Bennigson*, 2004 WL 803616, at \*3.

declaratory judgment action in the U.S. District Court for the Northern District of Illinois in Chicago to seek to quiet title in relation to the painting.<sup>123</sup> This case has since been dismissed following settlement,<sup>124</sup> likely sparked when both the FBI seized the painting in Chicago and brought it back to California and the U.S. Attorney's Office in Los Angeles initiated civil forfeiture proceedings against the painting in rem.<sup>125</sup> All litigation has since been dismissed because Mr. Bennigson and the Alsdorfs settled all the claims between them for \$6.5 million.<sup>126</sup>

#### IV

##### STATUTES OF LIMITATIONS GET TEETH

In December 2003, the heirs of Margarete Mauthner asserted a claim to *Vue de l'Asile et de la Chapelle de Saint-Remy*, by Vincent Van Gogh, against Elizabeth Taylor, which triggered both another declaratory judgment action in 2004 and, in early 2005, a suit filed separately by the claimants—and seemingly subsequently consolidated with the declaratory action.<sup>127</sup> The painting had been owned by Ms. Mauthner during the 1920s and 1930s, but there was no evidence of when or how the painting left her possession.<sup>128</sup> Ms. Taylor's father, an art dealer, purchased the painting for her in 1963 at Sotheby's in London for £92,000.<sup>129</sup> The purchase was publicly known.<sup>130</sup> In 2001, the Mauthner heirs hired a lawyer to explore Holocaust claims on their part, and, it seems, he identified Ms. Taylor as the possessor of the painting in 2002.<sup>131</sup>

<sup>123</sup> Alsdorf v. Bennigson, No. 04 C 5953, 2004 WL 2806301, at \*4 (N.D. Ill. Dec. 3, 2004).

<sup>124</sup> Bennigson v. Alsdorf, No. S124828, 2005 Cal. LEXIS 13370, at \*1 (Nov. 30, 2005) (dismissing pursuant to notice of settlement).

<sup>125</sup> Complaint, *Femme en Blanc*, *supra* note 112, ¶ 1; Press Release, Fed. Bureau of Investigation, \$10 Million Picasso Painting Stolen by Nazis During World War II Seized by U.S. (Oct. 26, 2004), available at <http://www.bhba.org/PR/PR-CFTA-FBI-10-04.htm>.

<sup>126</sup> Bob Egelko, *Suit over a Picasso Settled*, S.F. CHRON., Aug. 10, 2005, at B1.

<sup>127</sup> Adler v. Taylor, No. CV 04-8472-RGK(FMOX), 2005 WL 4658511, at \*1 (C.D. Cal. Feb. 2, 2005).

<sup>128</sup> *Id.*

<sup>129</sup> Danielle Demetriou, *Elizabeth Taylor, Her Van Gogh Masterpiece and a Legal Row over Looting in Nazi Germany*, INDEPENDENT (U.K.), May 28, 2004, at 3, available at <http://www.independent.co.uk/news/world/americas/elizabeth-taylor-her-van-gogh-masterpiece-and-a-legal-row-over-looting-in-nazi-germany-565004.html>.

<sup>130</sup> Adler, 2005 WL 4658511, at \*5.

<sup>131</sup> *Id.* at \*1.

The plaintiffs in this case attempted to broaden the legal grounds for restitution to all situations where it seemed that the painting would not have been sold but for the rise of the Nazi regime to power.<sup>132</sup> In other words, they sought to broaden the definition of “forced sale” to incorporate virtually any sale by a Jew within the German Reich, particularly after the passage of the Nuremberg laws.<sup>133</sup> Essentially, the Mauthner heirs alleged, without proof beyond the general conditions in Germany, that the painting was sold because of Ms. Mauthner’s need to flee after the Nazis rose to power. What is significant is what their claim lacked: any evidence concerning either the conditions of the sale, assuming one occurred, or how Ms. Mauthner otherwise lost possession of the painting in 1939.<sup>134</sup> Awarding restitution in such a case would do one of two things (or both): (1) it would shift the burden of proving a voluntary sale to the present-day possessor or (2) it would eliminate the need to show proximate cause between Nazi decree and the transfer of the particular painting in question.

The court rather quickly dismissed the heirs’ purported federal claim because no federal law gave rise to a private right of action<sup>135</sup> and it dismissed the state law claims on statute of limitations grounds—assuming, without deciding, that the discovery rule would have applied to the dispute.<sup>136</sup> The court did not even explore whether the painting had been sold for fair market value.<sup>137</sup> The decision was affirmed by the Ninth Circuit Court of Appeals on May 18, 2007.<sup>138</sup> The U.S. Supreme Court denied the claimant’s petition for a writ of certiorari on October 29, 2007.<sup>139</sup> *Taylor* was the first U.S. Nazi-era art case to be dismissed on statute of limitations grounds. This case can nonetheless be credited with having launched a small wave of claims attempting to increase the number of artworks subject to restitution because of their ownership histories during World War II—even if those histories would not seem to support a legal claim under current case law.

---

<sup>132</sup> *Id.* at \*3.

<sup>133</sup> *See id.*

<sup>134</sup> *See id.*

<sup>135</sup> *Id.* at \*4–5.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Orkin v. Taylor*, 487 F.3d 734, 736 (9th Cir. 2007).

<sup>139</sup> *Orkin v. Taylor*, 128 S. Ct. 491, 492 (2007).



## V

MUSEUM-DRIVEN DECLARATORY JUDGMENT ACTIONS<sup>140</sup>

U.S. museums have now started to respond to claims they have received, but that have not yet been filed in court, by filing declaratory judgment actions to remove any cloud on title. First, as discussed in more detail below, two U.S. museums faced with claims by the heirs of Martha Nathan, the widow of Hugo Nathan, a prominent Jewish collector from Frankfurt, decided to file declaratory judgment actions to resolve ownership of two paintings.<sup>141</sup> The claimants' arguments were similar to those in the *Adler v. Taylor* case.<sup>142</sup> This was the first time any museum had decided to initiate litigation when faced with demands for artwork by Holocaust survivors or their heirs.<sup>143</sup> The museums won both cases on statute of limitations grounds.<sup>144</sup> The heirs described Congress' allocation of funds for provenance research in the Holocaust Victims Redress Act without also creating any federal cause of action as "taunting Holocaust victims by providing them with information to help them locate Nazi-confiscated assets, while denying them a judicial remedy to reclaim their property if they can find it."<sup>145</sup>

Since then, more declaratory judgment actions have been filed to ward off potential claims to artworks with ownership histories showing a transfer during the Nazi era, especially where the transfer lacks certain indicia of looting, Aryanization, or forced auction.<sup>146</sup> The claimants argue that all artworks sold by Jews into the depressed

---

<sup>140</sup> Significant portions of Part V and Part VI of this Article reproduce the author's work in Jennifer Anglim Kreder, *U.S. Declaratory Judgment Actions Concerning Art Displaced During the Holocaust*, 4 KUNSTRECHTSSPIEGEL 181 (2008) (University of Heidelberg, Germany).

<sup>141</sup> Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 803 (N.D. Ohio 2006); Detroit Inst. of Arts v. Ullin, No. 06-10333, 2007 WL 1016996, at \*1 (E.D. Mich. Mar. 31, 2007). For more detail, see Jennifer Anglim Kreder, *U.S. Museums' Use of Declaratory Judgment Actions in Nazi-Looted Art Disputes*, ART, CULTURAL INSTITUTIONS & HERITAGE L. COMMITTEE NEWSL. (Int'l Bar Ass'n, Legal Practice Div., London, U.K.), Oct. 2007, at 7-8 [hereinafter Kreder, *U.S. Declaratory Judgment Actions*].

<sup>142</sup> Compare *supra* Part II, with *infra* Parts V.A-B.

<sup>143</sup> See Kreder, *U.S. Declaratory Judgment Actions*, *supra* note 141, at 7-8.

<sup>144</sup> See *infra* Part V.A.

<sup>145</sup> Reply Brief of Appellants at 12, Orkin v. Taylor, 487 F.3d 734 (9th Cir. 2007) (No. 05-55364). See generally Alexandra Minkovich, Note, *The Successful Use of Laches in World War II-Era Art Theft Disputes: It's Only a Matter of Time*, 27 COLUM. J.L. & ARTS 349 (2004).

<sup>146</sup> See *infra* Parts V.A-B.

art market after Hitler's rise to power in 1933, and the resulting economic oppression of Jews, should be considered "duress sales" or "forced sales" and the artwork should be restituted.<sup>147</sup> According to the claimants, the concept of an illegal "forced sale" includes sales made because of the general economic pressure put on Jews by the Nuremberg laws, not limited to just those sales made pursuant to either a specific Nazi decree applicable to the artwork at issue or the express threat of physical harm for failing to transfer the specific artwork.<sup>148</sup> The declaratory actions are inviting U.S. judges to draw the line between forced and voluntary sales—and to decide who must bear the burden of proof.<sup>149</sup>

#### A. *Museums Against Nathan Heirs*

Without filing suit, the Nathan heirs asserted claims to *The Diggers* by Vincent Van Gogh, located in the Detroit Institute of Arts, and *Street Scene in Tahiti* by Paul Gauguin, located in the Toledo Museum of Art.<sup>150</sup> The heirs claimed the paintings were sold under duress.<sup>151</sup> The museums, however, claimed the sales were voluntary and for fair market value in 1938—after Ms. Nathan emigrated to Paris from Frankfurt.<sup>152</sup>

According to the claimants, after Ms. Nathan emigrated, she was forced to relinquish property she had left behind in Germany.<sup>153</sup> The paintings, however, were not among that property.<sup>154</sup> The paintings were located in Switzerland.<sup>155</sup> In December 1938, a year and a half

---

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> The importance of such a distinction is not limited to Nazi-era art claims. See generally Stuart P. Green, *Looting, Law, and Lawlessness*, 81 TUL. L. REV. 1129 (2007) (analyzing the continuum of looting as a range from predatory and exploitive to ordinary acts of burglary and larceny committed out of necessity during Hurricane Katrina).

<sup>150</sup> Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 803 (N.D. Ohio 2006); Detroit Inst. of Arts v. Ullin, No. 06-10333, 2007 WL 1016996, at \*1 (E.D. Mich. Mar. 31, 2007).

<sup>151</sup> See Toledo Museum of Art, 477 F. Supp. 2d at 804–05; Detroit Inst. of Arts, 2007 WL 1016996, at \*1.

<sup>152</sup> See Toledo Museum of Art, 477 F. Supp. 2d at 805; Detroit Inst. of Arts, 2007 WL 1016996, at \*1.

<sup>153</sup> See Toledo Museum of Art, 477 F. Supp. 2d at 805; Detroit Inst. of Arts, 2007 WL 1016996, at \*2.

<sup>154</sup> See Toledo Museum of Art, 477 F. Supp. 2d at 804; Detroit Inst. of Arts, 2007 WL 1016996, at \*1.

<sup>155</sup> See Toledo Museum of Art, 477 F. Supp. 2d at 804–05; Detroit Inst. of Arts, 2007 WL 1016996, at \*1.

after emigrating to Paris, she sold *Street Scene in Tahiti* and *The Diggers*—for approximately \$6,000 and \$9,360, respectively—to a group of three prominent Jewish art dealers who had known her for many years.<sup>156</sup> In May 1939, the Toledo Museum of Art bought *Street Scene in Tahiti* from Wildenstein & Company for \$25,000.<sup>157</sup> In 1969, the Detroit Institute of Arts received *The Diggers* as a donation from collector Robert H. Tannahill, who bought it in 1941 for \$34,000.<sup>158</sup> *Street Scene in Tahiti* is currently estimated to be worth between \$10 and \$15 million.<sup>159</sup> *The Diggers* is estimated at \$15 million.<sup>160</sup>

In January 2006, the Toledo Museum of Art filed suit in the U.S. District Court for the Northern District of Ohio to quiet title to *Street Scene in Tahiti*.<sup>161</sup> The heirs then counterclaimed for conversion and restitution.<sup>162</sup> On December 28, 2006, the court ruled that the Ohio four-year statute of limitations, modified by the discovery rule, controlled the case.<sup>163</sup> In essence, the discovery rule provides that, in certain cases, the statute of limitations will not begin to run until the claimant has, or should have, knowledge of the claim and the correct entity to sue.<sup>164</sup> The discovery rule is applied to conversion and restitution cases in the majority of U.S. states with some variation.<sup>165</sup> Without making a determination as to exactly when the statute of limitations began to run under the discovery rule, the court found the claim time-barred because the painting was openly displayed in

<sup>156</sup> *Toledo Museum of Art*, 477 F. Supp. 2d at 804–05; *Detroit Inst. of Arts*, 2007 WL 1016996, at \*1.

<sup>157</sup> *Toledo Museum of Art*, 477 F. Supp. 2d at 805.

<sup>158</sup> *Detroit Inst. of Arts*, 2007 WL 1016996, at \*1; *Legal Battle Ends over Nazi-Era Gauguin, Van Gogh*, ARTNET MAG., May 15, 2007, <http://www.artnet.com/magazineus/news/artnetnews/artnetnews5-15-07.asp>.

<sup>159</sup> Tahree Lane, *Judge Rejects Claim to Gauguin Painting*, TOLEDO BLADE (Ohio), Dec. 29, 2006, <http://toledoblade.com/apps/pbcs.dll/article?AID=/20061229/NEWS15/612290337/-1/NEWS>.

<sup>160</sup> Mark Stryker, *Heirs Ask DIA to Pay: \$15 Million Van Gogh in Dispute*, DETROIT FREE PRESS, Apr. 28, 2006.

<sup>161</sup> *Toledo Museum of Art*, 477 F. Supp. 2d at 805.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 808–09.

<sup>164</sup> *See, e.g., id.* at 807. *See generally* Lauren F. Redman, *A Wakeup Call for a Uniform Statute of Limitations in Art Restitution Cases*, 15 UCLA ENT. L. REV. 203 (2008); Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L.J. 955, 1005 n.258 (2001).

<sup>165</sup> *See generally, e.g., Redman, supra note 164; Reyhan, supra note 164.*

Toledo and internationally since 1939 with public acknowledgment of Ms. Nathan's prior ownership.<sup>166</sup> Ms. Nathan died of natural causes in 1958.<sup>167</sup> By that time, she had pursued her other Aryanized and liquidated property but she never asserted any claims to the paintings, which, in the court's view, she easily could have done if she believed she had valid claims.<sup>168</sup> Moreover, in 1958, there was an accounting of Ms. Nathan's estate, and additional Holocaust-related claims were asserted as to other property.<sup>169</sup>

The court also held that the fact that the museum had posted information related to the painting on its website, in accordance with the AAM guidelines, did not waive the museum's time-bar defenses.<sup>170</sup> After investigating the Nathan heirs' claim, the Toledo Museum of Art concluded that it was most appropriate to deny the claim and file a declaratory judgment action against the heirs.<sup>171</sup> This approach is not expressly contemplated by the AAM guidelines, but the guidelines should not be interpreted to mean that every claim should be honored regardless of what provenance research subsequently reveals.<sup>172</sup>

Perhaps most controversial is the court's statement as to the importance of U.S. congressional hearings since 1998 concerning Nazi looting. The court stated, arguably in dicta:

At the very latest, sixty years after the sale of the Painting, the public debate surrounding Nazi-era assets should have led the Nathan heirs to inquire into the location of her former assets. Based upon Martha Nathan's own previous claims, as well as those of her estate, the heirs knew she was persecuted by the Nazis and sustained wartime losses. This knowledge would have led a reasonable person to make further inquiries.<sup>173</sup>

In early 2006, the Detroit Institute of Arts also filed a declaratory judgment action in a federal court in Michigan against the Nathan heirs in regard to *The Diggers*.<sup>174</sup> On March 31, 2007, the court ruled

---

<sup>166</sup> *Toledo Museum of Art*, 477 F. Supp. 2d at 808.

<sup>167</sup> *Id.* at 805.

<sup>168</sup> *Id.* at 807.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 808.

<sup>171</sup> *Id.* at 805.

<sup>172</sup> See *supra* Introduction (discussing AAM guidelines).

<sup>173</sup> *Toledo Museum of Art*, 477 F. Supp. 2d at 807.

<sup>174</sup> *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996, at \*1 (E.D. Mich. Mar. 31, 2007).

against the Nathan heirs using similar, but not identical, logic to that of the court in the *Toledo Museum of Art* case.<sup>175</sup> In contrast, the Michigan court ruled that the discovery rule did not apply because Michigan policy favors market certainty in cases alleging commercial conversion.<sup>176</sup> Thus, the court expressly ruled that the claim accrued in 1938, which means the three-year Michigan statute of limitations expired in 1941.<sup>177</sup> This precedent will make claimants' negotiating positions regarding art presently located in Michigan quite weak.

### B. *The Schoeps Cases*

Paul von Mendelssohn-Bartholdy was "a prominent and affluent German banker and art collector, patriarch of one branch of an extraordinarily distinguished German family of Jewish descent, representative of that branch of the family as a director of Mendelssohn & Co. Bank, and proprietor of the ancestral estate outside of Berlin, Schloss Börnicke."<sup>178</sup> In 1927, he married his second wife, Elsa Lucy Emmy Lolo von Lavergue-Peguillen (later Countess Kesselstatt), who was not Jewish.<sup>179</sup>

Mr. Mendelssohn-Bartholdy had bequeathed *The Absinthe Drinker* (*Angel de Soto*) by Pablo Picasso to his second wife, who was "Aryan" under Nazi laws.<sup>180</sup> Transferring wealth to an Aryan family member or friend via a "Verfolgten-Testament" was a common practice to try to insulate property from Nazi expropriation, and, thus, the validity of the wife's title came into question.<sup>181</sup> The second wife seemingly sold the painting to art dealer Justin K. Thannhauser, and the painting was then transferred to New York within the next two to four years, where it was subsequently bought and sold multiple times before eventually being purchased by the Andrew Lloyd Webber Art

---

<sup>175</sup> *Id.* at \*2–3.

<sup>176</sup> *Id.* at \*3.

<sup>177</sup> *Id.*

<sup>178</sup> Complaint for Declaratory Relief ¶ 2, *Museum of Modern Art v. Schoeps*, 549 F. Supp. 2d 543 (S.D.N.Y. 2008) (No. 07 CV 11074), 2007 WL 5161566 [hereinafter Complaint, *Schoeps*].

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* ¶¶ 28, 35.

<sup>181</sup> *Schoeps v. Andrew Lloyd Webber Art Found. (Schoeps I)*, No. 116768/06, 2007 WL 4098215, at \*1 (N.Y. Sup. Ct. Nov. 19, 2007).

Foundation.<sup>182</sup> In 2006, a suit was filed by Julius Schoeps, an heir of Mr. Mendelssohn-Bartholdy, after an attempted auction.<sup>183</sup>

The case was dismissed on the grounds that Mr. Schoeps could not initiate a suit on behalf of the entire estate without complying with additional requirements.<sup>184</sup> He reportedly intends to re-file the suit against the Andrew Lloyd Webber Art Foundation after complying with the requirements.<sup>185</sup>

The Museum of Modern Art and the Solomon R. Guggenheim Foundation subsequently filed a complaint for declaratory relief in the U.S. District Court for the Southern District of New York as to *Boy Leading a Horse* (1906) and *Le Moulin de la Galette* (1909), both painted by Pablo Picasso, against Mr. Schoeps.<sup>186</sup> Both paintings' ownership histories, like that of *The Absinthe Drinker*, have identical original ownership by Paul Robert Ernst von Mendelssohn-Bartholdy and subsequent ownership by the art dealer Thannhauser.<sup>187</sup> The Museums alleged that Mr. Mendelssohn-Bartholdy gave the paintings to his second wife as a wedding gift in 1927, and hence the paintings were excluded from his will, which was executed by his estate in May 1935 after his death from heart problems.<sup>188</sup>

Mr. Schoeps maintained that Mr. Mendelssohn-Bartholdy never gifted the paintings to his second wife.<sup>189</sup> Schoeps argued that, after the Nuremberg laws began to devastate Mendelssohn-Bartholdy's wealth, he secretly sent the paintings on commission to Mr. Thannhauser in Switzerland.<sup>190</sup> Further, Schoeps maintained that Mendelssohn-Bartholdy died unexpectedly of heart complications never having told anyone about his secret.<sup>191</sup> Mr. Schoeps pointed to interesting documentation from Thannhauser's files, described below, to support his argument that Mr. Thannhauser either stole the

---

<sup>182</sup> *Id.*; Complaint, *Schoeps*, *supra* note 178, ¶¶ 33–35.

<sup>183</sup> *Schoeps I*, 2007 WL 4098215, at \*1.

<sup>184</sup> *Id.* at \*2.

<sup>185</sup> Anemona Hartocollis, *Judge Refuses to Halt Auction of a Picasso*, N.Y. TIMES, Nov. 8, 2006, at B6.

<sup>186</sup> Complaint, *Schoeps*, *supra* note 178, ¶ 1.

<sup>187</sup> *Id.* ¶¶ 1, 2.

<sup>188</sup> *Id.* ¶ 2.

<sup>189</sup> See First Amended Counterclaim ¶ 27, *Museum of Modern Art v. Schoeps*, 549 F. Supp. 2d 543 (S.D.N.Y. 2008) (No. 07 CV 11074 (JSR)), 2008 WL 2308984 [hereinafter Counterclaim, *Schoeps*].

<sup>190</sup> *Id.* ¶ 46.

<sup>191</sup> *Id.* ¶ 48.

paintings after Mr. Mendelssohn-Bartholdy's death or bought them for a price far below fair market value.<sup>192</sup>

Mr. Thannhauser was a prominent Jewish art dealer in Berlin who fled Germany in 1937.<sup>193</sup> He continued as a prominent art dealer and collector, first in Paris and then in New York, until his death in 1976.<sup>194</sup> After the war, Mr. Thannhauser actively sought the return of many artworks on behalf of himself and those who had consigned works to him.<sup>195</sup> After his death, his extensive records were archived to assist in future restitutions.<sup>196</sup> Much of his art collection was donated to the Museum of Modern Art.<sup>197</sup>

Mr. Thannhauser was an active purchaser of art from European Jews, at least through 1939.<sup>198</sup> For example, Thannhauser was one of the three Jewish art dealers who purchased *The Diggers* (1899) and *Street Scene in Tahiti* (1891) from Ms. Nathan in 1938.<sup>199</sup> Additionally, Thannhauser's name was in the ownership history of *Femme en Blanc* (1922), the subject of the litigation between Alsdorf and Bennigson described above.<sup>200</sup>

Mr. Schoeps's suit compels one to ask whether Mr. Thannhauser's purchases should be viewed as benevolent acts, neutral business, or immoral profiteering. Schoeps plainly asserted the latter:

Thannhauser trafficked in stolen and Nazi-looted art during his career as a dealer. Both during and after World War II, Thannhauser partnered with art dealers such as Nazi Cesar Mange de Hauke and Albert Skira, both of whom the U.S. State Department and others identified as traffickers in Nazi-looted art.<sup>201</sup>

There is no doubt that Thannhauser's family would vehemently deny the allegation that Mr. Thannhauser acted immorally, particularly in

---

<sup>192</sup> *Id.* ¶¶ 29, 48.

<sup>193</sup> Complaint, *Schoeps*, *supra* note 178, ¶ 24.

<sup>194</sup> *Id.* ¶¶ 1, 24.

<sup>195</sup> *Id.* ¶ 44.

<sup>196</sup> *See id.* ¶¶ 43, 44.

<sup>197</sup> *Id.* ¶ 1.

<sup>198</sup> *Id.* ¶¶ 1, 24.

<sup>199</sup> *See supra* Part V.A.

<sup>200</sup> *See supra* Part III.

<sup>201</sup> Answer and Counterclaim ¶ 40, *Museum of Modern Art v. Schoeps*, 549 F. Supp. 2d 543 (S.D.N.Y. 2008) (No. 07 CV 11074 (JSR)), 2008 WL 1982812 (citing Maureen Goggin & Walter V. Robinson, *Murky Histories Cloud Some Local Art*, BOSTON GLOBE, Nov. 9, 1997, at A1).

light of his post-war efforts to assist Jews seeking restitution of works sent to him on commission.<sup>202</sup> However, this is not the first time accusations regarding Thannhauser's wartime conduct have been made.<sup>203</sup>

Logically, Schoeps lacked any documentary evidence supporting his views that Mr. Mendelssohn-Bartholdy never gifted the paintings to his second wife and only secretly sent the paintings to Thannhauser on commission. Schoeps stated the following:

[T]he Museums' claims that Mendelssohn-Bartholdy gifted all of his art collection to Elsa in 1927 at the time of their wedding is far-fetched. There is no record of such a gift any time near the wedding. Indeed, the only evidence of any Mendelssohn-Bartholdy transfer of art to Elsa is Mendelssohn-Bartholdy's February 1935 Contract for the Disposition of Property, which Schoeps will establish was a mere device to protect the Paintings from Nazi predation by creating a false impression that Elsa was the owner from 1927 forward.<sup>204</sup>

Mr. Schoeps described the sale as "a textbook example of a 'fencing' operation for stolen merchandise and a conspiracy to traffic in stolen art."<sup>205</sup> Schoeps relied, in part, on William S. Paley, the founder and chairman of CBS, for the following rendition of the sale in 1936:

Thannhauser—while peering through a window outside watching the sale go down—used Swiss art dealer Albert Skira (who later developed a reputation as a notorious trafficker in Nazi-looted art) to make the sale to Paley in Switzerland, already widely known as a venue for unloading Nazi-looted art. In addition, Skira seemed desperate to make the sale. He and Thannhauser were offering *Boy Leading a Horse* for an artificially low price, and Skira even refused

---

<sup>202</sup> See Complaint, *Schoeps*, *supra* note 178, ¶ 44.

<sup>203</sup> Goggin & Robinson, *supra* note 201, at A1.

<sup>204</sup> Answer and Counterclaim, *supra* note 201, ¶ 42.

<sup>205</sup> *Id.* ¶ 41. Additionally, the Art Loss Register's letter provided to the Museum of Modern Art in the course of its provenance research states in part:

Paul von Mendelssohn-Bartholdy, Berlin might have been related to Francesco Mendelssohn, whose collection underwent a forced sale. The Thannhauser archives are in Geneva now, and the name generally does not mean good things. Sigfried Rosengart records are now in Lucerne, Swit[z]erland. It might be worth checking with them to get a date of sale, as Albert Skira is a red flag list name, although [sic] it might be alright as the painting went to New York so early on.

*Id.* at Exhibit 2 (Letter from Lucy Haverland, Art Loss Register to Christel Hollevoet-Force, Research Assistant, Provenance, Museum of Modern Art (Sept. 18, 2001) (The next 1.5 pages are redacted, but it is not stated by whom or why. The remainder was omitted by the author.)).



to tell Paley who the owner was. Yet, somehow the “modest” price for *Boy Leading a Horse* enabled Skira, Thannhauser—and possibly another dealer, Rosengart—to make enough of a profit that it was worth driving the entire length of Switzerland through the Alps to make sure the sale occurred. . . . Moreover, any time Thannhauser was asked about the provenance of these five significant Picasso artworks he obtained from the well-known Mendelssohn-Bartholdy, Thannhauser was uncharacteristically vague and non-specific. For example, in 1964 when he sold *Madame Soler* to the Pinakothek der Moderne Museum in Munich, Thannhauser provided detailed information regarding the history of *Madame Soler*. However, when it came [time] to [provide] past owners (provenance), Thannhauser merely inserted “Sammlung (collection) Paul von Mendelssohn-Bartholdy” without providing any dates—the only entry on the page with no dates. . . . When Thannhauser donated *Le Moulin de la Galette* and *Head of a Woman* to the Guggenheim, he was equally vague. Thannhauser stated that he acquired *Le Moulin de la Galette* from Mendelssohn-Bartholdy “ca. [around] 1935.”<sup>206</sup>

As the parties had opposing views of the evidence, the determination of which party would bear the burden of proof in the litigation was extremely important. Schoeps’s Answer laid out the legal theories supporting his expansive view of the term “forced sales” and how, in his view, the applicable law requires a presumption of this classification as to *all* transfers of property from a Jew to a non-Jew in Nazi Germany between 1933 and 1945.<sup>207</sup> Such a presumption would be almost akin to placing the burden of proof upon the museums. The museum’s Complaint tried to head off this argument:

Even if there were such a presumption of duress, that presumption is rebutted by the evidence. The facts and circumstances establish that both von Mendelssohn-Bartholdy and his wife were free to decide whether or not to sell their artwork, were free to move artwork in and out of Germany without discrimination, were not under financial pressure to sell as the Paintings represented a negligible percentage of their net worth, and neither the German State nor the Nazi party played any role in directing, urging or otherwise threatening any adverse consequences if the Paintings were not sold to Thannhauser. . . . The allegation

---

<sup>206</sup> *Id.* ¶ 41 (quoting WILLIAM S. PALEY, AS IT HAPPENED: A MEMOIR 107 (1979)) (citations omitted) (third alteration in source). Schoeps relies on a document from Pinakothek der Moderne that was given to the Museum of Modern Art by Thannhauser in, or around, 1964, which is attached to the Answer and Counterclaim as Exhibit 3, and Guggenheim records, which are attached as Exhibits 4 and 5.

<sup>207</sup> Counterclaim, *Schoeps*, *supra* note 189, ¶ 51. Primarily, he relied on Military Government Law No. 59, a U.S. law addressing restitution of property following World War II, and related European post-war restitution laws.

that the Nazi government would force von Mendelssohn-Bartholdy and his wife to sell the Paintings to the Jewish art dealer Thannhauser, whom they knew and with whom they had done business for years, is completely implausible, as is the claim that they had to sell the Paintings because Nazi persecution had left them impoverished.<sup>208</sup>

Mr. Schoeps advocated for an aggressive shift of the burden of proof in all cases involving claims for art transferred during the Nazi era—like the burden of proof shift that was advocated unsuccessfully in *Orkin*.<sup>209</sup>

In January, the *Schoeps II* court performed a “substantial interest” conflicts analysis based on New York choice-of-law rules to determine which nation’s law would control various aspects of the case.<sup>210</sup> The court held that German law “plainly” controlled whether the painting was transferred to the second wife under duress conditions.<sup>211</sup> The court applied the five factors relevant to an interest analysis in a contract case—as to the initial sale by the second wife, not as to the subsequent sales in Switzerland or New York.<sup>212</sup> Those factors are as follows: (1) place of contracting, (2) place of negotiation, (3) place of performance, (4) location of the subject matter of the contract, and (5) domicile or place of business of the contracting parties.<sup>213</sup> The court rejected the argument out of hand, and neither party even raised the idea that Swiss law might apply to the issue, even though one theory of the facts was that the painting was in Switzerland as long as four years.<sup>214</sup>

As to the issue of the “validity and legal effect of the sale” of the painting in Switzerland, a separate conflicts analysis was necessary to determine whether “that sale . . . might create a ‘good faith purchaser’ defense for the [possessor] even if the transfer [in Germany] were infected with duress.”<sup>215</sup> The issue was essential because Swiss and New York law, the two potentially relevant laws, are diametrically opposed in terms of whether the present-day possessor might be able

---

<sup>208</sup> Complaint, *Schoeps*, *supra* note 178, ¶ 55.

<sup>209</sup> Counterclaim, *Schoeps*, *supra* note 189, ¶ 53.

<sup>210</sup> *Schoeps v. Museum of Modern Art (Schoeps II)*, 594 F. Supp. 2d 461, 468 (S.D.N.Y. 2009).

<sup>211</sup> *Id.* at 465.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 465 n.5.

<sup>215</sup> *Id.* at 467.

to credibly assert such a defense.<sup>216</sup> Under New York law, it is by now axiomatic that one cannot obtain title from a thief unless—under narrow circumstances—the present-day possessor’s title traces to someone with whom the original owner voluntarily entrusted the art.<sup>217</sup>

In applying interest analysis, the court noted:

In disputes over transfers of personal property, interest analysis will often lead to the conclusion that the law of the forum where the transfer took place applies . . . . But such a result is not inevitable, and where another forum has a more significant relationship to the parties and the property, that forum’s law will apply. . . . *In particular, when the parties did not intend that the property would remain in the jurisdiction where the transfer took place, that forum will have a lesser interest in having its law applied.*<sup>218</sup>

In sum, New York law applied because: (1) the painting was immediately shipped from Switzerland to New York, (2) the painting was paid for by a check made out to a New York bank, (3) none of the purported owners were Swiss residents or citizens at the relevant time, and (4) the painting had been in New York seventy years, mainly housed in a major New York cultural institution.<sup>219</sup> *Schoeps II* was set for trial in February 2009, but the case was settled on the courthouse steps.<sup>220</sup> Judge Rakoff indicated that the parties would have to show cause why their settlement should remain confidential,

---

<sup>216</sup> *Id.* (citing *Bakalar v. Vavra*, No. 05 Civ. 3037(WHP), 2008 WL 4067335, at \*6 (S.D.N.Y. Sept. 2, 2008); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1400 (S.D. Ind. 1989)).

<sup>217</sup> N.Y. U.C.C. LAW § 2-403(2) (McKinney 2002) (“Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.”); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429 (N.Y. 1991) (“New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of a good-faith purchaser for value . . . .”); *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829, 833 (E.D.N.Y. 1981) (“It is a fundamental rule of law in New York that a thief or someone who acquires possession of stolen property after a theft ‘cannot transfer a good title even to a bona fide purchaser for value . . . .’”).

<sup>218</sup> *Schoeps II*, 594 F. Supp. 2d at 468 (emphasis added) (citations omitted); *see also Kunstsammlungen zu Weimar*, 536 F. Supp. at 846 (noting that the German *Ersitzung* commercial certainty policy “does not extend to transactions which take place beyond its borders”).

<sup>219</sup> *Schoeps II*, 594 F. Supp. 2d at 468. All parties and the court agreed that New York law controlled the issue of laches. *Id.*; *see also infra* Part VII.B (discussing both statute of limitations and laches conflict-of-law analyses).

<sup>220</sup> Larry Neumeister, *Picasso Paintings to Stay at NYC Museums*, ASSOCIATED PRESS, Feb. 2, 2009, available at <http://abcnews.go.com/Entertainment/wireStory?id=6787661>.

noting the historical importance of the case.<sup>221</sup> He stated, “I find it extraordinarily unfortunate that the public will be left without knowing what the truth is.”<sup>222</sup> In the end, the settlement remained confidential despite the museum’s agreement to waive the confidentiality provisions of the settlement and Judge Rakoff’s urging the plaintiffs to change their stance on confidentiality in the future.<sup>223</sup>

### C. *Seger-Thomschitz Claims*

Meanwhile, the Museum of Fine Arts in Boston filed a declaratory judgment action in the U.S. District Court for the District of Massachusetts on January 22, 2008, which it recently won on summary judgment.<sup>224</sup> This case concerns a claim to *Two Nudes (Lovers)* (1913) by Oskar Kokoschka asserted by Dr. Claudia Seger-Thomschitz.<sup>225</sup> The museum alleged that the sale by Dr. Oskar Reichel, a Jewish doctor, art collector, and owner of a Viennese gallery that was Aryanized, after the *Anschluss* of Austria, into the Third Reich on March 12, 1938, was voluntary.<sup>226</sup> The purchaser of the painting (and three other Kokoschka paintings) was Otto Kallir, a Viennese art dealer who had moved to Paris by the time of the sale in February 1939.<sup>227</sup> The museum alleged that Dr. Reichel and Mr. Kallir had known each other for many years and often had done business together.<sup>228</sup> In 1943, Reichel died in Vienna of natural causes.<sup>229</sup>

When Dr. Reichel’s son asserted post-war restitution claims to Reichel’s art collection via a Viennese lawyer, he never sought

---

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*; see also Marilyn Henry, *Metro Views: Exploiting the Restitution Environment*, JERUSALEM POST, Apr. 1, 2009, at 13, available at <http://www.jpost.com/servlet/Satellite?cid=1238423654502&pagename=JPArticle%2FShowFull> (arguing that the confidential details of the *Schoeps II* settlement should be revealed).

<sup>223</sup> See Memorandum Order at 5–6, *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461 (S.D.N.Y. 2009) (No. 07 Civ. 11074 (JSR)).

<sup>224</sup> *Museum of Fine Arts, Boston v. Seger-Thomschitz*, No. 08-10097-RWZ (D. Mass. May 28, 2009).

<sup>225</sup> Complaint for an Order Quieting Title to Property, Declaratory Judgment, and Injunctive Relief ¶ 1, *Museum of Fine Arts, Boston v. Seger-Thomschitz*, No. 08-10097-RWZ (D. Mass. May 28, 2009) [hereinafter Complaint, *Seger-Thomschitz*].

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* ¶ 3.

recovery of the Kokoschka paintings.<sup>230</sup> *Two Nudes (Lovers)* was subsequently purchased by another dealer and sold to Sarah Blodgett either in late 1947 or early 1948, and she subsequently bequeathed it to the museum upon her death in 1972.<sup>231</sup> It has been publicly displayed since.<sup>232</sup>

Dr. Seger-Thomschitz made factual allegations that, had they been sufficiently proven, could have provided the court with sufficient grounds to clarify the line between forced and voluntary sales, as well as refine the statute of limitations and laches analyses in such cases.<sup>233</sup> Dr. Seger-Thomschitz argued that it is excusable that the son pursuing post-war restitution did not know of his father's claims to the Kokoschka paintings because of the dispersal of the family resulting from Nazi persecution, including the murder of one of Dr. Reichel's sons in 1940 or 1941.<sup>234</sup> Another son, Hans, fled Austria by June 1938.<sup>235</sup> A third son, Raimund, fled in March 1939.<sup>236</sup> In November 1938, Reichel's art gallery, including its paintings, which were mostly by Romako, was liquidated because of his Jewish heritage.<sup>237</sup> The family's apartment house was liquidated in 1941.<sup>238</sup> In January 1943, Dr. Reichel's wife, Malvine, was deported to Theresienstadt where she survived the war and eventually joined Hans in the United States.<sup>239</sup>

The brothers' post-war restitution application included a notarized statement by Raimund asserting that "[a] large art collection [owned by my father] was sold by force: 47 pictures by the painter Anton Romako."<sup>240</sup> No mention was made of the Kokoschka paintings,<sup>241</sup> but Dr. Reichel died after his wife had been deported to Theresienstadt and his sons had already fled; the sons only had their

---

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* ¶ 2.

<sup>232</sup> *Id.*

<sup>233</sup> See Answer and Counterclaim, *Museum of Fine Arts, Boston v. Seger-Thomschitz*, No. 08-10097-RWZ (D. Mass. May 28, 2009) [hereinafter Counterclaim, *Seger-Thomschitz*].

<sup>234</sup> *Id.* ¶ 46, at 29–30.

<sup>235</sup> *Id.* ¶ 82, at 43.

<sup>236</sup> *Id.* ¶ 46, at 29–30.

<sup>237</sup> *Id.* ¶ 35, at 27.

<sup>238</sup> *Id.* ¶ 37, at 27.

<sup>239</sup> *Id.* ¶ 46, at 29–30.

<sup>240</sup> *Id.* ¶ 20, at 6.

<sup>241</sup> *Id.*

own recollections to rely on and would not have known about the Kokoschka paintings due to their lack of access to the Austrian records that contained Dr. Reichel's Property Declaration—at least until the records were first made public in 1993.<sup>242</sup>

Significantly, Exhibit 1 of the Answer and Counterclaim showed that Dr. Seger-Thomschitz herself was put on notice to investigate any remaining claims of Reichel's heirs when the Vienna Community Council for Culture and Science contacted her upon its own more recent review of Viennese public collections,<sup>243</sup> which, the court determined, was, at the latest, the moment that the limitations period began to run based on Massachusetts's discovery rule.<sup>244</sup> In a November 10, 2003, letter to Dr. Seger-Thomschitz expressing its conclusion that it must reconstitute certain Romako paintings, the Vienna Community Council for Culture and Science noted as follows:

In January 1939, Vita Künstler, whom Otto Kallir, after his escape to the USA, had appointed as director of the "New Gallery" . . . approached the Municipal Collections with offers of "particularly high-quality pictures by Romako," whom [sic] she "just so happened to have in the gallery." Thereafter, the Municipal Collections acquired five paintings by Anton Romako . . . .

It is certain that these paintings involved art objects from the property of Dr. Oskar Reichel and which, in connection with the power seizure by National Socialism, he had to sell due to his persecution as a Jew to the galleries mentioned . . . .<sup>245</sup>

Dr. Seger-Thomschitz argued that the fact that the Romako paintings were transferred to Mr. Kallir with payment transferred into blocked accounts is evidence of what likely happened in regard to the Kokoschka paintings, which also were listed on the Property Declaration.<sup>246</sup> However, the Answer and Counterclaim do not

---

<sup>242</sup> *Id.* ¶¶ 85–90, at 44–45.

<sup>243</sup> *Id.*

<sup>244</sup> *Museum of Fine Arts, Boston v. Seger-Thomschitz*, No. 08-10097-RWZ, slip op. at 19–20 (D. Mass. May 28, 2009).

<sup>245</sup> First Amended Answer and Counterclaim, Exhibit 1, at 2, *Museum of Fine Arts, Boston v. Seger-Thomschitz*, No. 08-10097-RWZ (D. Mass. May 28, 2008). The First Amended Answer and Counterclaim also states that "once the Painting was placed on Dr. Reichel's Property Declaration—which the Nazis required all Jews to file—the Painting was effectively confiscated and owned by the Nazi[s]." First Amended Answer and Counterclaim, *supra*, ¶ 13, at 4. Such an argument could give legal force to Nazi confiscation policy. The fact that Dr. Reichel had to list the painting may be a relevant factor in determining whether the sale actually was a farce, yet it should not be determinative of his ability to legally transfer title.

<sup>246</sup> *See id.* ¶¶ 48–52.

clearly allege that the proceeds of the sale, if any, of the Kokoschkas actually went into a blocked account.<sup>247</sup>

The key difference between the Romako paintings and the Kokoschka paintings is that Mr. Kallir managed to get the Kokoschka paintings out of Vienna. Thus, what had to be determined was whether Kallir and Dr. Reichel managed to defeat Nazi attempts to steal the Kokoschka paintings and actually reached a voluntary sale for an amount close to fair market value, or whether Kallir alone, or in conjunction with Viennese Nazis, stole the painting. The issue, however, now appears to be moot given that the court has granted the museum's motion for summary judgment on the basis that Dr. Seger-Thomschitz's claims are barred by the statute of limitations.<sup>248</sup>

Dr. Seger-Thomschitz was also sued in a declaratory action filed by a collector in the U.S. District Court for the Eastern District of Louisiana by the current holder of *Portrait of a Youth (Hans Reichel)* (1910), another painting by Oskar Kokoschka.<sup>249</sup> The facts are similar.

## VI

### ONE DECLARATORY JUDGMENT CASE GOES TO TRIAL AND IS APPEALED

*Bakalar v. Vavra* concerned a dispute between the heirs of Fritz Grunbaum and David Bakalar, who filed an action for declaratory judgment, tortious interference with contractual relations, and slander of title in regard to *Seated Woman with Bent Left Leg (Torso)*, a drawing by Egon Schiele.<sup>250</sup> As a prominent Jewish entertainer in Vienna with a significant art collection, Fritz Grunbaum was arrested eight days after the March 12, 1938, *Anschluss*.<sup>251</sup> He was shipped to Dachau Concentration Camp where he was forced to sign a power of

<sup>247</sup> Counterclaim, *Seger-Thomschitz*, *supra* note 233, ¶ 4, at 15–16 (“Indeed, in Dr. Reichel’s case in particular, preceding sales proceeds for his artworks had been placed in ‘blocked’ accounts accessible only to the Nazis. Upon information and belief, even if Kallir had made any payment to Dr. Reichel, the money would have ended up in a ‘blocked’ account and in exclusive Nazi hands.”); *see also id.* ¶ 52, at 32, ¶ 81, at 43.

<sup>248</sup> Museum of Fine Arts, Boston, slip op. at 23.

<sup>249</sup> *Dunbar v. Seger-Thomschitz*, 638 F. Supp. 2d 659, 661 (E.D. La. 2009).

<sup>250</sup> *Bakalar v. Vavra*, No. 05 Civ. 3037(WHP), 2008 WL 4067335, at \*1 (S.D.N.Y. Sept. 2, 2008); Complaint for Declaratory Relief ¶¶ 71–89, *Bakalar v. Vavra*, No. 05 Civ. 3037(WHP), 2008 WL 4067335, (S.D.N.Y. Sept. 2, 2008). The tortious interference and slander of title claims have since been voluntarily dismissed.

<sup>251</sup> *Bakalar*, 2008 WL 4067335, at \*3.

attorney certificate, before he died on January 14, 1941, to provide his wife, Elisabeth, with the legal power to manage his assets in accordance with Nazi law.<sup>252</sup> Nazi law, beginning April 26, 1938, forced Austrian Jews, including Elisabeth on Fritz's behalf, to sign property declarations listing their assets, specifically including art collections, for assessment by Nazi appraisers.<sup>253</sup> The pinnacle legal farce in this case is that, before being arrested and shipped off to her death in the Minsk Concentration Camp in October 1942, Elisabeth was forced to sign Fritz's death certificate, which stated that "there is no estate . . . [and] in the absence of an estate, there are no estate-related proceedings."<sup>254</sup>

The parties dispute whether Fritz's sister-in-law sold the artworks, the conditions under which any alleged sale occurred in 1956, and whether title could have transferred from Fritz after his arrest, but, regardless of the circumstances, the artworks were purchased by Eberhard Kornfeld, a partner in the Swiss art gallery Gutekunst & Klipstein.<sup>255</sup> The gallery was founded by Otto Kallir, whose historical reputation as someone who fled approaching Nazi persecution and rescued much modern art has been questioned in the Seger-Thomschitz litigation.<sup>256</sup> The gallery is known to have sold artworks seized by the Nazis.<sup>257</sup> It sold the Schiele drawing, approximately six months after purchasing it in 1956, to a New York gallery, which subsequently sold it to Mr. Bakalar in 1963.<sup>258</sup>

Interestingly, in an attempt to certify a defendant class of present-day possessors of Fritz Grunbaum's art, the Grunbaum heirs sought discovery from Galerie St. Etienne, Sotheby's, and Christie's, to identify owners or possessors of artworks previously belonging to Fritz Grunbaum and provenance documents for those artworks, an attempt which the trial court disallowed.<sup>259</sup> The trial court also

---

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*; ALY, *supra* note 11, at 42.

<sup>254</sup> *Bakalar*, 2008 WL 4067335, at \*4.

<sup>255</sup> *Id.* at \*2.

<sup>256</sup> *See supra* Part V.C.

<sup>257</sup> Vivian Endicott Barnett, *Rereading the Correspondence: Rebay and Kandinsky*, in *ART OF TOMORROW: HILLA REBAY AND SOLOMON R. GUGGENHEIM* 86, 99 (2005).

<sup>258</sup> *Bakalar*, 2008 WL 4067335, at \*1.

<sup>259</sup> *Bakalar v. Vavra*, 237 F.R.D. 59, 65 (S.D.N.Y. 2006).



denied Bakalar's motion for summary judgment on the defense of laches.<sup>260</sup>

Very significantly, on May 30, 2008, the district court ruled in limine that Austrian and Swiss law conflicted because Austrian law does not permit a good faith purchaser to acquire title to stolen property, Swiss law does, and Swiss law governed the drawing's title. The court denied a motion to reconsider on June 18, 2008.<sup>261</sup>

After a trial on the merits, the court found that Bakalar's title traces back to a sale by Fritz Grunbaum's sister-in-law, whom the court found received the painting as a gift from Elisabeth, then sold it to Kornfeld.<sup>262</sup> Although adopted as factual truth by the trial court, Kornfeld's testimony and the evidence of the 1956 sale have been questioned by an expert hired by the Grunbaum heirs.<sup>263</sup> Moreover, under the court's theory, the power of attorney signed by Fritz Grunbaum in Dachau must have given Elisabeth the power to make a valid gift of the painting to his sister-in-law in Nazi Vienna—after Fritz died intestate and shortly before Elisabeth was shipped off to her death.

As described below, there simply was no justification for applying Swiss law in any aspect of the case when the art simply passed through Switzerland for a few months.<sup>264</sup> As to whether title could have transferred from someone in Austria, Austrian law controls. As to a bona fide purchaser defense and the limitations periods, New York law controls because of its interest in preventing the transfer of stolen property within its boundaries. Under any other analysis, this case would set a precedent that title might have vested in an object under foreign law and then, because of time spent in New York, effectively divested. The U.S. Court of Appeals for the Second Circuit should clarify conflicts analysis for the benefit of claimants to and innocent purchasers of stolen art so that they may better evaluate the merits of claims and reach settlement without litigation.

---

<sup>260</sup> *Bakalar v. Vavra*, No. 05 Civ. 3037(WHP), 2006 WL 2311113, at \*4 (S.D.N.Y. Aug. 10, 2006).

<sup>261</sup> *Bakalar v. Vavra*, 550 F. Supp. 2d 548, 550–51 (S.D.N.Y. 2008).

<sup>262</sup> *Bakalar*, 2008 WL 4067335, at \*2.

<sup>263</sup> See Supplemental Expert Opinion, *Bakalar v. Vavra*, 2008 WL 4067335 (S.D.N.Y. Sept. 2, 2008) (No. 05 Civ. 3037(WHP)) (admitted into the Record by the Second Circuit in March 2009) (on file with author).

<sup>264</sup> See *infra* Part VII.A.

VII  
LOOKING TOWARD THE FUTURE

If the judges deciding the new U.S. cases allow them to move beyond the statute of limitations and laches phases,<sup>265</sup> these cases may lay further precedent for resolving future claims to art displaced during the Nazi era and clarify the line between forced and voluntary sales in the context of Nazi persecution. Below is a discussion of the key issues that remain unresolved.

*A. Proper Choice-of-Law Analysis*<sup>266</sup>

A federal court must apply the choice-of-law (conflicts) principles of the state in which it sits to determine applicable substantive law.<sup>267</sup> A conflicts analysis is necessary only where there is a “true conflict,” a meaningful difference in the potentially applicable laws of different jurisdictions.<sup>268</sup> Different law often controls different issues.<sup>269</sup>

For example, in cases of intestate succession, New York’s Estates, Powers and Trusts Law (EPTL) section 3-5.1(b)(2) governs choice of law for issues such as donative intent, undue influence, order of succession, revocatory effect of conduct of a testator, and the scope, effect, and validity of powers of appointment:

(b) Subject to the other provisions of this section: . . . (2) The intrinsic validity, effect, revocation or alteration of a testamentary disposition of personal property, and the manner in which such property devolves when not disposed of by will, are determined by

---

<sup>265</sup> In its statute of limitations and laches analyses, the court deciding *Toledo Museum of Art v. Ullin* found that widely reported events in 1998 factor into whether the claimant was put on notice of the need to search for lost art. 477 F. Supp. 2d 802, 807–08 (N.D. Ohio 2006).

<sup>266</sup> Significant portions of this section reproduce the author’s work in the Brief for Bernard Beliak et al. as Amici Curiae Supporting Defendants-Counter-Claimant-Appellants, *supra* note 45.

<sup>267</sup> *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941).

<sup>268</sup> *Md. Cas. Co. v. Cont’l Cas. Co.*, 332 F.3d 145, 151 (2d Cir. 2003).

<sup>269</sup> *E.g.*, *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 88–94 (2d Cir. 1998) (carefully applying separate choice-of-law analyses to copyright ownership, infringement, and remedies); *see also* *Warin v. Wildenstein & Co.*, Index No. 115143/99, 2001 WL 1117493 (N.Y. Sup. Ct. Sept. 4, 2001) (“In deciding which state has the prevailing interest, a court uses only those facts [and/or] contacts which relate to the purpose of the particular law in conflict. . . . Under this approach, the significant contacts are, almost exclusively, the parties’ domicile and the locus of the tort.” (citation omitted)).

the law of the jurisdiction in which the decedent was domiciled at death.<sup>270</sup>

The statute appears to be easily overlooked in litigation that tangentially raises probate issues but occurs outside of probate court.<sup>271</sup> For example, in *Southeast Bank, N.A. v. Lawrence*,<sup>272</sup> the New York Court of Appeals refused to reach the merits of an appeal concerning heirs' personal property claims because the parties, the Special Term of the New York Supreme Court, and the Appellate Division all assumed the substantive law of New York applied, and "[i]n doing so, all ha[d] overlooked the applicable choice of law principle . . . that questions concerning personal property rights are to be determined by reference to the substantive law of the decedent's domicile."<sup>273</sup>

Where there is a choice-of-law statute, there is no need to engage in a conflicts analysis.<sup>274</sup> No Nazi-era art case to date has applied New York's EPTL section 3-5.1(b)(2) or any of the choice-of-law statutes of other states, but not every stolen art case has involved tangential estate-type issues.<sup>275</sup> The Second Circuit Court of Appeals in *Bakalar* is being asked to consider applying EPTL section 3-51(b)(2) to the questions of whether Mr. Fritz's art collection was part

---

<sup>270</sup> N.Y. EST. POWERS & TRUSTS LAW § 3-5.1 (McKinney Supp. 2009). In the absence of an applicable statute, some of these issues could be seen as contractual, which would be governed by common law interest analysis as discussed below. See *Keoseian v. von Kaulbach*, 763 F. Supp. 1253 (S.D.N.Y. 1991), *aff'd*, 956 F.2d 1160 (2d Cir. 1992) (holding that Germany's strong interest in protecting its citizens who allegedly made gratuitous promises required applying common law).

<sup>271</sup> Perhaps the oversight occurs because courts are not accustomed to choice-of-law statutes. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. b (1971) [hereinafter RESTATEMENT] ("[A] court will rarely be directed by statute to apply the local law of one state, rather than the local law of another state, in the decision of a particular issue[.]").

<sup>272</sup> 489 N.E.2d 744 (N.Y. 1985).

<sup>273</sup> *Id.* at 745 (citations omitted); see also *De Werthein v. Gotlib*, 594 N.Y.S.2d 230 (App. Div. 1993); cf. *Grosshandels-Und Lagerei-Berufsgenossenschaft v. World Trade Ctr. Props., LLC*, 435 F.3d 136, 140 n.7 (2d Cir. 2006) (implicitly criticizing an earlier case for failing to undertake conflict-of-laws analysis and "void[ing] by judicial fiat the legislative choices of New York" in failing to apply other EPTL provisions); *Schoeps v. Andrew Lloyd Webber Art Found.*, No. 116768/06, 2007 WL 4098215, at \*4 (N.Y. Sup. Ct. Nov. 19, 2007) (citing *Grosshandels* with approval); RESTATEMENT, *supra* note 271, § 6 cmt. i (noting desire of "[u]niformity of result . . . when the transfer of an aggregate of movables, situated in two or more states, is involved").

<sup>274</sup> RESTATEMENT, *supra* note 271, § 6(1).

<sup>275</sup> See, e.g., *Rep. of Turkey v. Metro. Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990) (dealing with claims by Turkey to artifacts allegedly dug up illegally and smuggled out of country).

of his estate and whether anyone could have legally transferred property out of his estate. If it applies Austrian law, presumably including the 1946 Nullification Act, the court would likely invalidate Mr. Bakalar's title.

Where no conflicts statute is on point, most states, including New York, conduct an interest analysis in tort cases "under which the law of the jurisdiction having the greatest interest in the litigation is applied."<sup>276</sup> The leading conflicts case in the stolen art conversion context is *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*<sup>277</sup> Both the Seventh Circuit Court of Appeals and the Southern District of Indiana District Court appear to have entirely ignored the possibility that Cypriot law should apply, which actually would have been the most appropriate choice given that the artwork was stolen from and had the greatest connection to Cyprus. Instead, they applied a choice-of-law analysis based solely on the jurisdictional contacts of Indiana and Switzerland, which resulted in the determination that Indiana law applied.<sup>278</sup> The court reached the right result—restitution to Cyprus of stolen art attempted to be "cleaned" in a shady quick-sale in Switzerland—but based on faulty reasoning.<sup>279</sup> It is actually not uncommon in stolen art cases for the courts to either avoid conflicts analysis by stating that no true conflict exists, such as in *Autocephalous*, or to perform a conflicts analysis without full analysis of the options.<sup>280</sup>

---

<sup>276</sup> Curley v. AMR Corp., 153 F.3d 5, 12 (2d Cir. 1998); accord RESTATEMENT, *supra* note 271, § 145 (Torts General Principle); *id.* § 147 (Wrongs: Injuries to Tangible Things); *id.* § 147 cmt. b (conversion). Courts and scholars often utilize incorrect *Restatement (Second) of Conflict of Laws* provisions, seemingly interchanging §§ 145, 147 cmt. b, 244 (voluntary conveyance), 246 (Property: Acquisition by Adverse Possession or Prescription of Interest in Chattel), and 221 (Contracts: Restitution). See *id.* § 5 (stating conflicts rules "are as open to reexamination as any other common law rules" in accordance with applicable policy considerations); *id.* § 5 cmt. c (stating that "more drastic changes have recently been made in the common law rules of Conflict of Laws than in most other areas of the law, and it seems probable that this trend will continue").

<sup>277</sup> 917 F.2d 278 (7th Cir. 1990).

<sup>278</sup> *Id.* at 287.

<sup>279</sup> Symeon C. Symeonides, *A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property*, 38 VAND. J. TRANSNAT'L L. 1177, 1182 (2005).

<sup>280</sup> See O'Keefe v. Snyder, 416 A.2d 862, 879 (N.J. 1980) (Handler, J., dissenting) ("The majority simply sidesteps the question of which state's *tort* law ought to be applied to this case."); *Gemological Inst. of Am., Inc. v. Zarian Co., Inc.*, No. 03 Civ. 4119(RLE), 2006 WL 2239594, at \*5 (S.D.N.Y. Aug. 4, 2006) (avoiding conflict issue by holding that, even if the purchase occurred abroad, the party with the burden did not demonstrate that the purchase met the conditions of Israeli law to obtain title).

In contrast, other courts have erred by relying on the following quote from *Kunstsammlungen zu Weimar v. Elicofon*, which raised arguments equivalent to an adverse possession or prescription case and relied on *Restatement (Second) of Conflict of Laws* section 246: “[Q]uestions relating to the validity of a transfer of personal property are governed by the law of the state where the property is located at the time of the alleged transfer.”<sup>281</sup> When a painting has changed hands multiple times, with an original involuntary dispossession followed by voluntary transactions, it can be unclear to a court which transfer is relevant when determining choice of law. Indeed, the *Kunstsammlungen* court applied New York law under an interest analysis to the adverse possession claim<sup>282</sup> in order to “best promote . . . [New York] policy,”<sup>283</sup> even though all of the evidence indicated an American G.I. stole a fifteenth-century painting in Germany and sold it in Brooklyn in 1946—where it remained until its location was discovered by the claimant in 1966.<sup>284</sup> *Kunstsammlungen*, like *Autocephalous*, reached the right result, restitution of clearly stolen property to a claimant actively searching for it, but for the wrong reasons. It should have reached the result not by applying the law of New York, in which good title cannot be obtained from a thief, but rather by applying the law of Germany, where the fifteenth-century painting was stolen; in which case, it would have then had to determine whether the possession: (1) fell within the scope of the German adverse possession law, (2) met the German legal requirements of good faith, and (3) was continuous for the German statutory period.

Under any other analysis, title might have vested in an object under foreign law and then, because of time spent in New York, effectively divested. In the typical looted art case, the art simply passed through Switzerland, and, despite the common assumption in relevant literature,<sup>285</sup> there is simply no reason why Swiss law should control. A contrary analysis could have devastating effects upon the stability of the art market, particularly in New York.

---

<sup>281</sup> 536 F. Supp. 829, 845–46 (E.D.N.Y. 1981).

<sup>282</sup> *Id.* at 846.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 830–32.

<sup>285</sup> *E.g.*, Kunitz, *supra* note 67, at 525 (noting that “items are smuggled into Switzerland, and it is at that point that Swiss law becomes an issue”).

*B. Limitations Period, Laches, and Burdens of Proof*

As to limitations periods, local law controls. First, as the *Bakalar* lower court correctly pointed out in its May 30, 2008, opinion, both the New York limitations periods and laches principle apply without any need for conflicts analysis.<sup>286</sup> Nonetheless, all of the New York stolen art conversion cases cited by the lower court performed conflicts analysis on precisely these issues. *Warin v. Wildenstein & Co.*<sup>287</sup> relied on *Kunstsammlungen* and noted that the law of the state where the injury occurred governs the dispute, except in “extraordinary circumstances.”<sup>288</sup> Then, despite the fact that possession cannot be wrongful and, thus, trigger an injury until demand and refusal,<sup>289</sup> which in *Warin* occurred in New York after an attempted auction, the *Warin* court applied French law.<sup>290</sup> The court specifically noted that the claim would have been barred under either New York or French law; thus, there was no true conflict.<sup>291</sup> Similarly, the claim in *Greek Orthodox Patriarchate of Jerusalem v. Christie’s, Inc. (Greek Orthodox)*,<sup>292</sup> was extremely weak, and the court claimed to apply a foreign limitations period while noting that “the laches defense provides a basis for granting defendants’ motion for summary judgment whether French law or New York law applies.”<sup>293</sup> In sum, *Warin* and *Greek Orthodox* are being relied on

<sup>286</sup> *Bakalar v. Vavra*, 550 F. Supp. 2d 548, 550 (S.D.N.Y. 2008).

<sup>287</sup> No. 115143/99, 2001 WL 1117493 (N.Y. Sup. Ct. Sept. 4, 2001).

<sup>288</sup> *Id.*

<sup>289</sup> See *Charash v. Oberlin Coll.*, 14 F.3d 291, 297 (6th Cir. 1994) (“A conversion does not occur when there is only a taking of property from its rightful owner. A conversion occurs when someone exercises dominion over the property without the owner’s consent or authority.”); *Menzel v. List*, 253 N.Y.S.2d 43, 44 (App. Div. 1964), *modified on other grounds*, 279 N.Y.S.2d 608 (App. Div. 1967), *modification rev’d*, 246 N.E.2d 742 (N.Y. 1969) (“[A] demand by the rightful owner is a substantive, rather than a procedural, prerequisite to the bringing of an action for conversion by the owner . . . [and] the statute of limitations did not begin to run until demand and refusal.”).

<sup>290</sup> *Warin v. Wildenstein & Co.*, 746 N.Y.S.2d 282, 282 (App. Div. 2002).

<sup>291</sup> See *id.* at 282–83. After issuing its initial opinion affirming the lower court, the Appellate Division, First Department, issued a new opinion specifically noting that “contrary to the court’s holding, the defense of laches is available to defendants.” *Id.* at 283.

<sup>292</sup> No. 98 Civ. 7664(KMW), 1999 WL 673347 (S.D.N.Y. Aug. 30, 1999).

<sup>293</sup> *Id.* at \*3. Moreover, *Greek Orthodox* was an adverse possession and prescription case relying on *Restatement (Second) of Conflict of Laws* section 246, not a conversion case like *Bakalar*, which correlates to section 147, comment b. Even *Restatement (Second) of Conflict of Laws* section 191 (Contract to Sell Interest in Chattel), which controls in disputes between the contracting parties, has a “most significant relationship” carve-out.

for their conflicts analysis, which is questionable dicta. In claims arising in New York,<sup>294</sup> foreign law cannot preempt New York's laches principles or the three-year limitations period triggered by a demand and refusal.<sup>295</sup>

Second, the burden of proof lying with the possessor of allegedly stolen property when trying to prove title is as essential a part of New York law as is demand and refusal.<sup>296</sup> As stated in another New York case: "We recognize this burden to be an onerous one, but it well serves to give effect to the principle that '[p]ersons deal with the property in chattels or exercise acts of ownership over them at their peril.'"<sup>297</sup>

### C. *Factual Evidence of Involuntariness*

Holding, more than sixty years after the war, that all sales by Jews in Nazi territory will be presumed involuntary as a matter of law could lay the groundwork for an influx of claims that would otherwise lack merit. Consider the weight that such a presumption would give to plaintiffs, encouraging, for example, not only trivial claims, but also claims for items that simply lack sufficient documentation as to their sale. In short, such a solution risks shifting the balance of justice excessively toward claimants—to the point of doing injustice to

<sup>294</sup> *Hoelzer v. City of Stamford*, 722 F. Supp. 1106, 1112 (S.D.N.Y. 1989) (holding that because the contested property "is located in New York, any claim to it accrues in New York, and its statute of limitations applies" but implying that the injury arose at the place of initial improper taking of the property).

<sup>295</sup> See also *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829, 846 (E.D.N.Y. 1981) (noting that German *Ersitzung* commercial certainty policy "does not extend to transactions which take place beyond its borders"); *Interested Lloyd's Underwriters v. Ross*, No. 04 Civ. 4381(RWS), 2005 WL 2840330 (S.D.N.Y. Oct. 28, 2005) (applying New York law in voluntary entrustment scenario, even though contract stated title passed upon payment and the painting was shipped from Japan to New York after payment).

<sup>296</sup> See, e.g., *Lobel v. Am. Airlines, Inc.*, 192 F.2d 217, 219 (2d Cir. 1951); *In re Moffett's Estate*, 266 N.Y.S.2d 989, 991–92 (Sup. Ct. 1966) (holding that the law never presumes a gift). The final issue relevant to conflicts analysis in this case, is, as logic suggests, the predicate issue that the elements of conversion must be determined under local law before the relevant issue for a conflicts analysis can even be identified. RESTATEMENT, *supra* note 271, §§ 7–8. "Conversion is the 'unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights.'" *Vigilant Ins. Co. of Am. v. Hous. Auth.*, 660 N.E.2d 1121, 1126 (N.Y. 1995) (citations omitted).

<sup>297</sup> *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 624 (App. Div. 1990) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 15, at 93 (5th ed. 1984)) (alteration in source).

possessors. A more modest legal theory, such as implementing a presumption of forced sale as to transfers of items at prices significantly below fair market value—after the Nazi takeover of the territory where the particular sale was made—would be more justifiable.

Additionally, before sending a demand letter to a possessor of seemingly stolen art, claimants need to perform extensive art history research, often in many different archives in different countries and in various databases, to build a strong case. This needs to be done promptly after the claimants have an indication that they may have a claim so as to avoid a statute of limitations or laches defense. Present-day possessors will not give up valuable art easily. In 1998, it was hoped that museums would readily forfeit art in the face of valid claims, but the new declaratory judgment movement indicates that the museums must be convinced by very solid factual evidence—of theft, lack of post-war restitution, and, perhaps, lack of statute of limitations and laches defenses—before giving up art. “Claimant Beware” is a good mantra for claimants contemplating sending demand letters to present-day possessors before having all of the expensive art history research, analyzing the likely outcome of a choice-of-law analysis, and fully understanding potentially applicable foreign law, which will require foreign experts and be expensive.

#### CONCLUSION

In conclusion, any precedent set by the currently pending cases most likely would not favor claimants of flight assets sold at close to fair market value when there is no evidence of either looting or a direct link between the sale of the specific asset and a specific Nazi decree compelling its Aryanization or auction—although *Schoeps II* suggests that at least summary judgment can be avoided with the presentation of sufficient factual evidence to question the motivation behind the sale.<sup>298</sup> However, courts should look more closely to

---

<sup>298</sup> *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461, 466 (S.D.N.Y. 2009) (“While the record regarding the transfers of these Paintings is meagre [sic], it is informed by the historical circumstances of Nazi economic pressures brought to bear on ‘Jewish’ persons and property . . . and . . . the Court concludes that Claimants have adduced competent evidence sufficient to create triable issues of fact as to whether they have satisfied the elements of a claim. . . . For example, Claimants have adduced competent evidence that Paul never intended to transfer any of his paintings and that he was forced to transfer them only because of threats and economic pressures by the Nazi government. Summary judgment is therefore not appropriate.”).



determine whether seemingly voluntary transfers were in fact forced sales engineered to look voluntary, to which Military Government Law 59 in Germany and the 1946 Nullification Act in Austria called attention immediately after the war.<sup>299</sup> Whether the court also shifts the burden of proof when the evidence points to the possibility of such a sale will be a key factor in its outcome.

During the March 2, 2009, meeting at the U.S. State Department, it was suggested that a statute be drafted to unify choice-of-law analysis at the federal level for all art cases (meaning Nazi-era cases, antiquities cases, and other art conversion-type cases). One item on the agenda that was not discussed was the possibility of creating a domestic or bilateral commission, and this idea has since gained steam.<sup>300</sup> In the perhaps utopian hope of ending the litigation and achieving justice, a compromise legislative proposal is attached to this Article as the Appendix. It is offered in the spirit that some of the tools outlined therein might be helpful to reaching a more comprehensive solution to Nazi-era art claims.<sup>301</sup>

---

<sup>299</sup> The facts in one recent case, *Vineberg v. Bissonnette*, which was recently affirmed on appeal, involved such a clear-cut forced sale at an infamous “Jew auction” now universally recognized as illegal that the court found it easy enough to grant summary judgment for the plaintiff, a relatively rare occurrence in U.S. courts. 529 F. Supp. 2d 300 (D.R.I. 2007) *aff’d*, 548 F.3d 50 (1st Cir. 2008).

<sup>300</sup> See, e.g., Eizenstat, *supra* note 8.

<sup>301</sup> See generally Kreder, *Tribunal*, *supra* note 9 (proposing parameters for an international tribunal to resolve Nazi-era art claims).

## APPENDIX

*Initial Draft for Discussion Purposes*

## An Act

To amend Titles 22 and 26, United States Code, to resolve claims to personal property displaced during the Nazi era and improve foreign relations, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Nazi-Era Art Restitution Act of 2009” or the “NEAR Act.”

**SECTION 2. NAZI-ERA ART RESTITUTION.**

Section 165 of Title 26, United States Code, shall be amended as follows:

XXX

A new Chapter 89 entitled Nazi-Era Art Restitution shall be added to Title 22, United States Code, as follows:

XXX

A new Chapter X entitled Nazi-Era Claims Commission shall be added to Title 28, United States Code, as follows:

XXX

**SECTION 3. PURPOSE.**

The purpose of the Nazi-Era Art Restitution Act (Act or this Act) is to insure that the interstate commerce in art does not unwittingly capitalize on the horrors suffered during the Nazi era, to more fully implement the Washington Conference Principles on Nazi-Confiscated Art, and to take advantage of tax incentives to avoid victimization of good faith purchasers of art displaced during the Nazi era who reasonably believed that they possessed good title.

**SECTION 4. SCOPE.**

This Act applies to claims to personal property alleged to have been forcibly displaced during the Nazi era and never previously restituted to the claimant or the claimant’s predecessor.

---

---

## SECTION 5. FINDINGS.

[To be added.]

## SECTION 6. DEFINITIONS.

*Aryanization*: *Aryanization* is: (1) a process whereby owners of property transferred the property to an individual not considered to be an inferior human according to Nazi doctrine (an Aryan) in an attempt to insulate it from loss, pursuant to Nazi decree, or (2) the transfer of property from non-Aryans to Aryans pursuant to Nazi decree.

*Blocked Account*: A *Blocked Account* is one that was established in the name of a person during the Nazi era but from which no withdrawals were permitted.

*Burdens of Proof*: The *Burdens of Proof* under this Act shall be by the preponderance of the evidence unless otherwise noted.

*Claimant*: A *Claimant* is one asserting the right to exercise dominion and control over personal property, presently held by a Present-Day Possessor, pursuant to this Act.

*Fair Market Value*: *Fair Market Value (FMV)* is a price paid that is equivalent to 75% of the highest price paid for a similar object by the same artist in a European market during the time period of 1930–1931. Where there is a disparity in price in different European cities or at different times, the higher price controls.

*Flight Taxes*: *Flight Taxes* include all discriminatory taxes, fees, and assessments imposed by the Nazi regime on individuals for reasons of race, religion, nationality, ideology, or political opposition to Nazi ideology, the most commonly known of which are those taxes, fees, and assessments imposed on Jews fleeing occupied territory. Reasons of nationality shall not include measures which, under recognized rules of international law, are usually permissible against property of nationals and enemy countries.

*Good Faith Purchaser*: A *Good Faith Purchaser* is one who, under the circumstances of a purchase of personal property, would not have reasonably suspected that the personal property had a reasonable chance of having been looted or subjected to a forced sale during the Nazi era.

*Looted Personal Property (and Looted)*: *Looted Personal Property* is personal property that, during the Nazi era, was (1) taken from its owner pursuant to Nazi decree, (2) purchased and the compensation for which was paid into a Blocked Account, (3) sold to pay Flight Taxes, or (4) otherwise stolen or taken by larceny, robbery, theft,

threat, or duress. General economic pressure resulting from World War II does not constitute duress if it is not a consequence of discrimination for reasons of race, religion, nationality, ideology, or political opposition to Nazi ideology. Reasons of nationality shall not include measures which, under recognized rules of international law, are usually permissible against property of nationals and enemy countries.

*Looted Personal Property Inventory: A Looted Personal Property Inventory* is a widely known inventory of looted personal property in existence prior to the Present Day Possessor's purchase, such as *Repertoire des Biens Spolies en France Durant la Guerre 1939–1945 (List of Property Removed from France During the War 1939–1945)*.

*Nazi Decree: A Nazi Decree* is: (1) a law, regulation, or order authorizing the Aryanization or other taking of personal property; (2) auctions held to sell Jewish property taken during the Nazi era; or (3) the taking of property by a member of the Nazi party.

*Nazi Era: The Nazi Era* is the period of time between January 30, 1933, and May 8, 1945, during which the Nazi Party ruled Germany, or the period of time, ending on May 8, 1945, after the date a country was annexed, occupied, or invaded by Germany, as indicated below:

Federal Republic of Germany 1/30/33

Republic of Austria 3/13/38

Czechoslovakia 10/15/38

Republic of Poland 9/1/39

Norway 4/9/40

Denmark 4/9/40

French Republic 5/10/40

Belgium 5/10/40

Luxembourg 5/10/40

The Netherlands 5/10/40

Romania 10/7/40

Yugoslavia 4/6/41

Greece 4/5/41

*Nazi Party Member: A Nazi Party Member* is a person who was registered with the National Socialist German Workers' Party during the Nazi era.

*Personal Property: Personal Property* is any moveable or tangible thing not including land and anything growing on or permanently affixed to it.

*Present-Day Possessor:* A *Present-Day Possessor* is one who exercises dominion and control over personal property that is subject to a claim pursuant to this Act.

*Red List:* The *Red List* is the Final Report of the U.S. Office of Strategic Services Art Investigation Unit issued on May 1, 1946, listing individuals believed to have trafficked in Nazi-looted art. It is available at <http://docproj.loyola.edu/oss1/toc.html>.

#### **SECTION 7. CLAIMANTS' STANDING—HEIGHTENED PLEADING.**

(a) A Claimant must allege in the Complaint standing to pursue a claim to the personal property at issue because it belonged to the Claimant prior to being looted or belongs to the Claimant now by virtue of some other legal right, such as contract, heirship, or inheritance. The law of the state in which the federal court sits, including any applicable provision to apply foreign law, shall control all issues concerning the capacity of the Claimant to represent an estate.

(b) A Claimant must file an affidavit or verified certificate with the first pleading waiving any domestic or foreign privacy or confidentiality laws that may prevent discovery of information related to the claim.

#### **SECTION 8. HEIGHTENED DISCOVERY OBLIGATIONS.**

(a) The Federal Rules of Civil Procedure will apply to discovery in such cases except as follows.

(b) It is essential to provide the Claimant with early access to information uniquely in the possession of the Present-Day Possessor. The initial disclosures required by Rule 26(a)(1) of the Federal Rules of Civil Procedure normally require a party to produce only that information that would “support its claims or defenses, unless that use would be solely for impeachment.” In regard to claims under this Act, the Present-Day Possessor must produce all information possessed as of the date on which initial disclosures are due that is “relevant to” any party’s claims or defenses, as that term is used in Rule 26(b)(1) of the Federal Rules of Civil Procedure. The duty to supplement initial disclosures contained in Rule 26(e) of the Federal Rules of Civil Procedure also applies.

(c) The court shall inform itself of any potentially applicable foreign law by making liberal use of the sources cited in Rule 44.1 of the Federal Rules of Civil Procedure.

(d) The court shall liberally grant subpoenas pursuant to Rule 45 of the Federal Rules of Civil Procedure to obtain discovery from third parties.

#### **SECTION 9. CLAIM.**

A rebuttable presumption that the property was looted and never restituted shall be established if (1) the Claimant has made a prima facie showing that the personal property was Looted Property or (2) the Claimant, or the Claimant's predecessor in interest, made a claim for the personal property after 1945 that was honored by a domestic or foreign court or tribunal without acting as a bar to later restitution. Eye-witness testimony, photographs, and receipts demonstrating ownership often will be sufficient to satisfy this burden.

#### **SECTION 10. GOOD FAITH PURCHASER PROTECTION.**

(a) Only if the Claimant satisfied the burden under Section 9, shall the burden shift to the Present-Day Possessor to show both that the Present-Day Possessor was a Good Faith Purchaser and possession of valid title pursuant to the law of the state in which the personal property was allegedly looted, including any applicable post-war laws designed to unwind certain Nazi-era transactions, except that any law providing that title would have vested pursuant to the doctrines of limitations, repose, or prescription shall not apply.

(b) One may not qualify as a Good Faith Purchaser if the personal property was listed in a looted personal property inventory prior to the date of purchase. One may not qualify as a Good Faith Purchaser if the personal property was purchased by the Present-Day Possessor or his agent from a dealer listed on the Red List.

(c) If the Present-Day Possessor fails to meet his burden under this Section 10, the Claimant shall be entitled to reasonable attorneys' fees and costs in pursuing its claim under this Act.

#### **SECTION 11. TAXATION.**

(a) No recovery, restitution, judgment, or other compensation awarded under this Act shall be subject to federal or state taxation.

(b) The Present-Day Possessor who has met the burden under Section 10 shall be entitled to take a loss on the individual's federal

taxes in accordance with Internal Revenue Code § 165 in the amount equivalent to the Fair Market Value of the personal property on the date of final judgment in that year, or rolled over to future years, in accordance with Title 26, Internal Revenue Code, §§ 1211 and 1231.

**SECTION 12. SETTLEMENT.**

If the Claimant and Present-Day Possessor reach a settlement, the appropriate U.S. District Court shall hold a hearing to determine whether: (1) the Claimant has made a prima facie showing that the personal property was looted and never restituted and (2) the Present-Day Possessor has made a prima facie showing of being a Good Faith Purchaser of the personal property. If the appropriate U.S. District Court determines that both parties have made the requisite prima facie showings, it shall enter an Order so stating, and the tax treatment of Section 11 of this Act shall apply to the settlement.

**SECTION 13. MANDATORY DISPUTE RESOLUTION [VIA THE COMMISSION].**

[This language is typical mandatory mediation language, but would need to be altered to parallel the commission's process:

(a) Unless the court finds that mediation would not be beneficial, within thirty days of the making of the parties' initial disclosures pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure, the court shall order the parties to engage in mediation at the earliest possible date.

(b) Within thirty days of the court ordering mediation, the parties may choose a mediator to conduct a settlement conference. If the parties choose a mediator, the parties shall notify the court of the name of the individual. If the parties do not notify the court that they have chosen a mediator, the court shall assign a mediator to conduct a settlement conference. Within seven days after the parties are notified of the identity of the mediator, a party may object in writing to the selection, stating the reasons for the objection. If the court sustains the objection, the court shall appoint a different mediator.

(c) The mediator shall schedule an initial conference with the parties as soon as practicable. At least fifteen days before the initial conference, the parties shall send a brief written outline of the strengths and weaknesses of the party's case to the mediator. If the mediator finds that the parties need to engage in discovery for a limited period of time in order to facilitate the alternative dispute

resolution, the mediator may mediate the scope and schedule of discovery needed to proceed with the alternative dispute resolution, adjourn the initial conference, and reschedule an additional conference for a later date. The outline described in this subsection and any written or oral communication made in the course of a conference under this section: (1) are confidential, (2) do not constitute an admission, and (3) are not discoverable.

(d) Unless excused by the mediator, the parties shall appear at all conferences held under this section. A party who fails to comply with the provisions of this section is subject to the sanctions provided in Rule 37 of the Federal Rules of Civil Procedure. Unless otherwise agreed by the parties, the costs of alternative dispute resolution shall be divided equally between the parties.]

#### **SECTION 14. PROVENANCE RESEARCH.**

The sum of \$X is hereby allocated for provenance research to be distributed in the following manner: [method of distribution to museums]. Priority is to be given to personal property most likely to be claimed under this Act.

#### **SECTION 15. EDUCATION.**

The sum of \$X is hereby allocated for education through the Federal Judicial Center so that federal judges may better understand the historical context of Nazi-era claims and the legal issues implicated by them.

#### **SECTION 16. JURISDICTION AND PREEMPTION.**

(a) U.S. District Courts shall have exclusive jurisdiction over all claims filed after the effective date of this Act arising out of a transfer of personal property during the Nazi era, be they asserted as claims, counterclaims, cross claims, impleader actions, or interpleader actions.

(b) This Act shall preempt all state law concerning title or possession of personal property allegedly displaced during the Nazi era, including claims for conversion, replevin, trover, trespass to chattels, restitution, and declaratory relief.



**SECTION 17. MISCELLANEOUS.**

(a) In cases filed by the Present-Day Possessor as a plaintiff seeking declaratory judgment as to title under this Act, the burdens of proof stated above shall nonetheless apply.

(b) In cases filed by the Present-Day Possessor for declaratory judgment as to title under this Act, the Claimant shall be deemed a “defendant” for purposes of applying the removal provisions contained in Title 28, Judiciary and Judicial Procedure, of the United States Code.

(c) The Federal Rules of Civil Procedure referenced throughout this Act are set out in the Appendix to Title 28, Judiciary and Judicial Procedure, of the United States Code.

