

## Judge Slams MoMA, Guggenheim on Secret Holocaust Art Agreement

By Lindsay Pollock and Philip Boroff - Jun 18, 2009

June 18 (Bloomberg) -- A memo by U.S. District Judge [Jed Rakoff](#) lambasting a secret settlement involving New York's Museum of Modern Art and the [Solomon R. Guggenheim Museum](#) has become the talk of the Holocaust restitution community.

The museums announced a confidential pact with a German historian named Julius H. Schoeps and his relatives on Feb. 2, the day a trial was to begin to determine the ownership of two [Picasso](#) paintings. Seven weeks later, in a six-page written judicial opinion tinged with sarcasm, Rakoff questioned the motives of both sides.

The museums initiated the legal action "to clear their names (or so they said)," Rakoff, 65, wrote.

As for Schoeps and family, "for reasons wholly unexplained and seemingly no more compelling than concealing the amount of money going into their pockets," they remain opposed to making the settlement public, he wrote.

[Thaddeus Stauber](#), a Los Angeles-based lawyer with [Nixon Peabody LLP](#), said Rakoff's March 23 written opinion represents a rare public rebuke by a judge to participants in a confidential art agreement. Stauber successfully represented the [Toledo Museum of Art](#) and the Detroit [Institute of Arts](#) in a 2006 restitution case.

"He's using the mechanism of a written order to take them out to the backyard and browbeat them," Stauber said.

The judge said that it "baffles the mind and troubles the conscience" that Schoeps and his relatives would believe that it's in the public interest to keep the settlement secret, given that they "repeatedly sought to clothe themselves as effectively representatives of victims of one of the most criminal political regimes in history," he wrote.

### Sparking Debate

Stauber said the judge's condemnation will spur discussion about transparency at the [Holocaust Era Assets Conference](#) in Prague later this month. The event is a forum for scholars, museum officials and

auction-house staffers to debate legal issues.

In a joint statement prepared for Bloomberg News, [Glenn Lowry](#), MoMA's director, and Guggenheim Director [Richard Armstrong](#) said that the museums "take restitution issues extremely seriously."

"Our provenance research made clear from the beginning that the museums are the proper owners of these works, and that the claims had no merit. It was a prudent decision -- we settled simply to avoid the costs of prolonged litigation, and to ensure the public continues to have access to these important paintings."

John J. Byrne Jr., a lawyer for Schoeps, said in an interview that "we do not believe we have shortchanged history."

### Aid to Victims

Byrne said the case "dramatically expands the potential opportunities of Holocaust victims and their heirs to recover property wrongfully taken."

He cited a preliminary Jan. 27 ruling by Rakoff. According to Byrne, it said that victims of Nazi persecution "have a viable judicial remedy to reclaim their property without establishing that Nazi authorities seized it directly or ordered the sale."

In 2007, lawyers for Schoeps contacted MoMA and the Guggenheim to demand the return of the Picassos. They said the works were sold before World War II "under duress from Nazi persecution" according to court records.

The 1906 "Boy Leading a Horse," now at MoMA, and the Guggenheim's 1900 "Le Moulin de la Galette" had been in the private collection of [Paul von Mendelssohn-Bartholdy](#), a German Jewish banker who died in 1935. Schoeps's grandmother was a sister of von Mendelssohn-Bartholdy.

### Valued at \$150 Million

Both paintings were later acquired by the museums and are highlights of the collections. Dealers said MoMA's Picasso is valued at over \$100 million and the Guggenheim's could command more than \$50 million.

The museums jointly filed a complaint in federal court in 2007, asking that the courts affirm their ownership. They argued that the paintings were not sold on account of duress; instead they were given by von Mendelssohn-Bartholdy to his wife and were sold by 1935 to Galerie Thannhauser, which had branches in Berlin and Lucerne, Switzerland, according to the museums' complaint.

Last year, in a motion to dismiss the complaint, Schoeps accused MoMA and the Guggenheim of being

“knowing possessors of art coerced from Jewish victims in Nazi Germany.” He said they employed “blitzkrieg tactics against Holocaust victims and their heirs” calculated to “deflect attention from the many serious breaches of fiduciary duty” that the museums committed by keeping the paintings.

‘Without Merit’

The museums originally insisted that Schoeps’s claim was “without merit,” and the museums were “prepared to have all factual and legal issues” resolved by the court. The museums “are and remain committed to transparency in their actions,” their lead lawyer, Evan Davis, wrote in a Jan. 15, 2009, letter to the judge, according to Rakoff.

After the settlement was announced, at Rakoff’s urging, the museums said they were prepared to make the provisions public, according to the memo. Schoeps refused.

Rakoff wrote that the confidentiality is “against the public interest and a troubling reversal of the parties’ previously stated positions on this issue.”

“It is hard to see why institutions that proclaim their public status and that seek to receive public support should view themselves as not owing a similar obligation” to New York City or state agencies that are accountable to the public, he said.

Rakoff placed a sealed copy of the agreement in the court docket in the hope, he wrote, that Schoeps “may yet move to unseal it.”

The New York Times reported on Rakoff’s memo the day it was filed.

‘Harsh’ Opinion

Stephen G. Crane, a retired New York judge and mediator, said the written opinion is “harsh and seems somewhat unbalanced.”

“He doesn’t recognize that there is a public interest in settling civil disputes and another public interest in enforcing confidentiality in the mediation of disputes,” he said.

[Lucy Dalglish](#), executive director of the Arlington, Virginia-based [Reporters Committee for Freedom of the Press](#), said a press challenge to the confidentiality of the settlement could take years and would likely fail, based on precedent in the 2nd U.S. Circuit Court of Appeals, in New York.

“I think it’s bad public policy to seal the settlement,” she said. “You can tell Judge Rakoff really, really wants to release this stuff.”

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