

Outline of Legal Principles Governing Holocaust-Looted Art Cases
(Including a List of Leading Cases and Other Resources for Reference)

By Herrick, Feinstein LLP

I. Historical Context of Nazi-Looted Art Claims

A. The Nazi Policy of Plundering Art

In all, the Nazi art confiscation program is considered the greatest displacement of art in human history. This wholesale plunder was not a mere incident of war, but an official Nazi policy. Upon his rise to power in Germany, Hitler set out to rid the nation of what he considered to be “degenerate” cultural influences that had helped to denigrate the pure Aryan culture of Germany. Therefore, many of the Nazi seizures of art involved these degenerate works, which were essentially the non-representational or modern artworks that comprised some of the greatest works in European museums and collections: the great modern Impressionists and Expressionists like Picasso, Egon Schiele, Kandinsky, Klimt and scores of other famous artists.

Although the Nazis eventually destroyed many of these works, they fortunately realized that although they found these works disgusting and degrading, many in the rest of the world considered them exquisite and valuable. The Nazi regime therefore sold huge numbers of these works at auctions in Europe so they could get hard currency to support their war effort.

But other works were favored by the Nazis. Hitler preferred Old Masters and other representational works by those deemed to be of Germanic-related heritage, like Rembrandt or Cranach. The Nazi forces confiscated these works en masse from museums and other collections.

After the War, the Allies were left with the enormous task of sorting the millions of pieces of art, cultural artifacts and other items they had recovered as they stormed through Europe during the War. It was the policy of the Allies to return the works they found to the governments of the countries from which they had been looted (other than Germany itself). Post-War restitution commissions and agencies were set up by these governments to consider claims for these works. But these governments often turned a cold and bureaucratic eye on claims that were asserted by Nazi victims for the return of their property. Many works thus ended up as the property of these governments.

There were also huge numbers of looted artworks that the Allies were not able to recover. Even where their artworks could be found, however, the families of Holocaust victims often did not pursue their claims, especially once they were rebuffed by their own governments. Or they did not or could not take on the enormous task of trying to find the works that were lost and never recovered by the Allies. In many cases, these families -- or what was left of them after the mass Nazi murders -- had only survival on their minds. And the next generation was often told by those who had suffered through the Holocaust that no one wanted to talk about those terrible

years, let alone actually research what might have happened to their families' property or where it might be located.

B. Reexamination of Lost Artworks: "Portrait of Wally" and Other Factors

Starting in the mid to late 1990's, a confluence of factors led survivors and their heirs, as well as governments and other organizations, to reexamine what happened to the lost Nazi-looted artworks. Most important among these factors was the start of the first significant legal case involving Nazi-looted art. It involved one artwork -- "Portrait of Wally" by Egon Schiele -- claimed by our firm on behalf of the family of Lea Bondi Jaray, who had been forced by a Nazi agent to give up the painting. On July 20, 2010, after over ten years of litigation, the case was finally settled. The settlement involved, among other things, the payment of \$19 million in compensation to the Bondi heirs, an amount that reflects the painting's market value.

In addition to the *Wally* case, there were other reasons for the renewed world-wide interest in the problem of Nazi-looted art. Around the time the *Wally* litigation began, a few scholarly books had just been published, examining the remarkable extent of the Nazi looting of artworks. At the same time, since the Cold War had ended and the Iron Curtain had fallen, previously classified archives maintained by the United States Government, and even information from the former Soviet Union, started to become publicly available, providing more and more information to researchers and others who wanted to look into the fate of individual artworks and collections. Also, and just as important, the advent of the internet effected a revolutionary change in the ability to do research in this area. And, not least important, the current generation -- unburdened by the extreme survival needs of their ancestors who were Holocaust victims, or the common feeling among members of that generation that the Holocaust was not something that anyone wanted to talk about -- readily asked questions about their families' property, including artworks. They started to locate artworks and began the process of reclaiming them.

Stimulated by all this interest, the Clinton Administration, under the leadership of Stuart Eizenstat, who was then Under Secretary of State for Economic, Business, and Agricultural Affairs, led the way in urging governments around the world to seek ways to effectuate the policy of identifying art looted by the Nazis and returning it to their rightful owners. In 1998, the U.S. Government convened a conference of government officials, art experts, museum officials and many other interested parties from around the world in Washington, D.C. to consider and debate the many issues raised by the continuing discovery of Nazi-looted assets, including artworks. The Conference promulgated eleven principles concerning Nazi-confiscated art, which were adopted by 44 nations. One principle states that pre-War owners and their heirs should be encouraged to come forward to make known their claims to art that was confiscated by the Nazis and not subsequently restituted. Another states that, once they do so, 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.

As a result of all of this interest and concern, several European governments created new restitution commissions to re-examine claims by victims' families that had been or could have

been brought after the War to recover looted artworks. These commissions often provided for waiver of any statutes of limitations that might otherwise have applied so that these claims could be considered on the merits. And museums all over the world, as well as governments with huge art collections of their own, started placing on the internet images and information about artworks in their collections for which there was a gap in ownership history, or provenance, between the years 1933 to 1945, asking those with further information about these works to contact them and perhaps make a claim for recovery.

II. Key and Unique Aspect of U.S. Recovery Cases

Underlying any claim for the recovery of Nazi-looted art in the United States is a single, fundamental rule that is at the core of all cultural property cases: no one, not even a good faith purchaser for value, can obtain good title to stolen property. This rule differs markedly from title passage rules in most European countries, where title to stolen property may pass to a good faith purchaser who possesses it for a certain period of time.

In certain cases, through conflicts of laws analysis, courts in the United States will apply civil code rules. Even so, it is this fundamental rule that has led the United States to be viewed as a generally favorable forum for art looting cases. The issues being determined by United States courts have a wide-ranging impact on foreign governments and others around the world.

III. Importance of Statute of Limitations and Laches

A. Statute of Limitations

Each state applies a different statute of limitations to the various causes of action. The key issue with regard to statute of limitations is determining when a cause of action arises or accrues.

Most states apply a discovery rule, which means that the clock starts to run when the plaintiff either discovered or reasonably could have discovered his or her claim to the property if he or she were reasonably diligent. In contrast, New York applies a demand and refusal rule. As against a good faith purchaser, the claim accrues and the statute of limitations begins to run when a demand by the true owner for the return of the property has been refused. According to a recent New York decision, a party will be deemed to have refused a demand by simply failing to return the property after some time, even when the parties are otherwise engaged in negotiation and are conducting research into that artwork's provenance. *See Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473 (S.D.N.Y. 2010), *aff'd*, 403 Fed. Appx. 575 (2d Cir. 2010).

California applies an actual discovery rule, after the Ninth Circuit struck down as unconstitutional a law that temporarily eliminated the statute of limitations until 2010 for claims against museums and galleries by Holocaust victims and their heirs for the recovery of Nazi-looted art. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 379 (U.S. 2010). The current law provides a six year statute of

limitations from the date of actual discovery to all claims involving stolen art brought against a museum, gallery, auctioneer, or dealer. The actual discovery rule provides that the statute of limitations will not begin to run until “actual discovery by the claimant” of the identity and whereabouts of the work and the “[i]nformation or facts. . . sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art.” Cal. Code Civ. Proc. § 338(3)(A) - (A)(ii).

B. The Doctrine of Laches

In many states, including New York, a case may also be dismissed on laches grounds. Laches is an equitable doctrine that holds that even if an action is brought within the statute of limitations, it can be dismissed if the plaintiff unreasonably delayed in bringing the claim and this delay prejudiced the defendant.

Where a party is found to have “unclean hands” -- meaning that the party asserting the laches defense acted improperly with regard to the artwork at issue -- a court may not dismiss on laches grounds.

IV. Duress and Foreign Law

In *Schoeps v. Museum of Modern Art*, 594 F.Supp.2d 461 (S.D.N.Y. 2009), the claimant initiated an action for the recovery of two paintings on the grounds that their transfer was a product of Nazi duress. In a novel decision, the court equated duress to theft, and denied the defendants’ summary judgment motion. The court left it to a New York jury to determine whether the original owner, as a Jew, was under duress pursuant to the German Civil Code when the artworks were transferred. The court held that German law should apply based on a conflict of laws analysis.

The case of *Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010), *motion denied*, 2011 U.S. Dist. LEXIS 4766 (S.D.N.Y. Jan. 14, 2011), *motion to strike denied*, 2011 U.S. Dist. LEXIS 91851 (S.D.N.Y. Aug. 17, 2011) also addressed conflict of laws issues. The Second Circuit determined that, based on an interest analysis, New York law applied, even though title purportedly passed under Swiss law while the disputed artwork was in Switzerland. The court found that the compelling interests of the State of New York in making sure that it did not become a haven for stolen property overrode any interests Switzerland might have had in connection with a transaction where the purchased property left the country almost immediately. On remand, although the claim was found timely under New York law, the court dismissed the action as barred under laches.

V. Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act (or FSIA), codified in 28 U.S.C. §§ 1602 *et. seq.*, provides that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607 of this chapter. . .” Of the enumerated exceptions listed in the statute, the expropriation exception is most utilized in

restitution cases. This exception provides that, where property has been expropriated in violation of international law, and that property, or any property exchanged for it, is present in the United States in connection with a commercial activity carried on in the U.S. by the foreign state, that state will not be immune from suit where the rights to such property are at issue. Similarly, where the property is owned or operated by an agency or instrumentality of the foreign state, and that agency or instrumentality is engaged in a commercial activity in the United States, the expropriation exception also applies.

One of the first major restitution cases predicated on these FSIA provisions was *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). The Supreme Court determined that the FSIA's expropriation exception, though first enacted when the FSIA was adopted in 1976, was retroactive in its application. This meant that the exception applied to conduct by foreign sovereigns before 1976, thereby opening the door to actions in the U.S. against foreign governments for the recovery of Nazi-looted artworks.

In *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298 (D.D.C. 2005), *motion granted, motion dismissed by* 2006 U.S. App. LEXIS 615 (D.C. Cir. Jan. 10, 2006), *motion granted* 517 F. Supp. 2d 322 (D.D.C. 2007), *motion granted*, 2007 U.S. App. LEXIS 29458 (D.C. Cir. Dec. 14, 2007), *motion granted, dismissed by*, 2008 U.S. App. LEXIS 28124 (D.C. Cir. May 14, 2008), the court likewise denied the foreign sovereign's attempt to dismiss the case, therefore allowing the claimants to proceed against the foreign museum, which was holding their stolen artworks. The interesting issue here is that the artworks, on loan to two U.S. museums, had been granted immunity from seizure under U.S. law. The court ruled that the artworks' presence in the United States was nevertheless a sufficient basis for jurisdiction. While not a Holocaust case, Holocaust groups have applauded the decision because of its application to Holocaust claims against foreign sovereigns.

In *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009), *on reh'g*, 616 F.3d 1019 (9th Cir. 2010), *cert. denied*, 2011 U.S. LEXIS 4928 (U.S. June 27, 2011), the court established that the expropriation exception should apply even where the foreign state involved in the litigation is not the entity that expropriated the property in violation of international law. Thus, despite the fact that Germany, and not Spain, was responsible for the looting at issue, the court held that the expropriation exception applied to the transfer. The court also held that the FSIA does not require exhaustion of domestic remedies as a prerequisite to jurisdiction under the FSIA, but left open the possibility that a court could, in its discretion, impose an exhaustion requirement in connection with a determination on the merits.

Agudas Chasidei Chabad v. Russian Fed'n, 729 F. Supp. 2d 141 (D.D.C. 2010), *motion granted, motion denied by* 2011 U.S. Dist. LEXIS 80971 (D.D.C. July 26, 2011) also addressed exhaustion under the FSIA. This case was brought against the Russian Federation, its Ministry of Culture and Mass Communication and the State Library and State Military Archive for the return of thousands of religious books, manuscripts, and other materials that were seized from Chabad by the Soviet Union. The defendants, as agencies of Russia, asserted that the claim should be dismissed on FSIA grounds. The court held that Chabad was not required to exhaust Russian domestic remedies before bringing the action in the United States because the remedy

provided under Russian law -- the right to purchase the property -- would be inadequate. The court further determined that Chabad had sufficiently alleged that the materials were seized in violation of international law and that the State agencies had engaged in commercial activity within the United States. The case was therefore allowed to proceed in a U.S. court.

But, in a unique turn of events, Russia announced that it would no longer participate in the lawsuit, and on July 30, 2010, the district court issued an opinion ordering a default judgment against Russia, ordering the defendants to surrender the complete collection of materials. When Russia did not, the plaintiff filed two motions -- a motion to enforce the judgment and permit attachment and a motion seeking an imposition of sanctions against the defendants.

Before the court could rule on these motions, Russia announced that it was “suspending exchanges of Russian art and cultural artifacts with American institutions” until the case was resolved, and directed its government-run museums to “cancel scheduled loans” to U.S. museums. As a result of this, the United States appeared in the action and submitted a Statement of Interest on June 15, 2011, explaining that the U.S. Government has an interest in ensuring proper enforcement of immunity from seizure protections.

On July 26, 2011, the district court granted the plaintiff’s motion to enforce the judgment, and concluded that while it would be “superfluous” to include specific exemptions for property covered by the immunity from seizure statutes in its order granting enforcement of the declaratory judgment -- such immunities exist regardless of whether the court makes note of them -- the court agreed to include such language into its order in light of the concern expressed over such seizures. With regard to the plaintiff’s motion for sanctions, the court directed the plaintiff to serve copies of its motion on the defendants, thereby granting the defendants 60 days to respond to the motion.

The most recent FSIA decision, *De Csepel v. Republic of Hungary*, 2011 U.S. Dist. LEXIS 98573 (D.D.C. Sept. 1, 2011), involves claims by the heirs of Baron Mór Lipót Herzog against the Republic of Hungary, three Hungarian museums and a Hungarian university for the recovery of paintings and other works lost in the early 1940’s that either remained in or came into the possession of Hungarian Government institutions. The defendants moved to dismiss the action asserting, among other defenses, that the district court lacks jurisdiction over the defendants under the FSIA. On that issue, the court held that it had jurisdiction pursuant to the expropriations exception. The court determined that, even though Hungary did not enact formal laws taking away the citizenship of Jews during the Nazi era, Hungary had subjected Jews to measures that stripped them of the rights that one normally accords to citizens. Thus, even though the plaintiffs were technically Hungarian citizens, Hungary could commit violations of international law under the expropriations exception of the FSIA.

VI. U.S. Government Involvement

In the years since the *Wally* decision, the United States has played many different roles in Nazi-looted art and other restitution cases, depending on the nature of its interest in each case. Besides being the plaintiff in the *Wally* case, it has been a defendant in the case of *Rosner*

v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002), also known as the “Hungarian Gold Case”, appeared as an amicus in support of the Republic of Austria in *Republic of Austria v. Altmann*, submitted a “statement of interest” against the position of the claimants in *Malewicz v. City of Amsterdam*, and filed a brief expressing the views of the United States in *Von Saher v. Norton Simon Museum of Art at Pasadena*.

But perhaps most importantly, the United States adopted the Terezin Declaration, along with 45 other nations around the world, at a conference in 2009. This Declaration, which confirmed the vitality of the Washington Principles, expressly supported the position that Holocaust-looted art claims should be decided on the merits and not determined by technical defenses like the statute of limitations.

Recent Cases:

Agudas Chasidei Chabad v. Russian Fed'n, 729 F. Supp. 2d 141 (D.D.C. 2010), *motion granted, motion denied*, 2011 U.S. Dist. LEXIS 80971 (D.D.C. July 26, 2011).

Alperin v. Vatican Bank, 365 Fed. Appx. 74 (9th Cir. 2010).

Bakalar v. Vavra, 619 F.3d 136 (2d Cir. 2010), *motion denied*, 2011 U.S. Dist. LEXIS 4766 (S.D.N.Y. Jan. 14, 2011), *motion to strike denied*, 2011 U.S. Dist. LEXIS 91851 (S.D.N.Y. Aug. 17, 2011).

Cassirer v. Kingdom of Spain, 580 F.3d 1048 (9th Cir. 2009), *on reh'g*, 616 F.3d 1019 (9th Cir. 2010), *cert. denied*, 2011 U.S. LEXIS 4928 (U.S. June 27, 2011).

De Csepel v. Republic of Hungary, 2011 U.S. Dist. LEXIS 98573 (D.D.C. Sept. 1, 2011).

Dunbar v. Seger-Thomschitz, 615 F.3d 574 (5th Cir. 2010); *cert. denied*, 2011 U.S. LEXIS 2037 (Feb. 22, 2011).

Freund v. Societe Nationale des Chemins de Fer Francais, 592 F.Supp.2d 540 (S.D.N.Y. 2008), *aff'd* 391 Fed. Appx. 939 (2d Cir. 2010).

Grosz v. Museum of Modern Art, 772 F. Supp. 2d 473 (S.D.N.Y. 2010), *aff'd*, 403 Fed. Appx. 575 (2d Cir. 2010).

In Re Flamenbaum, 899 N.Y.S.2d 546 (N.Y. Sur. 2010).

Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298 (D.D.C. 2005), *motion granted, motion dismissed by* 2006 U.S. App. LEXIS 615 (D.C. Cir. Jan. 10, 2006), *motion granted*, 517 F. Supp. 2d 322 (D.D.C. 2007), *motion granted*, 2007 U.S. App. LEXIS 29458 (D.C. Cir. Dec. 14, 2007), *motion granted, dismissed by* 2008 U.S. App. LEXIS 28124 (D.C. Cir. May 14, 2008).

Museum of Fine Arts, Boston v. Seger-Thomschitz, 623 F.3d 1 (1st Cir. 2010); *cert. denied*, 2011 U.S. LEXIS 2037 (March 7, 2011).

Orkin v. Swiss Confederation, 2011 U.S. Dist. LEXIS 4357 (S.D.N.Y. Jan. 13, 2011), *dismissed by* 2011 U.S. Dist. LEXIS 24507 (S.D.N.Y. March 11, 2011).

Republic of Austria v. Altmann, 541 U.S. 677 (2004).

Schoeps v. Museum of Modern Art, 594 F.Supp.2d 461 (S.D.N.Y. 2009).

Solomon R. Guggenheim Foundation v. Lubell, 550 N.Y.S.2d 618 (N.Y. App. Div. 1990), *aff'd*, 569 N.E.2d 426 (N.Y. 1991).

Sotheby's v. Shene, 2009 U.S. Dist. LEXIS 23596 (S.D.N.Y. March 23, 2009), *later proceeding*, 2009 U.S. Dist. LEXIS 30714 (S.D.N.Y. Apr. 9, 2009).

United States v. Portrait of Wally, 663 F. Supp. 2d 232 (S.D.N.Y. 2009).
Stipulation and Order of Settlement and Discontinuance.
Amended Stipulation and Order.

Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 379 (U.S. 2010).

Westfield v. Federal Republic of Germany, 2009 U.S. Dist. LEXIS 65133 (M.D. Tenn. July 28, 2009), *aff'd* 633 F.3d 409 (6th Cir. 2011).

Other Materials:

California Code of Civil Procedure § 338 (2011).

Terezin Declaration on Holocaust Era Assets and Related Issues (June 30, 2009).

Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998).

Reading for Background:

Lynn H. Nicholas, The Rape of Europa (Knopf Doubleday Publishing Group, Vintage Series 1995).

Konstantin Akinsha, Grigori Koslov & Sylvia Hochfeld, Beautiful Loot: The Soviet Plunder of Europe's Art Treasures (1995).

Robert M. Edsel, Rescuing Da Vinci: Hitler and the Nazis Stole Europe's Great Art - America and Her Allies Recovered It (2006).

Hector Feliciano, The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art (1997).

Elizabeth Simpson, The Spoils of War: World War II and its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property (1997).