

**HOLOCAUST ART LOOTING & RESTITUTION SYMPOSIUM
U.S. EXPERIENCE: PORTRAIT OF WALLY AND THE LEOPOLD MUSEUM**

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One major difference between the laws and practices regarding restitution of Nazi-looted art in the United States, on the one hand, and in European and other countries, on the other, results from the fact that the major American museums are by and large privately owned and operated while most other countries, like Italy, have mostly state-owned museums. This is one of the reasons that it has been difficult for a government restitution commission of some kind to be established in the U.S. to determine recovery claims. Any such commission could only make recommendations to be followed or ignored by the private museums, but could not mandate recoveries as in state-run restitution systems.

Similarly, that explains why most recovery efforts in the United States depend on private lawsuits brought by individual claimants, usually Estates or heirs of the original owner, against the current possessor of Nazi-looted art. So one might assume that in the United States, the role of the government would be relegated to one of moral suasion but without any enforcement capability. Actually, however, that is far from the case.

The main reason for this is one particular weapon that the United States Government has that permits it actively to assist claimants with civil claims to recover looted artwork. I am speaking about the proceeding known as civil forfeiture, a procedure that is well-established in American jurisprudence, but was first utilized to recover Nazi-looted art starting in 1999. Indeed, it was a civil forfeiture action that constituted the first major Holocaust art recovery case brought in the U.S, one which had world-wide

repercussions. I am referring to the case of *United States v. Portrait of Wally*, which my firm handled, essentially as partners with the federal government, and which lasted over ten years before we finally resolved it last summer. I will speak about this case today in some detail and further explain its significance for recovery efforts all over the world.

I will begin by summarizing the very interesting facts in the case, most of which were deemed by the Court to have been established by the evidence we presented.

In the late 1930's, after Nazi Germany's annexation of Austria, Lea Bondi (or Lea Bondi Jaray, her married name), a well-known Jewish art dealer in Vienna, was forced to sell her gallery to a Nazi art dealer named Friedrich Welz pursuant to recently adopted "Aryanization" laws in Austria prohibiting Jewish business ownership. Egon Schiele's painting of his lover and favorite model, Wally Neuzil, entitled "Portrait of Wally", however, was in Bondi's private collection, which she kept in her apartment. Shortly before Bondi and her husband fled for their lives to England, Welz came to their apartment and, upon spotting the Wally, insisted that Lea give it to him. This is what transpired, as set forth in the complaint in the case, based on Lea Bondi's letters:

Welz...observed Wally hanging on the wall and insisted that he have it under the Gallery's "aryanization." Bondi responded that it was part of her private collection and had nothing to do with the Gallery. Welz continued to pressure Bondi for the painting. Bondi's husband finally told her that, as they wanted to leave Austria, perhaps as soon as the next day, she should not resist Welz because "you know what he can do." Bondi surrendered Wally to Welz.

Meanwhile, around that time, another Jewish Viennese art collector, Dr. Heinrich Rieger, was forced to sell his art collection to Welz; it included a number of Schiele's works. Rieger was subsequently deported to the Theresienstadt concentration camp where he was murdered shortly thereafter.

After the War, United States military forces in Austria arrested Welz and seized the artworks in his possession, which included the Wally as well as the artworks that he had taken from Rieger. The U.S. military transferred all of these works to the Austrian Government. For it was the policy and practice of the Allied forces to return artworks that had originated in German-occupied countries, and found in Nazi hands or otherwise discovered after the War, to the governments of the countries of origin. The idea was that these governments would then determine if these artworks had been looted by the Nazis, and if so, would retribute them to the families of the original owners. So although masses of Austrian citizens greeted Hitler's tanks with flowers when they crossed over into Austria from Germany in 1938, the United States Government decided for political reasons to treat Austria as a victim of German aggression rather than what it was -- Germany's ally. Therefore, Austria was treated just like France and Holland, for example, with respect to the return of looted artworks. The idea was to prevent Austria from falling under the influence of the Soviet Union after the War.

But there was a mix-up regarding the Wally. According to the records of the U.S. Forces, the Wally was mixed in with the Rieger works that had been seized from Welz. The Americans were aware of the apparent error, however, and notified the Austrian Government.

This was what the mix-up was all about. On the lists of the works that the Rieger family had owned before the Nazi takeover in Austria, one entry referred to a Schiele drawing of Schiele's wife. Because no drawing fitting this description appeared among the actual collection of Rieger works seized from Welz, and because the Wally was mixed in among them, it was apparently presumed by some who dealt with this matter that the Wally must be this listed work. Now obviously, a drawing is not a painting, not to mention that Schiele's lover and model, Wally Neuzil, was certainly not his wife. But despite warnings from the U.S. military that something was amiss, the Austrian authorities closed their eyes to this obvious error.

Therefore, when the Rieger heirs later agreed to sell their collection to the government-owned Austrian National Gallery in the Belvedere Castle, the Wally was still mixed in with the Rieger works shipped to the Belvedere, and the Belvedere took Portrait of Wally for itself. It thus became part of its collection, despite the fact that, as its own internal records show, it also was well aware that the Wally was not part of the Rieger collection.

Lea Bondi, who then lived in London, learned that her painting was in the Belvedere. In 1953, Dr. Rudolph Leopold, an Austrian Schiele collector, paid her a visit and confirmed that he had seen the Wally at the Belvedere. Bondi asked Leopold to help her recover her painting, since her prior entreaties to the Belvedere had been ignored.

But instead of helping Bondi retrieve her painting, Leopold quickly entered into an agreement with the Belvedere whereby he exchanged a Schiele painting from his own collection for the Wally, and kept the Wally for himself. When Bondi discovered Leopold's deceit years later, she retained lawyers to attempt to convince Leopold to return her

painting to her, but to no avail. She never brought a lawsuit, however, believing that it was futile to try to defeat Leopold in an Austrian legal proceeding. As she said in one of her letters, she felt that “everyone,” including her lawyers, “was siding with Dr. Leopold.”

Lea’s concern was borne out by many other cases, which only came to light well after the War, of Jewish claimants who were unsuccessful when they attempted to retrieve their stolen artworks in Austria after the War. This was well-documented in the excellent reporting of Andrew Decker and others at the well-respected journal, ARTnews, edited by Milton Esterow, beginning in 1984.

But, unfortunately, this did not help Lea Bondi, who died in 1969 without having recovered her painting.

And that’s the way things remained for many years thereafter. Meanwhile, in 1994, Leopold’s art collection, including the Wally, became part of the newly formed Leopold Museum, where Leopold himself was appointed “Director for Life.”

But then in late 1997, Leopold made what turned out to be a fateful decision. He arranged to loan of many of the Leopold Museum Schiele works to the Museum of Modern Art (MoMA) in New York for a major exhibition there, and included the Wally in the exhibition. In an apparent attempt to avoid any problem when the Wally was sent to the U.S., however, Leopold made a significant change to the ownership history or provenance of the Wally that he prepared for the catalogue for this exhibition, as compared to the provenance listing he had previously set forth in the Schiele catalogue raisonné that he had compiled years before. In the MoMA exhibition catalog, Leopold for the first time included Rieger in the chain of ownership, thus suggesting that somehow Rieger had acquired the Wally from Lea Bondi, which obviously was not the case.

As it turned out, however, this attempt at subterfuge did not prevent the Bondi family from figuring out that the Wally owned by Lea Bondi was now in the United States, where several Bondi heirs lived. They therefore formally claimed the work and demanded that MoMA hold it pending the resolution of the matter. MoMA refused, however, citing its contractual obligation to return the painting to the Leopold Museum at the end of the exhibition.

Making matters more difficult for the heirs was a New York state statute, the only one of its kind in the country at that time, which provided that art loans from out-of-state lenders -- like the Leopold Museum -- to not-for-profit institutions in New York -- like MoMA -- are exempt from court seizures. Therefore, the heirs could not ask a court to have the painting seized to prevent its return to Austria pending the determination of the ir ownership claim.

But then, at the family's request, the local state prosecutor in New York, District Attorney Robert Morgenthau, stepped in and issued a subpoena for the painting in connection with an investigation his office had commenced into whether the Wally constituted stolen property brought into New York. That kept the painting in the United States, at least for the time being. But prolonged and intense litigation over the validity of the subpoena under New York's anti-seizure law followed, with inconsistent rulings from the trial and appellate courts.

Finally, the highest court in New York, the New York Court of Appeals, held, in 1999, that the anti-seizure statute should be read broadly as prohibiting even a prosecutor's subpoena of the painting and thus ruled that the painting could immediately be returned to the Leopold Museum in Austria.

Meanwhile, however, while the case was wending its way through the state courts, my partner, Larry Kaye, and I began visiting the federal prosecutors in New York and suggested to them that they should consider starting their own federal action should the state courts rule against us. We met with the head of the department in the U.S. Attorney's Office in New York responsible for seizing assets illegally imported into the United States, Sharon Cohen Levin, asking that her office seize the Wally if the State courts should ultimately rule against the Bondi family. We knew full well that if that happened, the Wally would be on a plane to Austria within hours. We also knew that under principles of federal supremacy in our federal system, the New York State anti-seizure law could not prevent a federal seizure of the Wally. Ms. Levin listened politely to our entreaties, but we did not learn then what she and her office intended to do.

As it turned out, the federal prosecutors were very sympathetic to the Bondi family's plight. Within hours of the State court's decision, the United States Customs Service obtained a warrant of seizure for the Wally on the ground that it was stolen property knowingly imported into the United States in violation of the National Stolen Property Act. And the United States Government immediately commenced a forfeiture action to remove the property permanently from the Leopold Museum.

So let me explain what this forfeiture proceeding is all about. The forfeiture laws in the United States permit the Government to bring a civil *in rem* action to have property that is the subject of criminal conduct forfeited to the United States. As an *in rem* proceeding, the action is actually brought against the property itself. Hence, our case is called *United States against the Portrait of Wally*. Although criminal conduct -- in this case, violations of the National Stolen Property Act -- must be established in order for the

Government to prevail, this is not a criminal proceeding. Thus, no prison term or fine against Leopold or the Leopold Museum could have resulted in this case, even if they were found to have knowingly brought stolen property into the United States in violation of the National Stolen Property Act. The only remedy that could be sought and ordered in a forfeiture proceeding is the permanent forfeiture of the stolen property to the Government.

In most forfeiture cases, property that has been involved in criminal activity, like a house where illegal drugs were manufactured, is seized and then sold by the Government, with the proceeds deposited into the United States Treasury. But early in this case, the Government agreed with the Lea Bondi Jaray Estate that if it recovered the Wally, it would promptly return it to the Estate. Thus, we worked jointly with the Government throughout the ten year litigation to effect this result.

A very important aspect of forfeiture proceedings is that the burden of proof on the Government is substantially less onerous than in a criminal proceeding, where the Government must prove its case “beyond a reasonable doubt.” Indeed, the burden is equivalent to the extremely low burden required to get a search warrant, that is, demonstrating probable cause to believe that the Museum knowingly exported stolen property into the United States. The probable cause standard is considered to be just a little more than mere suspicion. Moreover, this can be established with hearsay evidence not usually admissible in American court proceedings. Once the U.S. meets this reduced standard of proof, the burden then shifts to the Leopold Museum to prove that it did not knowingly export stolen property. And its burden of proof is substantially greater than the Government’s. It must prove its case by a “preponderance of the evidence,” which is the same standard of proof that plaintiffs usually have in typical civil cases. So essentially the

burdens of the parties in forfeiture cases are the opposite of the burdens in typical civil cases brought by private plaintiffs to recover their property. In the usual case, it is the plaintiff that bears the burden of proving his or her case by a preponderance of the evidence. But in forfeiture cases, it is the possessor of the property that has the burden of proving by that same standard that the property was not stolen property knowingly brought into the U.S. Thus, a forfeiture proceeding is very favorable for the Government, and in our case, for the Estate of Lea Bondi Jaray.

Nevertheless, the proceedings in this federal court action were extensive. The Museum of Modern Art, while conceding that its only “right” with respect to the painting was to return it to the Leopold Museum, nevertheless asserted a claim on its own behalf. And the first major step taken by both MoMA and the Leopold Museum in the litigation was to make a motion to dismiss the case in its entirety on various grounds. They were joined in this effort by an amicus curiae (that is a friend of the Court) brief submitted by nine major museums, as well as the American Association of Museums and the Association of Art Museum Directors.

Much to our surprise and extreme disappointment, the Court actually did dismiss the case, on the rather novel ground that since the U.S. military had recovered the Wally, it could no longer be considered stolen. But after further briefing by the Government, the Court reversed itself and eventually denied the Museums’ motion to dismiss. We then proceeded through an extensive pre-trial discovery process, including two weeks of deposition in Vienna of Dr. Leopold and his wife. In United States litigation, as many of you know, much time is spent as both sides are required to exchange all relevant documents and take the sworn testimony of witnesses at depositions.

Finally, after all discovery was completed, both sides moved for summary judgment two years ago. That is, each side argued that on the undisputed facts established in the case, and the law, it should prevail without need of a trial. After several months of consideration and a three hour oral argument, the Court ruled on both motions in the fall of 2009. Although the Court denied both motions, it made significant rulings in the case and vastly limited what was left to be determined at trial.

I invite you all to read the Court's decision, which will be posted on the symposium website. In the limited time I have here, I will only summarize the key holdings in the case.

First, the Court determined that the Wally had been stolen from Lea Bondi by Welz. The Court relied mostly on letters written by Bondi setting forth what happened in Austria when Welz visited her apartment. The Court rejected various theories that the Leopold Museum offered to try to show that Welz had actually purchased the Wally from Bondi or that it was not her personal property but that of her Gallery, which was officially aryanized during the Nazi era.

Next, the Court determined that the Wally remained stolen at the time of its importation into the U.S. This required the Court to consider whether under Austrian law, title to the Wally had legally passed from Bondi to the Belvedere by the passage of time and then to Leopold on the same basis such that it could no longer be considered stolen property. The Court found, based on expert reports submitted by both sides, that, under Austrian law, in order to acquire good title to property in its possession, the possessor must confidently believe for three years that the property did not belong to someone else. The Court concluded that there was ample evidence that the Belvedere had reason to believe

that Bondi owned the Wally and therefore lacked the requisite confidence to gain title, including Bondi's own written statement that she had gone to the Belvedere and claimed it.

As for Leopold, both sides had agreed that under Austrian law, once Bondi asserted to Leopold that she owned the Wally, he was required to adequately investigate the facts in order for him to gain confidence that she did not in fact own it. The Court found that essentially, Leopold did little more than depend on the word of the director of the Belvedere, Dr. Karl Garzarolli, who told him that the Wally had come from the Rieger collection. The Court deemed this insufficient under the circumstances.

Therefore, the Court found that neither the Belvedere nor Leopold could have gained title to the Wally under Austrian law. It therefore remained stolen at the time of its importation into the U.S.

In sum, the Court made conclusive findings on most of the key issues in the case: we and the Government had sufficiently established that the Wally was stolen by Welz and remained stolen when it was imported into the U.S., and the Leopold Museum would not be able to overcome that proof by a preponderance of the evidence.

That left only one issue for the Court to decide. Did Leopold know that Wally was stolen when it was brought into the U.S.?

The Court concluded that we had sufficiently shown that there was probable cause to conclude that Leopold knew that the Wally had been stolen from Lea Bondi by Welz. The evidence included the inadequacy of Leopold's investigation after speaking to Bondi, his failure to ask her how she had lost the painting, and his knowledge that Bondi had fled Nazi persecution and that her gallery had been aryanized. The Court concluded that in that context, Leopold should have realized that the Wally had been looted from Bondi by

the Nazis. Also, Leopold never sought any proof of Garzarolli's claim that the Belvedere had acquired the Wally from the Rieger collection, he rushed to acquire it after Bondi had told him that it was hers, and in connection with the loan to MoMA, he had changed the provenance of the painting to include Rieger as a prior owner, in an apparent attempt to deflect attention away from Bondi's ownership.

But the Court also found that there was evidence that could support Leopold's claim that he did not know that the Wally was stolen: he claimed that Bondi never told him that the Wally had been stolen from her, he had investigated her claim to some degree, and he made no attempt to hide his possession of the Wally, including it in exhibitions around the world for decades following his acquisition.

Faced with these opposing pieces of evidence, the Court left for trial the determination of whether Leopold could succeed in overcoming the Government's case by a preponderance of the evidence on this one remaining issue.

One interesting and important question as we headed for trial last spring and summer was whether Leopold himself would come to testify, or would the Court be left only with his videotaped deposition testimony? As it turns out, we were told as the trial was approaching that Leopold was too ill to come to New York. And indeed, shortly before trial was to commence, Leopold passed away. Apparently Mrs. Leopold was planning to come to testify in his stead, but we were prepared to argue that since neither she, nor other witnesses that the Leopold Museum intended to call at trial, had first hand relevant information concerning Leopold's state of mind when he brought the Wally into the United States, these witnesses should not be permitted to appear.

We never got to that point, however, since we settled the case less than a week before the trial was to commence. In light of the excellent terms of the settlement for the Estate, we believe that the Leopold Museum must have assessed that their chances of prevailing at trial were not good. We of course agreed.

The settlement had three major components:

1. The Leopold Museum paid the Estate 19 million dollars, reflecting the current value of the Wally. In return, the Estate and the Government gave up their claims to the painting.

2. The Wally was exhibited at the Museum of Jewish Heritage in New York for three weeks, before the painting was returned to Austria, preceded by a ceremony commemorating Lea Bondi's legacy and the successful conclusion of the litigation.

3. The Leopold Museum is required to post permanent signage next to the Wally wherever it is exhibited, either at the Leopold Museum or anywhere in the world, setting forth in specific language agreed to by the parties, the true facts of Bondi's ownership established in the litigation.

The settlement documents, which were filed in open court, will be posted on the symposium website, but I want to stress here the significance of the last two non-monetary terms, which were insisted upon by our client. Nazi-looted art claims involve very deep emotions occasioned by the horrific experiences of the claimant families during the Holocaust. As a result, even where a claim can be resolved by payment of the full value of the claimed artwork, there are often other interests of the claimant that must be satisfied before the case can be settled. Often these include "correction of the record," providing public and permanent recognition of the true historical facts. And the importance of

exhibiting the artwork at a museum dedicated to the remembrance of the Holocaust, even temporarily, cannot be overstated. For in this way, we acknowledged the emotional needs of claimants to try to correct, in some way, the historical but still deeply felt injustices of the Nazi era.

So with the Wally case settled after ten long years, let us turn to what I think is the true legacy of that case in the area of Nazi-looted art restitution world-wide.

First, the commencement of the State and federal litigation in the Wally case “changed everything,” as a headline in the Art Newspaper declared when the settlement was announced. That an artwork loaned to a major museum in New York could be seized by government authorities in the United States on the ground that it had been looted by the Nazis 60 years before sent shockwaves throughout the world. It helped spur a global re-examination of the massive looting of art fomented by the Nazi regime, as well as the post-War policies of the governments of Europe and the United States in dealing with looted art recovered from the Nazis but never returned to its true owners.

But, as I indicated at the beginning of my remarks today, perhaps the most significant aspect of the Wally case that distinguishes it from many other cases brought to recover Nazi-looted art is the fact that it was commenced by the United States Government. Indeed, one important question that was repeatedly raised by critics of the case throughout this long litigation was simply this: why were substantial Government resources being committed to what these critics characterized as nothing more than a private title dispute between the Leopold Museum and the Bondi family?

This question is critically important because it really raises the issue of whether the United States and indeed other governments throughout the world should play a significant

role in trying to resolve Nazi-looted art claims. Despite the misgivings expressed by many, it is clear that this civil forfeiture action was both consistent with and fully promoted the express public policy interests of the United States regarding Holocaust-looted art.

As former Chief Judge (and later Attorney General) Michael B. Mukasey determined in one of the early decisions in the case: “On its face, [the National Stolen Property Act] proscribes the transportation in foreign commerce of all property over \$5,000 known to be stolen or converted. Although the museum parties and *amici* would have it otherwise, art on loan to a museum--even a ‘world-renowned museum’--is not exempt.” Explaining further, the court added that “if *Wally* is stolen . . . , application of [the National Stolen Property Act] will ‘discourage both the receiving of stolen goods and the initial taking,’ which was Congress’s apparent purpose.” The court concluded that “there is a strong federal interest in enforcing these laws.”

Indeed, when Nazi-looted art is involved, the United States Government’s interest is even more sharply brought into focus. For it was the United States Government that 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 its rightful owners, by convening the Washington Conference in 1998, and as a leading participant in the more recent Prague Conference. The U.S. Government also played a major role in drafting the principles adopted at each one, which will also be posted on the symposium website.

Moreover, let us not forget that the Government brought the *Wally* action and seized the painting before it was about to be sent to Austria and thus placed beyond the reach of any plausible attempt at resolution. The Austrian Government, while adopting a law in 1998 that purportedly was designed to ensure the careful review of claims for Nazi-

looted artworks in the Austrian Government's possession, had determined that, as a “private foundation” under Austrian law, the Leopold Museum is not covered by this statute. This, despite the fact that the Austrian Government provided a substantial amount of the Leopold Museum’s funding and appointed half of its board of directors. Thus, commencing this forfeiture action without delay and securing the artwork in the United States certainly promoted the United States Government’s interest in fairly resolving these cases and preventing trafficking in stolen Holocaust property.

But in discussing the United States Government, one must also recognize that it is not always on the side of claimants in these cases. Often, especially when a foreign government is the party in possession of the disputed artwork and issues relating to sovereign immunity are involved, the Government may place its purported interest in maintaining foreign relations above its interest in assisting victims of the Holocaust. And, as Larry Kaye mentioned earlier, the Government has now even chosen to ignore those victims when its interest in asserting federal power over the states is involved.

But that does not remove the impact that the Wally case has had throughout the world. The Wally case has proclaimed that in the right circumstances, the U.S. Government will not tolerate the trafficking of stolen property and will commit the resources required to see that the victims of looted art are fairly treated. It can be a forceful partner with Holocaust victims, allowing them to stand up for their rights and persevere even in the face of intransigence and procrastination by the current possessors of their property.