51ST UIA CONGRESS

Paris, France
October 31-November 4, 2007

ART LAW

Thursday, November 1, 2007

STOLEN ART. HOW EXTENSIVE IS THE PROBLEM?

RESTITUTION OF NAZI - LOOTED ART: VIEW FROM THE UNITED STATES

Howard N. Spiegler, Esq. (Herrick, Feinstein LLP)
2 Park Avenue, New York, New York, United States
Phone: +1-212-592-1444/ Fax: +1-212-592-1500
hspiegler@herrick.com

Now that the world's renewed focus on the Holocaust and, in particular, Nazi-looted art is about ten years old, I thought it would be helpful to share with UIA members the particular aspects of litigation in this area that have developed in the United States. My law firm has been involved in many claims brought on behalf of the heirs of Holocaust victims so I believe we may have a particularly beneficial vantage point from which to report on relevant developments. But I think that perhaps the best use of this paper would be to review some of the basic tenets of law that arise regularly in these cases in the United States and to focus on one case that not only, in the view of many observers, substantially contributed to focusing the world's attention upon the problem of Nazi-looted art, but is still pending in court today: *United States v. Portrait of Wally*.[1] This case raises a host of interesting issues including the role of the United States Government in these types of cases.[2]

THE STATUTE OF LIMITATIONS AND RELATED TIMELINESS ISSUES

No examination of litigation in the United States in this area can fairly be made without recognition of a rule of American jurisprudence that distinguishes it from that of most Civil Code countries in Europe and around the world. Indeed, it is this rule that may explain why many claims that might arguably have been brought in other jurisdictions end up in the United States courts.

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, can obtain good title to stolen property. This simple rule is accepted and applied as a fundamental tenet of the property law of the United States.[3] Thus, the owner of stolen property always has the right to reclaim that property from anyone, unless barred by the statute of limitations, as will be discussed below.

---

1 **United States v. Portrait of Wally** [2002] 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y.).

2 The author first set forth several of the issues discussed herein in "Recovering Nazi-Looted Art: Report from the Front Lines," in the *Connecticut Journal of International Law*. SPIEGLER, Howard N., Spring 2001, p. 297-312, **Recovering Nazi-Looted Art: Report from the Front Lines**, *Connecticut Journal of International Law*.

3 **Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc**. [1989] 717 F. Supp. 1374, 1398 (S.D. Ind.), *aff'd*, [1990] 917 F.2d 278 (7th Cir.).

This rule, of course, differs significantly from the Civil Code rule that permits a good faith purchaser of stolen property to obtain title, usually after a certain period of good faith possession. But whereas prescription laws effecting transfer of good title as a result of the passage of time are not common in the United States, the application of the statute of limitations often has the same result: the barring of the plaintiffs' claim because of the passage of time. Thus, even if the plaintiffs technically retain title to their property, they may be prevented from recovering it because it is simply too late.

In virtually all stolen art cases, the specter of the statute of limitations must be dealt with. This poses a host of potential problems for claimants of Nazi-looted art.

A statutory limitations period begins to run when the cause of action accrues. While varying statutes adopted by each state specify the length of the limitations period, the definition of when a cause of action accrues has been left for the most part to the discretion of the courts. With respect to stolen art in the possession of good faith purchasers, the courts have fashioned accrual rules that allow a plaintiff to make a claim for the recovery of art stolen years before. It is important to note that each state has its own statute of limitations with its own set of court-developed accrual rules. Therefore, whether a case is brought in state or federal court, in general, the court will apply the statute of limitations rules that apply in the state in which the case is brought.

A minority of states, including New York, apply a "demand and refusal" rule, under which the limitations period does not begin to run until the owner makes a demand for the return of the property and the possessor refuses. In Menzel v. List,[4] one of the earliest reported United States cases to address the question of restituting Nazi-plundered art, the plaintiffs tried to reclaim a Chagall painting that had been seized from them by the Nazis in 1941 in Brussels.[5] Eighteen years after the War ended, they finally located the painting in the collection of the defendant, who had purchased it in 1955 from a reputable New York art gallery.[6] In response to their lawsuit to recover the painting, the defendant argued that the action was barred by New York's three-year limitations period because, he contended, the

---

4 **Menzel v. List** [1966] 49 Misc. 2d. 300 (N.Y. Sup. Ct.).

5 Id. at 804-06.

6 Id. at 806.

cause of action accrued when the painting was stolen in 1941 or, at the latest, when he purchased the painting in 1955.[7] Holding that the cause of action arises "not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel upon demand," the court concluded that the plaintiffs were the rightful owners of the painting.[8]

Years later, the New York Court of Appeals, the state's highest court, reaffirmed the demand and refusal rule in a case in which the Guggenheim Museum was seeking to recover a painting stolen some twenty years earlier.[9] The question before the court was whether the Museum's alleged failure to take certain steps to locate the painting was relevant to the application of the demand and refusal rule. The Court of Appeals declined to impose any duty of diligence on the owner in this context.[10]

As noted, however, the demand and refusal rule is applicable in only a few jurisdictions.[11] A majority of states impose a duty of diligence on the plaintiff by requiring him or her to establish having taken affirmative steps to locate the property in order to withstand dismissal on statute of limitations grounds.[12] In these states, the limitations period begins to run when the plaintiff discovers, or, after the exercise of reasonable diligence, should have discovered the whereabouts of the stolen art.[13]

This so-called "discovery rule" has been criticized for its imposition of an onerous duty on the owners of stolen art.[14] Not only do most individuals lack the knowledge, resources and experience necessary to successfully locate art, but in the particular case of Nazi-plundered art, information concerning the pieces stolen continue to come to light. In addition, even if an owner or heir had identified artwork after the War, there is historical evidence that the atmosphere in post-War Europe was such that claimants justifiably feared an adverse result if they made claims. Many survivors and heirs understood

---

7 Id. at 806-09.

8 Id. at 809.

9 **Solomon R. Guggenheim Foundation v. Lubell** [1990] 550 N.Y.S.2d 618 (N.Y. App. Div.), *aff'd*, [1991] 77 N.Y.2d 311 (N.Y.). The Guggenheim Museum sought to recover a 1912 Chagall gouache worth an estimated $200,000 that was allegedly stolen in the mid 1960's. The plaintiff discovered the defendant's possession of the painting in August of 1985 and demanded its return the following January. See id. at 619.

10 Id.

11 CUBA, Stephanie, 1999, p. 447, **Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art**, *Cardozo Arts & Entertainment Law Journal*.

12 Id. at 458-61.

13 Id.

14 Id.

that making a claim was a largely futile effort.[15] A court applying the discovery rule should permit the consideration of such historical information.

Clearly, the demand and refusal rule provides a more practical and equitable approach to claims concerning Nazi-plundered art. The explanation by the Court of Appeals in the Guggenheim case for not adopting the discovery rule is particularly apt with respect to Holocaust-looted art:

> To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover that property if the burden is not met would, we believe, encourage illicit trafficking in stolen art. Three years after the theft, any purchaser, good faith or not, would be able to hold onto stolen art unless the true owner was able to establish that it had undertaken a reasonable search for the missing art.[16]

Expecting an heir to conduct an exhaustive and probably expensive search for Nazi-looted artwork imposes too onerous a duty and provides the purchaser with little incentive to make due inquiry concerning the provenance of the art he or she is purchasing, despite being in a good position to do so.

The conflict between the two rules came up in the case of Goodman v. Searle.[17] The case involved "Landscape with Smokestacks," an 1890 painting by Edward Degas, which Friedrich and Louise Gutmann, a Dutch couple who had converted to Christianity from Judaism, purchased in 1932. In 1939, with the War fast approaching, Gutmann allegedly sent it to an art dealer in Paris for safekeeping who placed it in storage to protect it from seizure by the Nazis. The dealer was holding other works owned by the Gutmanns for the same purpose. The Degas later disappeared.[18]

Meanwhile, the Gutmanns both died in Nazi concentration camps in 1944. Their two children attempted to find their parents' artworks after the War but were unsuccessful.[19]

---

15 DECKER, Andrew, December 1984, p. 55, **A Legacy of Shame**, *ARTNews*.

16 **Solomon R. Guggenheim Foundation v. Lubell** [1991] 567 N.Y.S.2d 623 (N.Y.).

17 **Goodman v. Searle** [July 17, 1996] Complaint, No. 96-6459 (N.D. Ill.).

18 BAZYLER, Michael J., [2003] p. 216, **Holocaust Justice: The Battle for Restitution in America's Courts**, New York University Press.

19 Id. at 216.

Not until 1994 was the Degas finally discovered to be in the United States by a Gutmann grandson, Simon Goodman.[20] The family had believed that the Degas had been taken by Soviet troops to Russia and had hoped to find information about it after 1991 when the Soviet Union collapsed and its archives were newly-opened. As part of *his* search, however, Goodman was simply leafing through books at the art library of the University of California of Los Angeles and was shocked to find a photo of the Degas, indicating that it was in the collection of Daniel Searle, the Chicago pharmaceutical magnate, who had purchased it in 1987 for $850,000.[21]

The Gutmann heirs demanded that Searle return the piece to them and Searle refused. Suit was then commenced by Friedrich Gutmann's daughter, then in her mid-70's, and two grandchildren. Searle claimed that Gutmann had sold the Degas when he was suffering financially during the War, but apparently no bill of sale or other proof existed. Searle also argued, however, that the plaintiffs' claims were barred by the statute of limitations, contending that if they had been more diligent, they would have learned of the Degas's whereabouts well before Searle bought it.[22]

The Goodmans argued that the New York demand and refusal rule should apply because Searle purchased the Degas on the New York art market, and that therefore the statute of limitations only began to run when their demand for the Degas was refused by Searle—this meant that their lawsuit was clearly timely regardless of whether the Goodmans had made any effort to locate the Degas. Searle argued, however, that the Illinois discovery rule applied and that therefore the Goodmans would have to show that they brought the suit within three years of the time that they would have discovered the Degas after a reasonably diligent search. Moreover, Searle claimed that the Goodmans were not reasonably

---

20 Id. at 217.

21 Id.

22 Id. at 218. Searle argued that the Goodmans should have known about the Degas's presence in the United States because of the publication of two books (in 1968 and 1974) that included information regarding the Degas, and because of three exhibits at college museums (in 1965, 1968 and 1974) that featured the Degas. See id. at 219. The plaintiffs claimed that they reported the loss of the artwork immediately after the War to the Allied Forces, government officials in Germany, France, and Holland, Interpol, art experts and the International Foundation for Art Research. See id. at 220.

diligent since if they had been, they would have discovered in books published as early as 1968 and college museum exhibits as early as 1965 that the Degas was in the United States.[23]

These issues remained unresolved, however, because the parties settled the case on the eve of trial, but not before four years of litigation had passed. The terms of the settlement are interesting: Searle and the Goodmans agreed to share ownership of the Degas – Searle donated his one-half interest to the Art Institute of Chicago, where he is a trustee, and the Institute agreed to purchase the Goodmans' one-half interest based on an independent appraisal of the painting.[24] As the Goodmans reported, however, the amount they received was just enough to cover their costs of litigation.

In an apparent effort to avoid the difficulties inherent in establishing diligence in searching for and establishing a claim to Nazi-looted art, the state of California has adopted a statute[25] that provides that any claim to recover Nazi-looted art brought against galleries and museums may be asserted until 2010, regardless of whether the statute of limitations pertaining to any such claims had already expired under prior California law. In so doing, the California legislature expressly recognized that due "to the unique circumstances surrounding the theft of Holocaust-era artwork, commencement of an action requires detailed investigation in several countries, involving numerous historical documents and the input of experts" and that "investigating a prospective action may take several years."[26] We may expect other states to consider adopting similar statutes to assist heirs of Holocaust victims to avoid the bar of the statute of limitations in art recovery cases.

Still another legal doctrine related to the statute of limitations, which may be applicable in certain cases, is a common law concept that may be strange to many who practice in Civil Code jurisdictions -- the equitable defense of laches. This doctrine permits a court to determine that even if a claim is timely under the rules pertaining to the applicable statute of limitations, "equitable" considerations may require that the claim be dismissed nonetheless because plaintiffs did not bring it in a

---

23 Id. at 219.
24 Id. at 221.
25 Cal. Code Civ. Pro. § 354.3.
26 Id.

timely manner. Although some recent state and federal court decisions have been interpreted by some to mean that defendants may be able to easily dismiss a claim before trial by making a motion based on laches simply if a relatively long period of time had lapsed between the original theft and the time when the claim was asserted, without serious regard for other relevant circumstances, the defense of laches should not be so easily applied. First, one requirement of laches is that the defendant has the burden of not only showing unreasonable delay on the part of the plaintiffs, but also that the defendant was unduly prejudiced by the delay. Second, because laches is considered an "equitable" defense, the respective equities of the two sides in the case are supposed to be weighed and balanced. Third, this whole analysis is so fact-specific that it should not usually be determined by a motion but only after evidence of these factors are presented and considered after trial.[27]

When these principles are properly applied, there will be several important factors in most Holocaust art cases that militate against the laches defense. For example, conditions in Europe after the War, and the devastating personal losses suffered by Holocaust victims and their families, made searching for lost artwork virtually the last thing on those families' minds. Indeed, the understandable desire to avoid dwelling on that terrible era has likely caused many families to only recently start to investigate property losses suffered during the Holocaust. Moreover, locating lost artwork has been close to impossible for many families, as the Nazi purging of so-called "degenerate art" and their subsequent sale abroad succeeded in scattering artworks throughout the world. And even when art was located and restitution proceedings were available after the War, there were tremendous impediments to recovery, as the small success rate in post-War restitution proceedings in several European countries demonstrates. Finally, when the degree of vigilance exercised by the possessor before he or she had acquired Nazi-looted work is carefully weighed against these other factors, defendants should have great difficulty establishing the laches defense before a judge or jury.

Which really, in the author's opinion, is the way it should be, both with respect to laches and other so-called technical defenses. As Ambassador Stuart Eizenstat, the United States representative

---

[27] **United States v. Portrait of Wally** [2002] 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y.).

to a conference of 44 nations held in 1998 in Washington, D.C. -- which adopted the so-called "Washington Principles" that governments should follow in order to resolve claims related to Nazi-confiscated artworks -- put it so eloquently, "we [should] recognize that as a moral matter, we should not apply 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." [28]

Thus, litigation by private parties brought to reclaim Nazi-looted art can be a daunting endeavor even in the United States, where the fundamental concept that title to stolen property cannot be transferred even to good faith purchasers may be overshadowed by the rules relating to the statute of limitations and laches. Many other and different considerations may also present themselves when the defendant is a foreign government and the Foreign Sovereign Immunities Act comes into play, the subject of a recent article written by the author for the UIA publication, *Juriste*. [29]

U.S. GOVERNMENT AS PLAINTIFF: UNITED STATES v. PORTRAIT OF WALLY

Still other issues arise when the United States Government determines that at issue in a particular case is the importation of stolen artworks into the United States in violation of U.S. criminal laws, in which case the Government itself may decide to pursue recovery of such artworks for its eventual return to the heirs of the victim from whom they had originally been taken by the Nazis. A case in point is the eight-year battle that has been waged by the Estate of Lea Bondi Jaray to recover a painting looted almost 70 years ago in Vienna, *United States v. Portrait of Wally*. [30]

---

[28] EIZENSTAT, Stuart, December 3, 1998, p. 418, **Explanation of the Washington Conference Principles on Nazi-Confiscated Art**, *Washington Conference on Holocaust-Era Assets Conference Report.*

[29] SPIEGLER, Howard N., January 2007, p. 44, **Litigation Against a Foreign Sovereign in the United States to Recover Artworks on Temporary Loan: the Malewicz Case,** *Juriste*.

[30] 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y.).

First the facts, as alleged in the case.[31] In the late 1930's, after Germany's annexation of Austria, Lea Bondi, an Austrian Jewish art dealer, was forced to sell her gallery to a Nazi named Friedrich Welz pursuant to recently adopted aryanization laws in Austria prohibiting Jewish business ownership. Bondi owned a painting by Egon Schiele, called the "Portrait of Wally," which she kept as part of her private collection in her apartment. Shortly before Bondi and her husband were to flee to England, Welz came to their apartment to discuss the gallery's transfer and, upon spotting the "Wally," insisted that she give it to him. Out of fear for what Welz could do if she refused, she turned it over. Also around that time, another Viennese art collector, Dr. Heinrich Rieger, was also 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 died shortly after his arrival.

After the War, the United States occupation forces in Austria attempted to sort out the artworks and other cultural artifacts that had been taken by the Nazis and their collaborators in order to return them to the countries of origin. The U.S. forces arrested Welz and seized his possessions, including artwork. In this process, the "Portrait of Wally" was erroneously mixed in with the Rieger collection. That collection — or at least a part of it — was then sold to the Austrian National Gallery by Rieger's heirs. Although the Austrian authorities responsible for restitution of the Wally to its true owner were made aware by the United States forces of the mixup, the Austrian National Gallery nevertheless took the painting for itself, and "Portrait of Wally" became part of its collection.

Years later, Lea Bondi learned that her beloved painting was hanging in the Austrian National Gallery. In 1953, Dr. Rudolph Leopold, an Austrian Schiele collector, paid Bondi a visit in London – ironically, to seek her assistance in locating more Schiele paintings – and told her that he had seen "Portrait of Wally" at the Austrian Gallery. Bondi asked Leopold to help her recover her painting from the Gallery, and, when in Vienna, she herself asserted her claim directly to the Gallery.

[31] Since the author's law firm represents the Estate of Lea Bondi Jaray in this lawsuit, the facts are those that are in the "record," as alleged by the United States Government and the Estate. Many of these facts are disputed by the other parties and will have to be determined eventually by the Court, perhaps after trial.

But a year later, Leopold entered into an agreement with the Austrian National Gallery whereby he exchanged a Schiele painting from his own collection for "Portrait of Wally," and kept "Wally" for himself. Bondi retained lawyers to attempt to convince Leopold to return her painting to her, but to no avail. She never brought an action, however, believing that it was futile to try to defeat Leopold in an Austrian legal proceeding, and that everyone, including her lawyers, who delayed taking appropriate action, was siding with Leopold. And indeed the historical record of post-War recoveries by Jews in Austria bears out her concerns.[32]

Lea Bondi died in 1969 without having recovered her painting. In 1994, Leopold's art collection, including "Portrait of Wally", became part of the newly-formed Leopold Museum where Leopold himself is Director for Life. And, in late 1997, "Wally" formed part of an exhibit of Schiele paintings loaned by the Leopold Museum to the Museum of Modern Art ("MoMA") in New York. When Bondi's heirs learned that the painting was being exhibited at MoMA, they demanded that the Museum hold the work pending the resolution of the heirs' claim to ownership of the painting. MoMA refused, citing its contractual obligations to return the painting to the Leopold Museum at the end of the exhibition.

Since a New York statute,[33] the only one of its kind in the country at that time,[34] provided that art loans from out-of-state lenders to not-for-profit institutions in New York are exempt from judicial seizures, the heirs could not ask a court to attach the painting to prevent its return to Austria pending the determination of the heirs' ownership claim. At that point, the District Attorney of New York County entered the picture and issued a subpoena for the painting in connection with an investigation he commenced into whether the "Wally" constituted stolen property brought into New York. Prolonged and intense litigation over the validity of the subpoena under New York's anti-seizure law followed, with

---

[32] For example, from 1952 to 1969, the Austrian government made no attempt whatsoever to locate the true owners of over 8,000 priceless works of art that had been handed over to Austrian authorities by American military forces. Moreover, evidentiary requirements in restitution proceedings were unduly harsh given the circumstances. DECKER, Andrew, December 1984, p. 67-71, **A Legacy of Shame**, *ARTNews*.

[33] N.Y. Arts & Cult. Aff. Law § 12.03.

[34] Texas has a similar statute, but it expressly provides that the restriction does "not apply if theft of the work of art from its owner is alleged and found proven by the court." Tex. Civ. Prac. & Rem Code Ann. § 61.081(d).

inconsistent rulings from the trial and appellate courts.[35] Finally, the New York Court of Appeals held that the anti-seizure statute should be read broadly as prohibiting the District Attorney's subpoena of the painting and thus ruled that the painting could be returned to the Leopold Museum in Austria.[36]

Within hours of the court's decision, however, the United States Customs Service obtained a warrant of seizure for "Wally" on the ground that it was stolen property knowingly imported into the United States in violation of the National Stolen Property Act.[37] The United States Government then commenced a civil forfeiture action to remove the property permanently from the Leopold Museum. The Estate of Lea Bondi Jaray and the Leopold Museum, have filed claims to the painting in that action.

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. Although criminal conduct -- in this case, violations of the National Stolen Property Act[38] -- must be established in order for the Government to prevail, this is not a criminal proceeding. For one thing, no prison term or fine will be meted out if the Leopold Museum is held to have brought stolen property into the United States; the stolen property, however, will be forfeited to the Government and subsequently returned to the Estate of Lea Bondi Jaray. Moreover, 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

---

35 **In re: Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art** [1998] 677 N.Y.S. 2d 872 (N.Y. Sup. Ct.) (granting museum's motion to quash based on N.Y. Arts & Cult. Aff. Law § 12.03), *rev'd,* **In re Grand Jury Subpoena Duces Tecum** [1999] 253 A.D.2d 211 (N.Y. App. Div.).

36 The court held that the statutory language of § 12.03 was unequivocal, broadly prohibiting any seizure. It concluded that in this case, by compelling the paintings' indefinite detention in New York, the subpoena clearly effectuated a seizure. **People v. Museum of Modern Art** [1999] 93 N.Y. 2d 729 (N.Y.). The dissent by Judge Smith argued that the court's decision would cause adverse consequences well beyond the parties in this case and that the ruling conflicts with New York law which "has long protected the right of the owner whose property has been stolen to recover that property." Id. at 749. (Smith, J., dissenting) (citing **Solomon R. Guggenheim Foundation v. Lubell** [1991] N.Y.2d 311, 317 (NY)). "[T]he Legislature could not have intended that New York assist the free flow of *stolen* art under an umbrella of complete immunity from civil and criminal process." Id. (emphasis in original). The New York statute was subsequently amended (by unanimous vote of both houses of the New York State Legislature and signature of the Governor) to overrule the Court of Appeals decision and clarify that the law only prevents seizure in a civil, not criminal proceeding. See N.Y. Arts & Cult. Aff. Law § 12.03. The amendment provided for its own expiration 2 years later, and has not been renewed. Id.

37 National Stolen Property Act, 18 United States Code § 2314. The United States Government is not subject to state anti-seizure laws, and MoMA never applied for a State Department determination under the Federal Immunity from Seizure Act. Federal Immunity from Seizure Act, 22 United States Code § 2459.

38 National Stolen Property Act, 18 United States Code § 2314.

doubt." Indeed, most of the burden of proof in the case will be carried by the Leopold Museum, in that it must establish that it did not knowingly bring stolen property into the United States.

The proceedings in the federal court action have been extensive although the merits of the heirs' claim have yet to be addressed by the court. All sides submitted sizeable briefs and hundreds of pages of supporting documents concerning Austrian law, the effect of treaties and agreements to which the United States and Austria were parties, and a host of other issues. The Leopold Museum moved to dismiss the action. In addition, it moved to dismiss the Estate's claim, on statute of limitations and laches grounds, as well as on its claim that "Wally" was not really stolen from Lea Bondi by the Nazi Welz since she had handed it to him when he demanded it. 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 to which the government responded with a dismissal motion of its own. While that motion was pending, MOMA vigorously moved to dismiss the case in its entirety and was supported by an *amicus* brief submitted by nine major museums as well as the American Association of Museums and the Association of Art Museum Directors. Making things even more complicated, another claimant surfaced during the proceedings, asserting that he was the grandson of Lea Bondi's husband from his prior marriage and, appearing pro se, argued that his grandfather and not Lea Bondi had actually owned the painting. The Estate moved for summary judgment dismissing his claim as lacking any basis whatsoever.

All of these motions were pending when the court granted the Leopold Museum's and MoMA's motion to dismiss the case on only one ground—one that the parties had spent a relatively small amount of time briefing. The basis of the court's decision was simply that "Wally" was not stolen property within the meaning of the National Stolen Property Act.[39]

Under the applicable forfeiture laws, the government was required to prove that "Wally" was stolen property within the meaning of the law. While refusing to concede that Welz had stolen the

[39] Id.

"Wally" from Lea Bondi Jaray, the Leopold Museum nonetheless contended that even if that were the case, the "Wally" had ceased being stolen when it was recovered by the United States forces.

The court agreed, basing its holding on a line of so called "sting" cases that held that a defendant could not be convicted of violating the National Stolen Property Act in situations where the police recovered stolen property that was then used in a "sting" operation. The typical fact pattern in these cases is that the police or FBI agents observe thieves taking stolen cars to a warehouse. They raid the warehouse and arrest the perpetrators. Upon questioning, they learn that the next step in the operation was to sell the cars to a "fence." In order to catch the fence, the police then direct the thieves to do what they normally would do and transfer the stolen cars to the fence under police observation. They do it and the police arrest the fence for the crime of receiving stolen property.

The indictment is typically dismissed, however, because, as the courts have ruled, the property is no longer considered stolen—that is, the police had already recovered the cars. So even though the fence intended to commit a crime, he could not be charged with receiving stolen property. The rationale is that when the police recovered the property, they acted as agents of the true owner, and therefore the property was in effect recovered by the owner.[40]

The court in the "Portrait of Wally" case utilized the "sting" rule to dismiss the Government's forfeiture action, even though this rule had never previously been applied outside of the "sting" context. The court ruled that since United States forces had recovered the "Wally" from Welz after the War, it was no longer stolen and therefore could not be the subject of a forfeiture action alleging that stolen property had been imported into the United States.[41]

The court framed the question before it as "whether the U.S. Forces' recovery of the painting was a recovery by an agent of the painting's true owner."[42] It answered that question affirmatively, opining that "[i]n this case, the U.S. Forces were charged with recovering stolen items and acting on behalf of the items' true owners. . . . Accordingly, when they recovered the painting they did so

---

40 **United States v. Portrait of Wally** [2000] 105 F. Supp. 2d 288, 292-93 (S.D.N.Y.).

41 Id. at 294.

42 Id. at 293.

as agents of Lea Bondi. . .- - even though they did not know her name, or that the painting was hers."[43]

The United States Government moved for reconsideration of that decision. In its moving papers, the Government argued that on the facts alleged in the complaint, deeming the U.S. armed forces to be agents of the owner was analytically incorrect. First, at the time "Wally" was confiscated, the U.S. forces had no way of knowing that the painting was stolen property. Indeed, as alleged in the complaint, all they knew was that "Wally" had been taken by Welz, and they seized it pursuant to their authority to confiscate all of the property of suspected war criminals. Second, the fiction of deeming the U.S. forces to be agents of the owner failed because the U.S. forces, unlike the police in the "sting" cases, were under no obligation to return "Wally" to Bondi; their sole obligation was to surrender possession of the painting to a third party, i.e., the Austrian government, without any authority from the owner. As the government noted in its brief: "[t]his is the very antithesis of a genuine agency relationship: an agent has no authority to release property held on behalf of his principal to a third party without the principal's consent." Third, the Austrian authorities responsible for seeing to it that property was returned to the owner after the War also cannot be deemed to be agents of Lea Bondi because, as alleged in the Government's complaint, they did not hold "Wally" as a disinterested party but made every effort, in concert with the Austrian National Gallery, to keep "Wally" in Austria. To that end, they ignored information concerning who the true owner was so that the Austrian Gallery could acquire "Wally" for itself. Fourth, by ignoring Lea Bondi's plea and acquiring "Wally" from the Austrian National Gallery for himself, Leopold wrongfully converted the painting, which means it was stolen all over again. Finally, the Government contended that the court's decision was a far-reaching and dangerous precedent with respect to Nazi-stolen property, stating that "the Court's ruling, if followed to its logical conclusion, could effectively legitimize all property stolen from victims of the Holocaust that passed through Allied hands after the War."

The Court's response was to essentially undo its earlier dismissal. While declining to retract its holding that the "sting" cases could be applied to the activities of the U.S. forces after the War, the Court limited its earlier decision to the facts alleged in the complaint that was the subject of the

[43] Id. at 294.

dismissal motion. The Court acknowledged that there may be additional facts that could be alleged concerning the exact nature of the U.S. forces' activities in post-War Europe with respect to the restitution of property looted by the Nazis, and that it was possible, therefore, that the "sting" cases would not ultimately govern the outcome of the case. But the Court concluded that it could not consider facts and theories first proffered by the Government in its re-argument motion, since its prior decision was based on the allegations of the complaint. Instead, the Court granted the Government's alternative motion to amend or alter the judgment of dismissal to allow it to amend the complaint. The Court's reasoning demonstrates the importance of the case to all victims of Nazi art looting:

> It is true . . . that in the ordinary case the need to protect the finality of judgments will prevail, absent other factors. . . .This is not the ordinary case, and there are other factors present here. This case involves substantial issues of public policy relating to property stolen during World War II as part of a program implemented by the German government, and others. There are more interests potentially at stake here than those of the immediate parties to this lawsuit. Moreover, there is no evidence that the government was pursuing some tactical goal when it withheld arguments it now advances, or that the parties or others would suffer any prejudice other than disappointment if I were to permit the complaint to be amended in whatever fashion the government may now choose. For those reasons, I am loath to decide this case without having all facts and theories considered, simply because of the inadvertent conduct of counsel.[44]

Indeed, the significance of the Court's earlier decision in this case was not lost upon those who have exhaustively studied the historical record of United States actions after the War with respect to art that had been looted by the Nazis. The Presidential Advisory Commission on Holocaust Assets in the United States, after two years of study, issued its "Findings and Recommendations" in December 2000.[45] It made the following finding with respect to the application of the "sting" doctrine in cases involving post-War recoveries by U.S. Forces, like the *Wally* case:

> In that case, a federal district court in New York held that U.S. Forces charged with recovering stolen items were acting on behalf of the true owners and that such recovery

---

[44] **United States v. Portrait of Wally** [2000] 2000 U.S. Dist. LEXIS 18713, 4-5 (S.D.N.Y.).

[45] December 2000, **Plunder and Restitution: The United States and the Holocaust Victims' Assets**, **Report to the President**. Presidential Advisory Commission on Holocaust Assets in the United States.

> prohibited continued treatment of the item as stolen property. Nothing in this Commission's research indicates that the U.S. Army was acting on behalf of owners or their heirs.[46]

And the Commission included the following recommendation to the President:

> The President should urge Congress to amend the National Stolen Property Act to preclude as a defense in a forfeiture action involving the Act that the Holocaust-era art or cultural property lost its status as stolen property . . . when it was recovered by law enforcement or military authorities . . . .[47]

As a result of the Court's decision, the Government amended its complaint and in a subsequent decision, the Court ruled that the recovery doctrine was no longer applicable.[48] In reviewing the Government's amended complaint, the Court acknowledged that the Government modified the allegation that the United States armed forces were holding stolen works of art with an eye toward their eventual restitution:

> Rather, the Complaint now alleges that, pursuant to a military decree in effect, the allied forces seized all of the property of suspected war criminals, regardless of whether it was stolen, Aryanized, or legitimately acquired. . . . Under these circumstances, it can no longer be said that the United States military acted as Bondi's agent when it came into possession of Wally. Rather than "recovering" stolen property, the United States armed forces were simply collecting all property. They did not even know that Wally was stolen. Nor were they "charged by law" with holding Wally on Bondi's behalf or with securing Wally's eventual return. Rather, they were required merely to sort all seized property and transfer it to the [Austrian Government]. This lack of knowledge and duty makes this case unlike every other case . . . that applied the recovery doctrine to the police or other implied agents. . . . [T]he doctrine has never been applied, and should not be applied, where property has merely passed through the hands of government officials who were unaware that the property was stolen and who were under no legally enforceable duty to act on the owner's behalf. The point of the recovery doctrine rests on the agent's knowledge that stolen property has been recovered. I therefore rescind my prior ruling that Wally could not be considered stolen based on the recovery doctrine.[49]

---

46 Id. at 17.

47 Id. at 26.

48 **United States v. Portrait of Wally** [2002] 2002 U.S. Dist. LEXIS 6445, 48-9.

49 Id. at 47-48.

The Court also rejected the other arguments raised by the Leopold Museum and MoMA in support of their dismissal motions and granted the Estate's motion to dismiss the claim brought by the grandson of Lea Bondi's husband. Pre-trial discovery has been underway since then and the case is now headed for resolution by the Court on the merits.

CONCLUSION: THE ROLE OF THE UNITED STATES GOVERNMENT

It is interesting to note that the United States Government has played many different roles in Nazi-looted art 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 "Hungarian Gold Train Case,"[50] appeared as an *amicus* against the plaintiff in Altmann v. Republic of Austria,[51] and was the plaintiff in another forfeiture case.[52] Going beyond the cases that strictly involved Nazi-looted artworks but did concern attempts to recover allegedly stolen cultural property, the Government's role has been similarly varied: it prosecuted a criminal action in United States v. Schultz,[53] submitted a "statement of interest" against the position of the claimants in Malewicz v. City of

---

50 **Rosner, et al. v. United States of America** [2002] 231 F. Supp. 2d 1202 (D. Fla.), in which the United States Government was accused of wrongfully converting a train-load of jewelry, art and other property that had been seized by the Nazis from Hungarian Jews and subsequently recovered by United States forces; the case was eventually settled by, *inter alia*, the creation by the Government of a 25 million dollar settlement fund for the benefit of social service programs for the victims' families.

51 **Altmann v. Republic of Austria** [2003] 124 S. Ct. 46 (U.S.). In this case brought to recover five Klimt paintings from the Republic of Austria and the Austrian National Gallery, the United States argued that the Foreign Sovereign Immunities Act should not be applied retroactively to permit a claim against the Austrian Government for conduct that occurred prior to the enactment of the Act; the Court's ruling rejected that argument.

52 **United States v. One Oil Painting Entitled "Femme En Blanc" by Pablo Picasso** [2005] 362 F. Supp. 2d 1175 (D. Cal.). In this case, the federal government alleged that a Nazi-looted painting had been transported across state lines in violation of the National Stolen Property Act.

53 **United States v. Schultz** [2003] 333 F.3d 393 (2d. Cir.),was a criminal prosecution involving trafficking of cultural property from Egypt in violation of the National Stolen Property Act. An article by the author about this case appears in the UNESCO publication, *Museum International*. SPIEGLER, Howard N., December 2005, p. 103, **The UNESCO Convention's Role in American Cultural Property Law: The Journey to U.S. v. Frederick Schultz**, *Museum International*.

Amsterdam,[54] and has brought a number of forfeiture cases to recover cultural property wrongfully taken from foreign countries.

Moreover, as noted above, the United States Government led the way in urging governments around the world to seek ways to effectuate the policy of identifying art looted from the Nazis and returning it to its rightful owners, by convening an international conference of government officials, art experts, museum officials and many other interested parties in Washington in 1998, known as the "Washington Conference."[55] The Conference promulgated eleven principles on Nazi-confiscated art, which were adopted by 44 nations. One such 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, and 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. [56]

A related principle adopted in Washington encouraged the resolution of disputes by alternative dispute resolution where possible to avoid long drawn-out litigation.[57] It is unfortunate that the parties in *Wally* have been unable to avoid or resolve this litigation that has lasted almost eight years. But it does appear that a court resolution shall finally be forthcoming.

Note: This paper was submitted at the 2007 Congress of the Union Internationale des Avocats ("Association of International Lawyers") ("UIA") and won the Monique Raynaud-Contamine award. The UIA's website address is www.uianet.org. It is being republished here with the UIA's permission.

---

[54] **Malewicz v. City of Amsterdam** [2005] 362 F. Supp. 2d 298 (D.D.C.). In this case, the United States Government had supported the unsuccessful argument of the City of Amsterdam that a loan of artworks to two American museums, which were immunized from judicial seizure pursuant to the Immunity from Seizure Act, could not form the basis for jurisdiction under the Foreign Sovereign Immunities Act. Federal Immunity from Seizure Act, 22 United States Code § 2459; Foreign Sovereign Immunities Act of 1976, 28 United States Code § l330, l332(a), l39l(f), l60l-l6ll. See SPIEGLER, Howard N., January 2007, **Litigation Against a Foreign Sovereign in the United States to Recover Artworks on Temporary Loan: the Malewicz Case,** *Juriste.*

[55] See November 30 - December 3, 1998, *Washington Conference on Holocaust-Era Assets Conference Report.*

[56] Id.

[57] Id.

REFERENCES

Articles and Books:

BAZYLER, Michael J., [2003] p. 216, **Holocaust Justice: The Battle for Restitution in America's Courts**, New York University Press.

CUBA, Stephanie, 1999, p. 447, **Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art**, *Cardozo Arts & Entertainment Law Journal*.

DECKER, Andrew, December 1984, p. 55, **A Legacy of Shame**, *ARTNews*.

SPIEGLER, Howard N., January 2007, p. 44, **Litigation Against a Foreign Sovereign in the United States to Recover Artworks on Temporary Loan: the Malewicz Case,** *Juriste.*

SPIEGLER, Howard, Spring 2001, 297-312, **Recovering Nazi-Looted Art: Report from the Front Lines,** *Connecticut Journal of International Law*.

SPIEGLER, Howard N., December 2005, p. 103, **The UNESCO Convention's Role in American Cultural Property Law: The Journey to U.S. v. Frederick Schultz**, *Museum International*.

Case Law Citations:

Altmann v. Republic of Austria [2003] 327 F.3d 1246 (9th Cir.).

Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc. [1989] 717 F. Supp. 1374, 1398 (S.D. Ind.), *aff'd*, [1990] 917 F.2d 278 (7th Cir.)

Goodman v. Searle [July 17, 1996] Complaint, No. 96-6459 (N.D. Ill.).

In re: Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art [1998] 677 N.Y.S. 2d 872 (N.Y. Sup. Ct. N.Y. County)), *rev'd*, **In re Grand Jury Subpoena Duces Tecum** [1999] 253 A.D.2d 211 (N.Y. App. Div.).

Malewicz v. City of Amsterdam [2005] 362 F. Supp. 2d 298 (D.D.C.).

Menzel v. List, [1966] 49 Misc. 2d. 300 (N.Y. Sup. Ct.).

People v. Museum of Modern Art [1999] 93 N.Y. 2d 729 (N.Y.).

Rosner, et al. v. United States of America [2002] 231 F. Supp. 2d 1202 (D. Fla.).

Solomon R. Guggenheim Foundation v. Lubell [1990] 550 N.Y.S.2d 618 (N.Y. App. Div.), *aff'd*, [1991] 77 N.Y.2d 311 (N.Y.).

United States v. One Oil Painting Entitled "Femme En Blanc" by Pablo Picasso [2005] 362 F. Supp. 2d 1175 (D. Cal.).

United States v. Portrait of Wally [2000] 105 F. Supp. 2d 288, 294 (S.D.N.Y.).

United States v. Portrait of Wally [2000] 2000 U.S. Dist. LEXIS 18713 (S.D.N.Y.).

United States v. Portrait of Wally [2002] 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y).

United States v. Schultz [2003] 333 F.3d 393 (2d. Cir.).

Statutes:

Cal. Code Civ. Pro. § 354.3.

Federal Immunity from Seizure Act, 22 United States Code § 2459.

Foreign Sovereign Immunities Act of 1976, 28 United States Code § l330, l332(a), l39l(f), l60l-l6ll.

National Stolen Property Act, 18 United States Code § 2314.

N.Y. Arts & Cult. Aff. Law § 12.03.

Other:

December 2000, **Plunder and Restitution: The United States and the Holocaust Victims' Assets**, **Report to the President**. Presidential Advisory Commission on Holocaust Assets in the United States.

November 30 - December 3, 1998, *Washington Conference on Holocaust-Era Assets Conference Report.*