Six Klimts, a Picasso, & a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art

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Conquering armies since the dawn of civilization have viewed the cultural treasures of a conquered people as the spoils of war, rightfully theirs for the taking as payment for their efforts in battle. Such was the view, at least, until the outset of the 20th century when civilized nations formed agreements to eliminate the barbaric practice. But enlightened views and international compacts did not prevent the systematic spoliation of cultural treasures by the Nazis during World War II, and sixty-five years later Europe is still trying to sort out who took what from whom, as the rightful owners of plundered artworks emerge to claim the treasures that disappeared from family.

This article attempts to trace the recent efforts of some of those individuals whose families lost priceless treasures to Nazi collectors during World War II. Section II gives a brief overview of how and why the Nazis embarked on their artistic feeding frenzy. Section III looks at how looted works of art escaped efforts to return them to their rightful owners after the war and instead ended up in museums or private collections. Sections IV, V, and VI detail the efforts of Lea Bondi Jaray, Maria Altmann, and Thomas Bennigson to recover, through litigation, works of art that formerly belonged to their families in Europe before they were stolen by the Nazis. Finally, Section VII offers a brief summary and a concluding note on the problems inherent in conducting litigation centered on events that happened nearly 70 years ago.
The article also includes glimpses throughout the text into similar cases that did not reach the litigation stage, and discusses efforts by nations and museums to resolve these disputes without litigation.

II. ACCUMULATING THE NAZI HOARD

Between the years 1938 to 1945, Adolf Hitler and the Nazi troops looted and confiscated thousands of works of art throughout occupied Europe.1 Although an exact number is impossible to pinpoint, between one-fourth and one-third of Europe’s artistic treasure trove was pillaged by the Nazis in an effort to realize Hitler’s vision for Germany as the cultural center of Europe.2 Hitler was not seeking out just any works of art; in his view only German or Germanic art was worthy of Third Reich edification.3 But Hitler and the Nazis still had a use for works that they did not consider cultural property of the Third Reich;4 the Nazis also


2. Id. at 1105 (the number of all valuables looted during the war, including all art objects, books, Judaica, silver pieces and other valuables has been estimated at $10.7 million). See also Tom Tugend, Lawyer Fights for Nazi-looted Art Works, JERUSALEM POST, Apr. 9, 2003.

3. Henson, supra note 1, at 1106 (the Nazis sought any type of German or Germanic art, even if the German artworks were in bad condition or anonymous); Stephen J. Schlegelmilch, Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule, 50 CASE W. RES. L. REV. 87, 93 (1999) (such painters as Vermeer, Pieter Bruegel the Elder, Rembrandt, Hals, Fragonard, Van Eyck, and Durer were particularly targeted because, pursuant to Nazi aesthetic ideology, they represented pure Northern European art of the highest order).

4. Kelly Diane Walton, Leave No Stone Unturned: The Search For Art Stolen By The Nazis and The Legal Rules Governing Restitution of Stolen Art, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 549, 556 (1999) (Josef Goebbels and the Einsensatzstab Reichleiter Rosenberg were in charge of repatriating art from the conquered Western nations, and part of the plan was to seize works taken by the French in the Napoleonic Wars, as well as to seize and secure art of Germanic origin and character).
looted the so-called 'degenerate art' of the modern masters and used these artworks as a sort of war currency to trade for Germanic art.

The Nazis confiscated and resold or traded numerous works of art located in Germany, both before and after the Nazis began deporting Jews to concentration camps in the east. Among these works were those displayed in the infamous "Entartete Kunst," or "Degenerate Art" exhibit first shown in Munich in 1937. These works were later sold to collectors and dealers, as were pieces of 'degenerate art' confiscated from Jewish homes by the Gestapo after 1938. When the Nazis turned their attention towards art

5. Henson, supra note 1, at 1105 (Degenerate art was unacceptable art and included modern or abstract works, art by Jewish artists or depicting Jewish subjects, and anything that was critical of Germany or did not depict Germany as the Nazis perceived it); Schlegelmilch, supra note 3, at 94 ("Hitler... attacked Futurism, Dadaism, and Cubism in his 'Mein Kampf' and, after his rise to power, continued to purge the German people from the influence of [the] spiritual madness. ... of such Judeo Bolshevist modern artists as Pissaro, Kandinsky, Marc, Chagall, Klee, Matisse, Dix, Ensor, Picasso, and Van Gogh").

6. Henson, supra note 1, at 1106; Schlegelmilch, supra note 3, at 94 (some pieces of German heritage could not be plundered, often because they were in the United States, the United Kingdom, Soviet Union or another not-yet-annexed Western European nation, and therefore had to be purchased. The currency by which these purchases were financed often came from the sale or exchange of seized 'degenerate art').


8. Id. at 11.

9. Id. at 13-14.

10. Emma Daly, American Says Painting in Spain is Holocaust Loot, N.Y. TIMES, Feb. 10, 2003, at E1 (this article discusses a claim by Claude Cassirer, a United States citizen, for Pissarro's Rue St. - Honore, Apres-Midi, Effet de Pluie. The Pissarro is currently hanging in the Thyssen-Bornemisza Museum in Madrid. Cassirer claims that the painting was confiscated from his grandmother's apartment in Munich in 1939, and later auctioned in 1943. Both the Museum and Spain have refused to return the painting. The claim is being pursued by the Commission for Art Recovery. More facts on this dispute are available in the WHITE PAPER ON THE MADRID THYSSEN MUSEUM'S NAZI-LOOTED PISSARRO, Sept. 2002, at
located in occupied countries, they found the cultural centers of Vienna and Paris especially fertile looting grounds for 'degenerate art' because both cities boasted lavish private collections and housed the galleries of important modern art dealers. It was in these cities that a Schiele was taken from Lea Bondi Jaray, six Klimts from Ferdinand Bloch, and a Piccaso from Carlota Landsburg. The story of how these works of 'degenerate art' were taken from their rightful owners, how they made their way into the hands of their current possessors, and the efforts of the rightful owners' heirs to regain possession of these works of art demonstrates the complexity of the international legal morass that surrounds the issue of recovering Nazi-looted art.

III. THE CLIMATE FOR RECOVERY

Some additional background on the issue of Nazi-looted art should be briefly noted before this story can be accurately related. The conclusion of World War II brought a halt to Nazi looting, but the confusion that ensued during the Allied occupation allowed a large number of confiscated works to elude attempts by their rightful owners to recover the art. British and American forces


11. See Hector Feliciano, The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art (2d ed. 1997); Lynn H. Nicholas, The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War (1994). See also Lippman, supra note 7, at 24 (the main cultural target [in Vienna] was the art collections of Vienna's leading Jewish family, the Rothschilds . . . . The great prizes [in Paris] were the galleries of the leading Jewish art dealers . . . including the Wildenstein, Seligmann, Paul Rosenberg, and Berheim-Jeune Galleries and the collection of the Rothschild family).


15. See, e.g. Schlegelmilch, supra note 3, at 95.
set up collection points to process and sort out enormous caches of art discovered in "mines, hidden vaults, monasteries, office buildings, homes, and even medieval castles." However, Allied efforts to make sure the works found their way back to their rightful owners were largely unsuccessful and complicated by Allied looting. Many works were misclassified and dumped into the hands of post-war European governments that were less than careful in their attempts to find the rightful owners. Still others never came into Allied hands and found their way out of Europe and into the United States through clandestine means. And regrettably, capitalist pursuits eventually overcame conscientious attempts to control trade in Nazi-looted art, and a period of blissful ignorance ensued.

16. Id. (the "Monuments, Fine Arts, & Architecture" was set up to "salvage, catalogue, and repatriate the treasures").

17. Id. See also Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829 (E.D.N.Y. 1981); DeWeerth v. Baldinger, 658 F. Supp. 688 (S.D.N.Y. 1987) (both suits against owners of collections that had purchased art from American soldiers who had looted art after the war); and Malcolm Balfour, Court OK's Holocaust Suit vs. U.S., N.Y. POST, Feb. 28, 2003, at 22 (discussing a pending lawsuit that alleges the U.S. government confiscated $200 million worth of valuables, including art works, from the "Gold Train" and never returned the valuables to their rightful owners. The "Gold Train" was a cache of war's-end Nazi plunder stolen from Hungarian Jews intercepted en route to Austria by U.S. forces. The suit alleges that many of the works were auctioned for federal benefit or used in government offices and officials' homes).


19. Collins, supra note 18, at 125 (the U.S. government attempted to monitor importation of art into the country after the war, but determined dealers found the means to get works to American museums and collectors "eager to fill the gaps in their collections with works from Europe").


The comfortable complicity of museums and collectors was dealt a disruptive blow in the mid-1990s, when Hector Feliciano and Lynn H. Nicholas published books detailing the systematic method of looting that the Nazis utilized. The books detailed not only the extent of Nazi looting, but also gave potential claimants a body of research that denoted unequivocal evidence of theft. No longer could dealers and collectors ignore gaps in provenance by simply pointing to representations made by the previous seller; both books provided easily verifiable evidence that art had illegally passed through Nazi hands before finding a willing purchaser. It was against this backdrop that the first significant claim was made in the United States for recovery of a Nazi-looted painting. The tide has been turning ever since.

IV. THE BATTLE FOR WALLY

In 1938, Egon Schiele’s Portrait of Wally (“Wally”) hung on a wall in Lea Bondi Jaray’s apartment in Vienna, Austria. The painting was taken from Jaray, an Austrian Jew, in 1938 through the process of “Aryanization,” by Frederick Welz. After the

22. See Feliciano, supra note 11.
23. Id.
24. See generally Collins, supra note 18.
25. See Howard J. Tiernans, Landscape With Smokestacks: The Case of the Allegedly Plundered Degas (2000) (the heirs of Friedrich Gutmann demanded the return of Degas’ Landscape with Smokestacks from Chicago collector Daniel Searle in 1995. The dispute was set for trial in federal court in 1998, but was settled on the eve of litigation. The painting was sold to The Art Institute of Chicago and the Gutmann heirs split the proceeds with Searle).
26. See, e.g., Henson, supra note 1, at 1133-35 (detailing the return of Picasso’s L’Odalisque to the Rosenberg heirs); Howard N. Spiegler, Recovering Nazi-Looted Art: Report From the Front Lines, 16 Conn. J. Int’l L. 297, 297 (2001) (detailing return of a Cranach painting to the heirs of Dr. Phillipe von Gomperz); Collins, supra note 18, at 117-119 (detailing return of Franz Snyder’s “Still Life With Fruit and Game” to the heirs of Edgar Stern).
28. Id. “Aryanization” was the forced sale of Jewish property to “Aryans” at artificially low prices. Welz was an Austrian who joined the Nazi party after the German Reich annexed Austria in March of 1938.
but death in 1969 with Wally still in

29. Id. at *4.
30. Id. at *5; Id. at n2 (the BDA “was not charged with the restitution of artwork to the true owners”).
31. Id. at *6-7; Id. at *6 (the United States authorities initially questioned whether or not Wally was properly included in the Rieger collection based on records kept by Welz).
33. Id.
34. Id. at *8.
35. Id.
37. Id.
38. Id. at *9.
Leopold's possession. In 1994 Leopold sold Wally to an Austrian museum, the Leopold Museum-Privatstiftung ("the Leopold"), where he is Museological Director for life. In 1997 the Leopold sent Wally to New York for display at the Museum of Modern Art ("MoMA"). In 1998 the New York County District Attorney's office issued a subpoena for Wally, which was later quashed by the New York Court of Appeals on September 21, 1999. That same day the United States obtained a seizure warrant under the National Stolen Property Act ("NSPA") and started a forfeiture action, claiming that Wally should be forfeited "because the Leopold transported it in foreign commerce knowing it to have been stolen or converted property."

The court initially dismissed the government's complaint on the basis that Wally did not fit the definition of "stolen" under the NSPA because it had been recovered by United States armed

39. Id. at *8-10.
40. Id. at *11.
41. Wally III, 2002 U.S. Dist. LEXIS 6445, at *11-12. The Court of Appeals' decision is reported at In the Matter of the Grand Jury Subpoena Ducas Tecum Served on Museum of Modern Art, 719 N.E.2d 897 (1999). The subpoena also encompassed Schiele's Dead City III, a painting claimed by the heirs of Fritz Grunbaum. Id. at 899. The Grunbaum heirs also claimed ownership of 15 other Schieles shown at the same MoMA exhibit; the paintings had been purchased by a Swiss art dealer and later conveyed to the Leopold. Lippman, supra note 7, at 85. The Schieles claimed by the Grunbaum heirs have since been returned to Austria, including Dead City III. Celestine Bohlen, Lauder's Mix of Restitution and Collecting, N.Y. TIMES, Feb. 27, at E1. Other Schiele paintings claimed by the Grunbaum heirs have been subsequently seized within Austria by the Austrian government. See infra, note 77. It is unclear why the United States did not include the Grunbaum Schieles in its seizure warrant, but it can be speculated that the Grunbaum heirs' title to these paintings may have been lost under Swiss law, which accords a bona fide purchaser good title to stolen goods after five years of uninterrupted possession. Kelly Ann Falconer, When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art, 21 U. PA. J. INT’L ECON. L. 383, 422 (2000).
forces after the war. The court allowed the government to amend its complaint, and reversed the *Wally I* holding based on a clarification of the role of the United States armed forces as one of “collecting” rather than “recovering” stolen property.

The *Wally III* court also addressed and rejected additional attempts to dismiss the action on jurisdictional grounds, finding that Article 26 of the Austrian State Treaty of 1955 did not grant Austria sole responsibility to restore “property improperly seized from its citizens during Nazi rule,” and that the action was not

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44. See United States v. Portrait of Wally, 105 F. Supp. 288, 294 (S.D.N.Y 2000) (“Wally I”). The court attributed to the United States armed forces the role of Jaray’s agent, meaning that they would have recovered it on her behalf. *Wally III*, 2002 U.S. Dist. LEXIS 6445, at *45-46. Under the “recovery doctrine” the painting would no longer be considered stolen as it was recovered by the owner or her agent acting on her behalf. *Id.* at *46.

45. See id. at *45-49. The government “retracted the allegation that [it was] holding stolen works of art with an eye towards their eventual restitution” which would have created the agency relationship; rather, “the allied forces seized all of the property of suspected war criminals, regardless of whether it was stolen, Aryanized, or legitimately acquired.” *Id.* at *47. The court stated that: “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* . . . [they were just] required to sort all seized property and transfer it to the BDA. This lack of knowledge and duty . . . negates the existence of the requisite agency relationship.” *Id.* at *47-48. Under a similar rationale, the BDA did not have the requisite agency relationship to relieve *Wally* of its stolen taint. *Id.* at *49-50.

46. *Id.* at *19-25. The Leopold and the Republic of Austria, as amicus curiae, argued that Article 26 of the Austrian State Treaty of 1955, signed by the United States, granted Austria exclusive jurisdiction to dispose of all improperly-seized property not claimed within six months after the treaty was signed. *Id.* at *21-23. The court cited *Altmann II*, in stating that “Article 26 . . . does not state that the Austrian government has exclusive jurisdiction over such property . . . [and] [t]he restitution laws enacted to fulfill Austria’s obligation under the treaty have never been viewed as the exclusive means for restoring property; indeed other restitution actions have been filed in the United States.” *Id.* at *23-24. Also, “had the Republic of Austria taken control of *Wally* as unclaimed property within the meaning of the Treaty, it would have breached the treaty to allow the painting to remain with the state-owned Belvedere or to give it to Dr. Leopold.” *Id.* at *24. The court further reasoned that the treaty could not be read to include *Wally*, as *Wally* was only unclaimed because it was
barred by the act of state doctrine, international comity, or the political question doctrine.

The court then went on to address the predicate elements necessary for an NSPA seizure claim, first holding that Welz "stole" Wally under the NSPA. The court rejected claims that either the Belvedere or Leopold acquired good title to Wally through Austrian law of prescription despite Welz’ theft.

improperly included in the Rieger collection. Id. at *25.

47. Id. at *28. Similar to the court’s conclusions, there was no act of state present because “Wally was never legally transferred to the Rieger heirs pursuant to an official Austrian government determination of ownership . . . Rather, the BDA erroneously attributed it to the Rieger collection and mistakenly shipped it to the Belvedere . . . ”.

48. Id. at *33-34. The court found that the balance of interests of the respective forums and international policy favored the United States because Jaray’s ownership in Wally “was never adjudicated on the merits under Austrian law,” and the United States has a strong interest in prohibiting “knowing transportation of stolen or converted goods.”

49. Id. at *37-38. The court reasoned that there was no impermissible intrusion on Austrian law; the court’s “review of Austrian law is limited to determining the predicate issue of ownership.”

50. Id. at *39. The elements of a violation of the NSPA are “(1) the transportation in interstate commerce of property, (2) valued at $5,000 or more, (3) with knowledge that the property was “stolen, converted or taken by fraud”; 18 U.S.C. § 2314; Dowling v. United States, 473 U.S. 207, 214 (1985); and United States v. Wallach, 935 F.2d 445, 446 (2d Cir. 1991). The government’s complaint alleged that “the Leopold transported Wally knowing it to have been stolen by Welz and/or converted by Dr. Leopold.”

51. Wally III, 2002 U.S. Dist. LEXIS 6445, at *50-52. The court had no question of Welz’ specific criminal intent to steal Wally, even if he may have been acting under the “colorable” law of Aryanization.

52. Id. at *53-54 n16. Under Austrian Law (Paragraph 1475 of the Austrian Civil Code), “a possessor of property may acquire title to that property if the possession is based on legal title (purchase or exchange) and extends throughout the [three year] statutory period accompanied by the possessor’s belief that the possession is lawful”); Both the Belvedere and Leopold had reason to doubt legal possession of Wally at all times during their possession of the painting, and a “possessor will be found not to have had the requisite confidence for prescription if, at any time during the prescriptive period, the possessor had any objective reason to doubt his claim . . . . ” Id. at *55. The Belvedere was put on notice as to the probability that Wally was erroneously attributed to the Rieger
Additionally, the court rejected a claim that the action was barred by the statute of limitations, and determined that application of the doctrine of laches was not subject to resolution at this stage in the proceedings. Returning to necessary NSPA elements, the court found that the Leopold knowingly transported stolen property when it brought Wally to New York, thus satisfying the NSPA’s scienter requirement. The court then dismissed collection, and Leopold was informed directly by Jaray of her claim to Wally. Id. at *55-59 (“That Dr. Leopold may have been able to whistle past the graveyard with enough confidence to fool even himself is a hypothesis I need not indulge at this stage of the case.”). Therefore, neither entity gained prescriptive title to Wally. Id. at *52-59.

53. Id. at *61. The court decided that the Austrian statute of limitations was applicable, and did not begin to run under the Austrian Civil Code which does not “generally subject ownership rights to limitation”; Jaray’s ownership rights were not abrogated by the Third Restitution Act of 1947, which would have sunsetted her rights at one year, because Welz’s theft brought Jaray’s claim under the jurisdiction of the Austrian Civil Code, and therefore was not the exclusive jurisdiction of the Third Restitution Act. The court rejected similar claims under the Austrian State Treaty of 1955 for reasons stated see supra note 46 - Wally was not unclaimed property. Wally III, 2002 U.S. Dist. LEXIS 6445, at *60-67. Additionally, Jaray’s claim would not have been barred under New York law, because the statute of limitations would not begin to run until Wally entered the United States in 1997. Id. at *67-69.

54. Id. at *69-70. The Leopold could only prove laches by showing that Jaray and her heirs “unreasonably delayed in starting an action and that the Leopold suffered undue prejudice as a result.” Id. at *69-70 (citing, inter alia, Solomon R. Guggenheim Foundation v. Lubell, 153 A.D.2d 143, 149 (N.Y. Sup. Ct. 1990)). Resolving such a claim involves a “fact-intensive inquiry into the conduct and background of both parties in order to determine the relative equities . . . . [and] [t]he record here does not provide the factual basis for a finding as to delay and prejudice.” Wally III, 2002 U.S. Dist. LEXIS 6445, at *70.

55. See also supra text accompanying note 50. The court also found that Leopold’s conduct satisfied the government’s alternate allegation of conversion. Wally III, 2002 U.S. Dist. LEXIS 6445, at *71-76.

56. Id. at *76-81. The court had no doubt from the allegations in the complaint that Dr. Leopold “either knew or could deduce that Wally was stolen . . . . deliberate ignorance is no defense.” Id. at *78. The court treated an argument that Austrian Law placed the ownership of Wally in reasonable dispute, thereby defeating the scienter requirement, as inapplicable to the
arguments based on the rule of lenity,\textsuperscript{57} the NSPA's statutory purpose,\textsuperscript{58} and due process.\textsuperscript{59} The court allowed the government to proceed with the action.

\textit{Wally} remains in New York, in the custody of MoMA.\textsuperscript{60} Barring any appeal from the court's decision on the application of the NSPA or some of the arguable jurisdictional issues, the next phase in the proceeding will be to determine whether \textit{Wally} was actually stolen from Jaray, and if the painting should then be returned to her heirs.\textsuperscript{61} Given the court's in-depth analysis of the Leopold's legal claim (or absence thereof) to \textit{Wally},\textsuperscript{62} there seems little doubt that a trial will result in civil forfeiture of the painting. The only possible issue left for legal resolution in this regard is the weight given to dueling experts on Austrian law on the issue of prescriptive possession.\textsuperscript{63}

Whether the Jaray heirs will be able to establish ownership of the painting will depend in large part on the court's analysis of the laches issue.\textsuperscript{64} Even though the heirs' claim is not barred by the statute of limitations,\textsuperscript{65} under New York law laches would be an inquiry - this argument actually cut against the Leopold's claim for prescriptive possession - and further determined that Jaray "owns \textit{Wally} under Austrian law; \textit{Wally} is thus not the subject of an objectively colorable ownership dispute." Id. at *80. The court imputed Dr. Leopold's guilty knowledge to the Leopold. Id. at *76-81.

\textsuperscript{57} Id. at *81-84.

\textsuperscript{58} Id. at *84-88. The dominant purpose of the NSPA is to effect "forfeiture of property which has been imported into the United States or is about to be exported in violation of law," and its application effects the congressional purpose of discouraging both "the receiving of stolen goods and the initial taking," even if a "world-renowned museum" such as MoMA is implicated. Id. at *86.

\textsuperscript{59} Id. at *89-94.

\textsuperscript{60} Celestine Bohlen, \textit{Judge Revives Case of Nazi-Looted Art}, N.Y. TIMES, April 27, 2002, at B9.

\textsuperscript{61} Id.

\textsuperscript{62} See supra text accompanying notes 52-53, 56.

\textsuperscript{63} See \textit{Wally III}, 2002 U.S. Dist. LEXIS 6445, at *52-60.

\textsuperscript{64} See supra text accompanying note 54.

\textsuperscript{65} See supra text accompanying note 53.
independent defense to the heirs' claim to *Wally*. However, the court applied Austrian law to the statute of limitations defense, and may also apply Austrian law to the laches defense. Austrian law on laches was not briefed for the motion to dismiss, but it is probable that as a civil law country, Austrian law has no corollary to the common law defense of laches. If New York law on laches is applied to the case, there is evidence on the record to suggest that Jaray and her heirs were less than diligent in pursuing *Wally*.

Even if the heirs cannot establish a claim to the painting, the court's analysis basically forecloses the Leopold's claim as well.

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67. See also *supra* text accompanying note 53.

68. See *Warin v. Wildenstein & Co., Inc.*, No. 115143/99, 2001 N.Y. Misc. LEXIS 542, at *26 (applying French law and determining that the doctrine of laches is unavailable under French law, which, like Austria, is a civil law country).

69. See *supra* notes 6-7. Jaray was aware of the painting's location, at the Belvedere, and then later in the possession of Dr. Leopold, for a significant period of time before her death in 1969. The heirs likely also knew that Leopold and later the Leopold had *Wally*.

70. It is possible that a finding of laches would return the painting to the Leopold.
Under these circumstances, the Leopold may not be able to reclaim the painting, and, if no settlement is reached in this case, *Wally* may eventually end up in the possession of the United States government, an outcome that is likely less than desirable for all parties involved.\(^{71}\)

It is difficult to understand exactly why this case has progressed as it has. The government’s intervention is perhaps understandable in the context of policy considerations and a renewed governmental interest in the recovery of holocaust assets.\(^{72}\) Aside from economic considerations,\(^{73}\) however, the opposition of MoMA\(^{74}\) and numerous other museums who filed

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71. Except, perhaps, for whoever acquires the painting at a subsequent auction.

72. In December of 1998, the State Department hosted the Washington Conference on Holocaust-Era assets, during which the over forty countries in attendance adopted eleven principles to assist in settling issues surrounding Nazi-looted art. Falconer, *supra* note 41, at 390. Afterwards, the United States formed the Presidential Advisory Commission on Holocaust Assets in the United States; the Commission’s findings are compiled in *Plunder and Restitution: The U.S. and Holocaust Victims Assets in the United States and Staff Report 15* (2000). Among the Commission’s findings was a note related to the *Wally* saga that may or may not have affected the decision in *Wally III*: “[W]ith respect to the application of the “sting” doctrine in cases involving post-war recoveries by the United States . . . . ‘In *Wally I*, 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 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.’” Spiegler, *supra* note 26, at 311 (quoting *Plunder and Restitution, supra* this note, at 17).

73. The MoMA is a party to this action as bailee of *Wally*, and “the Leopold has threatened MoMA with liability for any damage it suffers” as a result of this action. See *Wally III*, 2002 U.S. Dist. LEXIS 6445, at *12-18.

74. The opposition of MoMA is interesting in this case given the fact that Ronald S. Lauder, MoMA chairman, is also chairman of the Commission for Art Recovery of the World Jewish Congress, an organization that has been instrumental in recovery of Nazi-looted art (and is currently working to force a Spanish museum to return a Nazi-looted Pissarro, see Daly, *supra* note 10). Bohlen, *supra* note 41. Perhaps the opposition is explainable by Lauder’s “weakness” for Schiele works.
amicus curiae briefs in this case\textsuperscript{75} represents a direct conflict with their previous public pledge to assist the government in the recovery of Holocaust assets.\textsuperscript{76} The opposition of the Republic of Austria is even more difficult to reconcile in light of the fact that Austria has taken affirmative steps to return Nazi-looted art to claimants.\textsuperscript{77} Given these considerations, as well as international pressure to rid museums of Nazi-looted art,\textsuperscript{78} it is difficult to explain why this proceeding has developed to such an adversarial degree. Clearly, the best and easiest solution to this case is some form of settlement that reflects the interests of all parties involved.\textsuperscript{79}


\textsuperscript{76} Both the American Association of Museum Directors and the Association of Art Museum Directors publicly pledged provenance review of works in their collections, and also pledged to formulate methods for resolving ownership disputes in a non-adversarial fashion. Lippman, \textit{supra} note 7, at 89-90. These representations were made in light of the 1998 Washington Conference on Holocaust-Era assets, and were repeated to Congress in 2000. See \textit{Restitution of Holocaust Assets: Hearings Before the House Comm. on Banking and Financial Services}, 106th Congress (2000). Numerous museums have returned paintings to their rightful owners pursuant to this policy. See also \textit{supra} text accompanying note 26.

\textsuperscript{77} See \textit{infra} note 95. Also, the Viennese police have seized a Schiele of questionable provenance, and several others have been withdrawn from auction due to seizure concerns. Peter S. Green, \textit{Austrian Police Seize Art Said to Be Stolen by Nazis}, NEW YORK TIMES, Nov. 16, 2002, at B7; \textit{Schiele Painting Withdrawn From Auction on Nazi Theft Suspicion}, DEUTSCHE PRESSE-AGENTUR, Nov. 19, 2002. See also Robert Schwartz, \textit{The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II}, 32 COLUM. J.L. & SOC. PROBS. 1, 25-26 (1998); See also \textit{Altmann II}, 317 F.3d 954.


\textsuperscript{79} A possible settlement option is presented by the claim for Degas' \textit{Landscape with Smokestacks}, TIERNANS, \textit{supra} note 25. The parties in that dispute agreed to sell the painting to The Art Institute of Chicago and split the proceeds.
The Republic of Austria’s role in preventing the return of Nazi-looted artwork to its rightful owners forms a more central theme in Maria Altmann’s story. In 1907, Gustave Klimt completed his portrait of Adele Bloch-Bauer. The painting was commissioned by Adele’s husband, Ferdinand Bloch, a wealthy Czech-Jewish sugar magnate. The Blochs lived in Vienna, and at the time of her death in 1925, Adele possessed six Klimt paintings. Adele’s will requested that Ferdinand donate the paintings to the Austrian Gallery upon his death.

When the Nazis entered Vienna in 1938 and declared the Anschluss, Ferdinand left behind all his possessions and fled to Zurich. The Nazis divided up Ferdinand’s property, and at least five of the Klimts were taken by Dr. Erich Fuerher, the Nazi lawyer appointed to liquidate Ferdinand’s estate. Fuerher later traded or sold four of these paintings to Austrian museums, and

80. Altmann II, 317 F.3d at 959.
81. Id.
82. Id. Adele owned Adele Bloch Bauer I & II, Amalie Zuckerandl, Apple Tree I, Beechwood, and House in Unterach am Attersee.
83. Id. When the will was probated, “the paintings were found to be part of Ferdinand’s property, not Adele’s.” Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, 1192-93 (C.D. Cal. 2001) (“Altmann I”).
84. Altmann II, 317 F.3d at 959. Much of Austria sympathized with the Nazis, and Hitler capitalized on this popular acceptance of the Nazi invasion by convening a “mock council of ministers . . . which adopted the resolution for the Anschluss. The legitimate Austrian cabinet leaders were arrested and deported to concentration camps. The country was split into single districts under the control of Berlin.”
85. Id.
86. Id. at 959-60. Ferdinand had a large collection that contained works by a number of Austrian Masters in the style coveted by Hitler as Germanic art. Hitler and Goering took several paintings for their own collections and other were purchased for Hitler’s planned museum in Linz. As for the remainder of Ferdinand’s property, his sugar company was Aryanized, his Vienna home used as German railway headquarters, and Reinhardt Heydrich, author of the “Final Solution,” took up residence in Ferdinand’s castle outside Prague.
kept one for his private collection. The sixth Klimt ended up with a private dealer, and eventually also made its way into the Austrian Gallery. Ferdinand died in 1945, and his will revoked all prior wills and left his estate to his heirs, one of whom is Maria Altmann.

Altmann also fled Austria, and relocated to Hollywood, California. Altmann and the other Bloch-Bauer heirs tried to recover the Klimts after the war, but were unsuccessful. The Austrian Gallery claimed rightful possession through Adele’s will. Altmann attempted to file a lawsuit in Austria to recover

87. Id. Fuerher traded Adele Bloch Bauer I and Apple Tree I to the Austrian Gallery in 1941, claiming to “deliver the paintings in fulfillment of the last will and testament of Adele,” sold Adele Bloch Bauer II to the Gallery, and Beechwood to the Museum of the City of Vienna. Fuerher kept Houses in Unterach.

88. Altmann I, 142 F. Supp. 2d at 1193 (the whereabouts of Amalie Zuckerkandl were unknown until it turned up “in the hands of art dealer Vita Kunstler, who donated it to the Gallery in 1988”).

89. Altmann II, 317 F.3d at 960. Ferdinand left his estate to one nephew and two nieces.

90. Id.

91. Id. Official policy of the Second Republic of Austria made voidable all transactions motivated by the Nazis, and should have voided Fuerher’s trades and sales with the Austrian Gallery. The Museum of the City of Vienna offered to return Beechwood for a refund of the purchase price, but the heirs rejected these terms. Altmann’s brother initially reclaimed Houses in Unterach from Fuerhrer’s private collection, but the heirs were unable to procure export permits for the painting and several other recovered artworks. The heirs’ Austrian attorney, Dr. Rinesch, negotiated an agreement with Austria’s Federal Monument Agency, and obtained export permits for many of Ferdinand’s other works “in exchange for a ‘donation’ of the Klimt paintings.” Id. at 960-61. Pursuant to this agreement, Rinesch gave Houses in Unterach to the Austrian Gallery, and Beechwood was transferred to the Gallery. Altmann I, 142 F. Supp. 2d at 1193. The heirs never signed this agreement, and this practice of extorting donations was later declared illegal by the Austrian government. Altmann II, 317 F.3d at 960. Altmann was unaware of this agreement until 1999, and denied granting Rinesch any power to negotiate with the Gallery or donate the paintings on behalf of the heirs. Altmann I, 142 F. Supp. 2d at 1195 n9.

92. Altmann II, 317 F.3d at 960. The Austrian Gallery asserted that the paintings were bequeathed by Adele’s will. Rinesch agreed in the document
the Klimts in September 1999, prompted in part by the litigation over Schiele’s *Wally*, and in part by the Austrian government’s decision not to return the paintings even after it had set up a Committee to review claims for paintings in the Austrian Gallery. Altmann’s suit would have sought to overturn this decision, but she was unable to pay the filing fees required to bring the suit. Altmann instead sued the Republic of Austria and the Austrian Gallery in federal court in California. Austria and the Gallery filed a motion to dismiss which the district court denied.

“donating” the Klimts to the Austrian Gallery that the family would acknowledge the donation as stemming from Adele’s will, justifying this decision to the family “by claiming that Adele’s will would be sufficient to give the museum a claim to the six paintings.” Altmann now claims that the language in Adele’s will was merely precatory, which would make it unenforceable under both U.S and Austrian law. *Id.* at 960 n1.

93. *Id.* at 961.


95. See *Altmann II*, 317 F.3d at 961. *Wally III* brought allegations that the Austrian Gallery possessed looted art. In response, the Austrian Minister for Education and Culture “opened up the Ministry’s archives to permit research into the provenance of the national collection,” and the Austrian government set up a Commission to advise on the return of artworks. Despite discovering documents that called into question the Austrian Gallery’s legal claim to the Klimts through Adele’s will, the Commission recommended against returning the paintings. The Austrian Parliament approved a law in 1998 that allowed return of 500 looted works in Austrian museums. See also Lippman, supra note 7, at 88-89; NORMAN PALMER, MUSEUMS AND HOLOCAUST 178-79 (2000) (for the text of this law). Obviously, the Klimts were not among these works; however, the act returned 200 works to the Rothschild family, which netted the family nearly $90 million in a subsequent auction at Christie’s. Falconer, *supra* note 41, at 416-17.

96. *Altmann II*, 317 F.3d at 961. Under Austrian law, Altmann’s required filing fee was a percentage of the recoverable amount, which would have been about $1.6 million. Altmann applied for and was granted a reduction in filing fees, but still found the cost prohibitive.

97. *Id.* (Altmann filed her complaint in the Central District of California on August 22, 2000).

98. *Id.* (Austria and the Gallery moved for dismissal for lack of subject matter jurisdiction, lack of venue, failure to join indispensable parties, and forum non conveniens); see also *Altmann I*, supra note 82.
The basic issue before the circuit court on appeal was whether or not the Federal Sovereign and Immunities Act99 ("FSIA") granted the district court jurisdiction over the Republic of Austria and the state-owned Austrian Gallery.100 Altmann contended that Austria's conduct fell within the expropriation exception to the FSIA,101 and Austria argued that the FSIA could not be retrospectively applied to conduct pre-dating passage of the FSIA.102

The court applied the Landgraf v. USI Film Prod's103 retrospective application test to the dispute, and considered the reasoning in Princz v. Federal Republic of Germany104 to determine that application of the FSIA in this case would not be impermissibly retroactive.105 The court reasoned that, because the FSIA is basically a jurisdictional statute, on the facts present its operation "effected merely a change of jurisdiction... [and] did

100. Altmann II, 317 F.3d at 958, 962-69.
101. 28 U.S.C. § 1605(a) (2002). "A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case... (3) in which rights in property taken in violation of international law are in issue and... that property or any property exchanged for such 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... ."
102. Altmann II, 317 F.3d at 962. The FSIA become law in 1977. See 28 U.S.C. § 1602 (2002). There is a circuit split as to whether or not the FSIA can be applied prior to conduct that occurred prior to the Department of State's issuance of the Tate Letter in 1952, the moment when "'the American position changed and the restrictive theory of sovereign immunity was adopted'..." Id. at 964 (quoting Edward D. Re, Human Rights, Domestic Courts, and Effective Remedies, 67 St. John's L. Rev. 581, 583-84 (1993)). The text of the 1952 Tate Letter is reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 713 (1976).
104. Princz, 26 F.3d 1166.
not alter liability under the applicable substantive law." The court then determined that, based on a widespread change internationally in adopting the restrictive theory of sovereign immunity, and because the transactions at issue were repudiated by the Austrian government, it could not legitimately expect to receive sovereign immunity for these actions.

The court then found the expropriation exception to the FSIA applicable to Austria’s conduct because it committed a taking that violated international law. The court also found that the

106. Id. at 964. This finding was directed towards the first prong of the Landgraf test.

107. Id. at 964-67. The court noted that Austria itself adopted the restrictive immunity theory after World War I, and that Belgium, Italy, Egypt, Switzerland, France, and Greece had adopted the theory by the 1920s. Id. at 966. The court stated that it was “[m]indful that such seizures explicitly violated . . . Austria’s obligation under the Hague Convention . . . and that Austria’s Second Republic officially repudiated all Nazi transactions in 1946 . . . [just because] Austria and the United States were no longer on opposite sides of World War II at the time the Federal Monument Agency attempted to extort the Klimt paintings does not mean that Austria could reasonably expect the granting of immunity for an act so closely associated with the atrocities of war . . . Austrians could not have had any expectation . . . that the State Department would have recommended immunity as a matter of ‘grace and comity’ for the wrongful appropriation of Jewish property.” Id. at 965. The court also distinguished cases that held the FSIA inapplicable to pre-1952 events as involving “economic transactions entered into long before the facts of this case arose, and unlike here, prior to the defendant country’s acceptance of the restrictive principle of sovereign immunity and to the widespread acceptance of the restrictive theory.” Id. at 967.

108. Id. at 967-68. The expropriation exception to the FSIA “‘is based upon the general presumption that states abide by international law and, hence, violations of international law are not sovereign acts.’” Id. at 967 (quoting West v. Multibanco Comerex, S.A., 807 F.2d 820, 826 (9th Cir. 1987), cert denied, 507 U.S. 1017 (1993)). The taking of the Klimts would only be valid under international law if: (1) it served a public purpose; (2) aliens were not discriminated against or singled out for regulation by the state; and (3) just compensation was paid. Altmann II, 317 F.3d at 968. The court found that “the Klimt paintings were wrongfully and discriminatorily appropriated in violation of international law . . . [as] The Nazis did not even pretend to take the Klimts for a public purpose; instead, Dr. Fuerher sold them for personal gain or exchanged them to supplement his private collection;” and that “their taking
Austrian Gallery is sufficiently engaged in commercial activity in the United States to justify application of the exception. The court also decided that Austria and the Gallery had sufficient minimum contacts to justify personal jurisdiction. The court allowed Altmann’s claim to proceed in district court.

Altmann survived Austria’s and the Gallery’s motion to dismiss, at least initially. The Ninth Circuit denied Austria’s request for a rehearing en banc, but Austria then petitioned for a writ of certiorari which the Supreme Court granted. Austria also applied for and received a stay of the court’s mandate. But even if the Supreme Court affirms the court’s decision and Altmann is allowed to pursue her claim in district court, she could face an uphill battle in establishing her claim to the Klimts.

Altmann’s complaint sought recovery under a number of legal
The crux of Altmann’s complaint is a replevin action under California law for recovery of the painting. Although California law may apply to a replevin action, Austrian law should be used to determine Altmann’s ownership interest in the Klimts. Although the decision in Altmann II as to the application of the expropriation exception to the FSIA should assist in the resolution of this issue, the district court will have to determine the legal effect under Austrian law of the alleged language in Adele’s will and the agreement between Rinesch and the Gallery to “donate” the Klimts.

Additionally, Austria will likely argue that the Gallery gained good title to the Klimts through the Austrian law of prescription, and that Altmann’s claim to the Klimts has expired under the Third Restitution Act. Austria’s claim to prescriptive title will probably fail due to evidence discovered in the Gallery’s archives that indicates the Gallery lacks the requisite good-faith

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115. Altmann seeks a declaration that the Klimts should be returned pursuant to the 1998 Austrian law, replevin under California law, rescission of Rinesch’s agreement with the Gallery, damages for expropriation and conversion, damages for violation of international law, imposition of a constructive trust, restitution based on unjust enrichment, and disgorgement of profits under the California Unfair Business Practices law. Altmann I, 142 F. Supp. 2d at 1197.

116. Id.

117. See Wally III, 2002 U.S. Dist. LEXIS 6445, at 53. Determining title to Wally under Austrian law because “although federal law determines whether the property has been stolen, local law ‘controls the analytically prior issue of (a) whether any person or entity has a property interest in the item such that it can be stolen, and (b) whether the receiver of the item has a property interest in it.’” (quoting Wally I, 105 F. Supp. 288).

118. See supra text accompanying note 108.

119. See supra text accompanying note 92.

120. See supra text accompanying note 91.

121. See supra text accompanying note 52.

122. See supra text accompanying note 53.

123. Altmann I, 142 F. Supp. 2d at 1194-95. Dr. Garzarolli of the Austrian Gallery expressed doubt in a 1948 letter that Adele’s will actually granted the Gallery title to the paintings. Id. A search of the archives also revealed documentation that the Klimts passed through Nazi hands en route to the Gallery’s collections. Id. at 1195.
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possession to gain prescriptive title.\textsuperscript{124} The success of any argument Austria attempts to make in accordance with the Third Restitution Act will depend on the viability of Altmann’s claim for ownership under the Austrian Civil Code.\textsuperscript{125}

Austria will also raise statute of limitations and laches defenses to Altmann’s replevin action. If Austrian law is applicable to these issues, Altmann’s claim is not subject to limitation under the Austrian Civil Code, provided that she has a viable ownership claim under the Code.\textsuperscript{126} Austrian law on laches was not resolved in \textit{Wally III}.\textsuperscript{127} Any laches determination would depend on the legal effect given to Rinesch’s “donation” of the Klimts to the Gallery.\textsuperscript{128} If California law is applicable to these defenses,\textsuperscript{129}

\begin{footnotesize}
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\textsuperscript{124} & \textit{See supra} text accompanying note 52. Paragraph 1475 of the Austrian Civil Code states that “a possessor of property may acquire title to that property if the possession is based on legal title (purchase or exchange) and extends throughout the [three year] statutory period accompanied by the possessor’s belief that the possession is lawful.” \textit{Wally III}, 2002 U.S. Dist. LEXIS 6445, at 55. The documentation discovered in the Gallery’s archives, as well as Rinesch’s negotiation efforts should defeat good-faith possession. \textit{Supra} notes 91, 120. \\
\textsuperscript{125} & \textit{See Wally III}, 2002 U.S. Dist. LEXIS 6445, at 60-65. There are no facts to show that the heirs ever made a claim in accordance with the Third Restitution Act, but even if they had not, if Altmann has a viable ownership claim to the Klimts under the Austrian Civil Code, the Third Restitution Act would not bar Altmann’s claim. \textit{See id.} \textit{Wally III} is unclear as to what provision of the Austrian Civil Code would grant a viable ownership claim, but the implication is that, if the Klimts were stolen by the Nazis as was \textit{Wally}, then Altmann would have an ownership claim under the Austrian Civil Code. \textit{Id. Altmann II} established that the Nazis stole the Klimts, so Altmann should be able to win this argument. \textit{See Altmann II}, 317 F.3d 954. \\
\textsuperscript{126} & \textit{Supra} notes 53, 124. \\
\textsuperscript{127} & \textit{See supra} text accompanying note 68. \\
\textsuperscript{128} & \textit{See supra} text accompanying note 91. It would be difficult to show that Altmann and the heirs “slept on their property rights” when they were not even aware that they had title to the paintings. \\
\textsuperscript{129} & California employs a governmental interest analysis to choice of law issues, which determines choice of law in statute of limitations conflicts by asking whether or not applying California’s statute of limitations advances the statute’s underlying policies. \textit{See, e.g.}, Ashland Chemical Co. v. Provence, 181 Cal. Rptr. 340 (Cal. Ct. App. 1982).
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either under the former statute of limitations or under newly enacted California law, Altmann’s claim would probably not be subject to limitation. 130 Laches appears unavailable in California as a defense to a replevin action. 131

Whatever transpires next in this case, it can be presumed that Austria will fight any attempt to return the paintings to Altmann. Although the Austrian government has made progress in returning Nazi-looted art to its rightful owners, 132 its reluctance to settle this issue with Altmann can be explained by examining Austria’s economic motivation. In addition to profits that flow to Austria through tourism in connection with the Klimts, 133 the paintings themselves are valued at $150 million. 134

VI. CARLOTA LANDSBERG’S PICASSO

Prestigious museums and recalcitrant governments are not alone, however, in their efforts to retain possession of Nazi-looted art. Private art collectors also continue to rebuff requests to return works in their collections that were taken from their rightful owners during the war, preferring litigation to settlement. Such is

130. CAL. CODE CIV. P. § 338 (establishes a three year statute of limitations that “accrues upon discovery of the whereabouts of a stolen article of artistic significance”). See Altmann I, 142 F. Supp. 2d at 1195 n11 (citing Society of California Pioneers v. Baker, 50 Cal. Rptr. 2d 865 (Cal. Ct. App. 1996)). Altmann I determined that Altmann did not actually discover her claim to the Klimts until 1999. However, California courts may follow the New York rule on discovery as discussed in Lubell, supra note 66; in this scenario the district court may conduct a further objective inquiry into Altmann’s attempts to discover her rights to the Klimts. The statute of limitations picture becomes much clearer if newly-enacted CAL. CODE CIV. P. § 354.3 is applied to the case, which purports to retroactively extend until December 31, 2010, the statute of limitations for recovery of “Holocaust-era artwork.”

131. In California, laches is defense only to equitable actions, and not actions at law such as replevin. See Bagdasarian v. Gragnon, 31 Cal.2d 744, 752 (1948).

132. See supra text accompanying notes 77, 95.

133. See Altmann II, 317 F.3d at 970-71.

the crux of a current dispute over the ownership of Picasso’s *Femme en blanc*.  

Picasso painted *Femme en blanc* in 1922, and Robert and Carlota Landsberg purchased it in 1926 or 1927 and took it to their residence in Berlin. After Robert died in 1932, and hostility against Jews in Germany increased, Carlota fled to New York where she settled in 1940 or 1941. Before Carlota left Berlin, she sent the Picasso to Paris for safekeeping with Paris art dealer J.K. Thannhauser. The painting was taken from Thannhauser’s Gallery by the Nazis in 1940 during the occupation of Paris. The Picasso was then in undetermined private ownership until it was exported to New York in 1975.  

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135. Also known as *Femme assise*. Reich, supra note 21.  
136. *Id.*.  
137. *Id.*. Carlota and her daughter left Berlin shortly after Kristallnacht, Nov. 9-10, 1938, “when rampaging Nazis and their sympathizers burned synagogues, Jewish-owned businesses and homes in Germany and Austria.”  
139. Reich, supra note 21; Bennigson, No. BC287294 (Cal. Sup. Ct. 2002) (also from the Thannhauser letter: “Upon the occupation of Paris in 1940, when we were no longer in Paris and the house was closed, the entire contents of the four-story building - and with it your painting - were stolen . . . during the four day long violent German national socialist plundering everything was taken out of the four-story house during the night and placed in trucks”).  
140. Bennigson, No. BC287294 (Cal. Sup. Ct. 2002). Sarah Jackson is the Historic Claims Director of the Art Loss Register, the organization that did much of the preliminary investigation in this dispute. The Picasso was exported from France in 1975 by the Galerie Renou & Poyet without attached provenance. *Id.* at 9. The current owner of the Renou & Poyet would not reveal the provenance of the Picasso, but stated that “he had the picture on consignment from a private collector who had obtained the picture from an art dealer who . . . had faced a Paris tribunal on having traded with the Germans during the occupation.” *Id.*. The owner promised to “provide the name of the private collector and other gallery on the proviso that he was given a hold harmless by the current owner and claimant.” *Id.*. The Renou & Poyet was known as the Renou & Colle during the war, and was noted in an OSS (forerunner of the current CIA) report as a “Firm of art dealers who handled
and Marilyn Alsdorf bought *Femme en blanc* from art dealer Stephen Hahn in New York the same year.\(^{141}\)

The Alsdorfs kept the Picasso in their Chicago apartment\(^{142}\) until Marilyn\(^{143}\) sent the painting to the David Tunkl Fine Art Gallery in Los Angeles for possible sale in September of 2001.\(^{144}\) Tunkl located a Parisian art dealer interested in the painting,\(^{145}\) and sent the Picasso to Switzerland where it was held in the Freeport for inspection by the prospective purchaser.\(^{146}\) The Parisian art dealer contacted the Art Loss Register ("ALR") to conduct a provenance search on the Picasso.\(^{147}\) The search revealed that the painting had been stolen from Thannhauser’s collection during the war after being placed there by Carlota.\(^{148}\) The ALR then contacted

\[\text{looted art . . . . Schenker documents indicate sales to German buyers.} \] \(\text{Id. at 8-9.}\)

\(^{141}\) Reich, *supra* note 21. When the Alsdorfs bought the painting, the receipt read "Private Collection, Paris." Hahn purports to have no further information on the painting’s provenance.


\(^{144}\) *Id.*

\(^{145}\) *Id.*

\(^{146}\) Bennigson, No. BC287294 (Cal. Sup. Ct. 2002).

\(^{147}\) *Id.*

\(^{148}\) *Id.* at 4-8. The ALR first noted that the painting was listed in the "Repetoire des beins spoiles" (sic) ("Catalog of French Property Stolen Between 1939-45"), and recorded under Thannhauser’s name. *Id.* at 4. Thannhauser’s records at the Silva Casa Foundation in Geneva were examined and showed that the painting had indeed been in Thannhauser’s possession and was later stolen by the Nazis. *Id.* at 4-5. The ALR advised the Parisian art dealer of the Picasso’s history, and then contacted Marilyn Alsdorf, who told the ALR that she had purchased the painting from Hahn in 1975. *Id.* at 5-6. Alsdorf directed the ALR to discuss the matter further with her attorney. *Id.* at 6. The ALR then conducted further investigation and discovered through records at the Wiedergutmachungsamt von Berlin that the German government, in 1965, had determined that the Picasso belonged not to Thannhauser, but to Carlota Landsberg. *Id.* Indeed, the German government had, in 1969, paid compensation to Carlota for the actions of the Third Reich, after determining that the Nazis had taken the Picasso from Thannhauser’s gallery. *Id.* at 7.
Carlota’s grandson and heir, Thomas Bennigson.\textsuperscript{149} Initially, negotiations concerning the Picasso were handled by the ALR.\textsuperscript{150} However, once the ALR brought Carlota’s heir, Bennigson, into the picture, Alsdorf’s initial cooperative attitude chilled.\textsuperscript{151} Once negotiations broke down, Bennigson hired an attorney and brought a replevin action in California state court against Alsdorf and the Tunkl art gallery.\textsuperscript{152}

Bennigson also requested a preliminary injunction to prevent Alsdorf from taking the Picasso back to her Chicago apartment,\textsuperscript{153} and immediately filed an \textit{ex parte} application for a temporary restraining order in an attempt to keep the Picasso in Los Angeles.\textsuperscript{154} The TRO was granted the next day (after Alsdorf’s attorney was notified).\textsuperscript{155} But Tunkl and Alsdorf had already removed the painting from Tunkl’s gallery and shipped it back to

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Additional documentation was found that substantiated Carlota’s ownership from the Wiedergutmachungsamt von Berlin and the Ministere des Affaires Etrangeres in France. \textit{Id. at} 6-7.

\textsuperscript{149} Reich, \textit{supra} note 21.

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} \textit{Id.} The ALR’s initial research pointed to Thannhauser as the claimant. When the ALR first contacted Alsdorf about the painting in April 2002, “Alsdorf immediately began discussions to resolve the matter,” and authorized the ALR to “negotiate directly with my attorney Stephen Bernard as he has my complete and absolute authority to negotiate a resolution of your claim of interests.” When Bennigson came into the picture, Alsdorf broke off negotiations, stating in her court declaration that: “When I learned that the [ALR] had changed its position about the history of the painting, after it had made clear representations regarding its authority to resolve another claimant’s claim, I felt very uncomfortable about the reliability of the conclusions that the [ALR] had reached about the painting.” Alsdorf’s attorney stated that: “When this issue came up, I believe Mrs. Alsdorf felt extremely uncomfortable with the fact that there were negotiations ongoing with a party whose standing and whose representation was at best questionable. . . . I’m not suggesting that they were lying or [operating] in bad faith, I’m only suggesting that, not having the benefit of hindsight, what she [Alsdorf] was hearing was somebody who was unclear as to who they were representing.”

\textsuperscript{152} Bennigson, No. BC287294 (Cal. Sup. Ct. 2002).

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} Application for T.R.O, \textit{Id.}

\textsuperscript{155} Guccione, \textit{supra} note 142.
Chicago, just hours before the court granted the TRO. Bennigson then filed a motion to change the lawsuit’s venue from California to Illinois, which the court granted. Bennigson has appealed the court’s ruling and still hopes to keep the case in California.

No matter which state, California or Illinois, eventually hears this case, its resolution may depend in large part on applying French law and perhaps New York law to determine whether or not Asldorf acquired good title to the painting. Under the French law, even a thief can acquire good title if he maintains “continuous, peaceful, open and unequivocal possession” over a thirty-year prescriptive period. Assuming that possession by the

156. Id. Bennigson’s attorney stated that “he would ask the judge to modify his order and allow the painting to remain with Alsdorf in Chicago until the dispute is resolved.” There was some concern that the painting might be damaged if shipped back to California. See Vincent Cinisomo-Lara, Picasso Suit, CITY NEWS SERVICE, June 18, 2003.

157. Id. The court ruled that “there is no jurisdiction for the suit in [California] because the defendant and the artwork are both in Chicago.”

158. Id. Bennigson’s attorney feels that the jurisdictional issue is controlled by Supreme Court precedent that was disregarded by the court.

159. Transfer to federal court is not possible, as Tunkl’s presence as a defendant in the case defeats diversity jurisdiction. Strawbridge v. Curtiss, 7 U.S. 267 (1806).

160. French law has been applied by New York state and federal courts to determine whether or not title passed, and then choice of law rules were applied separately to determine when the action accrued. See Greek Orthodox Patriarchate, No. 98 Civ. 7664(KMW), 1999 U.S. Dist. LEXIS 13257 (applying German law to ownership acquisition issues). Of course, either California or Illinois may apply their own replevin law to determine ownership. See Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 288-290 (7th Cir. 1990) (applying Indiana replevin law to determine ownership of the Kanakaria mosaic looted from Cyprus).

161. New York law may apply to the validity of Alsdorf’s purchase, if indeed good title passed from the Renou and Poyet.

162. See Warin, No. 115143/99, 2001 N.Y. Misc. LEXIS 542, at *20-21 (examining article 2279 of the French Civil Code). Alsdorf also disputes that the painting was stolen rather than sold prior to Nazi occupation. Reich, supra note 21.
anonymous French holder\textsuperscript{163} began shortly after the Picasso’s theft in 1940,\textsuperscript{164} thirty-five years passed before the painting was exported to New York in 1975.\textsuperscript{165} During this time, the anonymous holder may have acquired good title to the painting under French law, which may have passed to Alsdorf\textsuperscript{166} when she purchased the painting from Hahn in New York in 1975.\textsuperscript{167} However, if the anonymous holder did not acquire good title, neither could Alsdorf under New York law.\textsuperscript{168} This inquiry would require further development of the record.

Assuming that Alsdorf did not acquire good title to the painting, the next question would be which statute of limitations is applicable to the case. California law would not bar Bennigson’s claim.\textsuperscript{169} Illinois law is not as settled as to when the statute of limitations began to run on Bennigson’s claim; the discovery rule

163. See supra text accompanying note 140.
164. See supra text accompanying note 139.
165. See supra text accompanying note 140.
166. See Porter v. Wertz, 421 N.E.2d 500 (N.Y. App. Div. 1979) and U.C.C. §§ 1-203, 2-403 (detailing the rights of a good faith purchaser).
167. See supra text accompanying note 141.
169. See supra text accompanying note 130. The statute of limitations in force at the time this action commenced was CAL. CODE CIV. P. § 338, which establishes a three year statute of limitations that “accrues upon discovery of the whereabouts of a stolen article of artistic significance.” See Altmann I, 142 F. Supp. 2d, at 1195 n11 (citing Society of California Pioneers v. Baker, 50 Cal. Rptr. 2d 865 (Cal. Ct. App. 1996)). Bennigson has argued that the new California statute of limitations in CAL. CODE CIV. P. § 354.3 should retroactively apply to this action, which would extend time for bringing a claim to recover “Holocaust-era artwork” until December 31, 2010. Application for T.R.O. at 10-11, Bennigson, No. BC287294 (Cal. Sup. Ct. 2002). Indeed, Bennigson alleged that the specter of this statute was the driving force behind Alsdorf’s decision to take the painting back to Chicago. Id. at 6. An additional wrinkle in this analysis is that CAL. CODE CIV. P. § 354.3 covers artworks in the possession of a museum or art gallery - now that the Picasso is no longer at the Tunkl gallery, this statute may not apply. In any event, Bennigson demanded the painting in 2002 when he learned of its whereabouts, and commenced this suit the same year. Application for T.R.O. at 10, Bennigson, No. BC287294 (Cal. Sup. Ct. 2002). This should be sufficient to overcome any statute of limitations problems in California.
is not codified in Illinois, as it is in California. As to which statute of limitations would apply in each jurisdiction, California’s governmental interest analysis for choice of law would probably

170. See Mucha v. King, 795 F.2d 602, 611-612 (7th Cir. 1986). The relevant statute of limitations, 735 ILCS 5/13-205 (West 2002) does not mention discovery. In interpreting a similar statute, the Mucha court determined that “it must remain a matter of speculation whether an Illinois court would apply [the discovery rule].” Id. at 612. Mucha did note that “the tide in Illinois is running strongly in favor in favor of the discovery rule,” and suggested that Illinois may apply a discovery rule similar to the rule in O’Keefe v. Snyder, 416 A.2d 862, 872-873 (N.J. 1980). Id. at 611-12. 735 ILCS 5/13-205 (West 2002) states that “actions . . . to recover the possession of personal property . . . shall be commenced within 5 years next after the cause of action accrued.” Recent Illinois case law shows that the Mucha speculation may have been prophetic. In Hitt v. Stephens, the Fourth District Appellate Court held that “the discovery rule applies in replevin actions.” Hitt v. Stephens, 675 N.E.2d 275, 278 (4th Dist. 1996). Significantly, the Hitt court discusses its holding in demand and refusal language, suggesting that a replevin discovery rule would not contain a due diligence component; in the court’s estimation only notice to the owner from the possessor would end the tolling of the statute of limitations. Id. at 275. Such a rule would vary from the O’Keefe rule, and would be closer to the New York rule from Menzel v. List, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966). However, the Hitt holding is tempered by the general Illinois rule that the discovery rule is “applied on a case-by-case analysis, balancing ‘the increase in difficulty of proof which accompanies the passage of time against the hardship to the plaintiff who neither knows nor should have known of the existence of the right to sue.’” Hitt, 675 N.E.2d, at 277 (quoting Hermitage Corp. v. Contractors Adjustment Co., 651 N.E.2d 1132, 1135 (1995). The Hitt holding would only be persuasive authority on a Cook County, Illinois, circuit court (where presumably the claim would be brought). In absence of any controlling authority on the specific issue of replevin in the art context, Illinois may borrow the Seventh Circuit’s analysis of analogous Indiana law in Autocephalous, 917 F.2d 278, 288-290 (7th Cir. 1990), wherein the court determined that Indiana would apply a discovery rule with a due diligence component to determine when the statute of limitations began to run on the plaintiff’s action for replevin of the Kanakaria mosaic looted from Cyprus in the late 1970s.

171. See supra text accompanying note 130.

172. See supra text accompanying note 129. See also International Harvester v. Superior Court, 157 Cal. Rptr. 324 (Cal. Ct. App. 1979) (applying the governmental interest analysis to choice of law in tort).
lead a California court to apply its own statute of limitations, and it is fairly clear that an Illinois court would apply its own statute of limitations under a significant contacts analysis. In either jurisdiction, no matter what law was applied, laches would not be a problem. In both California and Illinois, replevin is an action at law, and laches is not a defense to an action at law. Obviously, there are advantages to Bennigson if the case remains in California. The statute of limitations issue is clear, and the only real issues there would be determination of ownership and possibly the discovery issue.

173. A primary consideration in choice of law issues for California is the ability of California residents to recover in tort; Bennigson’s ability to recover would be much more unsettled if Illinois law were applied. See International Harvester, 157 Cal. Rptr. 324 (Cal. Ct. App. 1979).

174. Illinois employs the most-significant-contacts approach to choice of law in tort, choosing “the local law of the place of injury unless Illinois has a more significant relationship with the occurrence and with the parties.” Wreglesworth v. Artco, Inc., 738 N.E.2d 964, 971 (1st Dist. 2000). “Illinois courts would apply their own statute of limitations, as a general rule, to cases of this sort.” Kalmich v. Bruno, 450 F. Supp. 227, 229 (N.D. Ill. 1978) (case involving confiscation of property by the Nazis). It is worthy to note here that, if French law conveyed good title to Alsdorf, or if the corresponding French law limiting actions time-bars Bennigson’s claim, see Warin, No. 115143/99, 2001 N.Y. Misc. LEXIS 542, at *20-21, Illinois would not even entertain the action. See 735 ILCS 5/13-210 (West 2002) “When a cause of action has arisen in a state or territory out of this State, or in a foreign country, and, by the laws thereof, an action cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this State.”

175. In California, laches is not a defense to replevin. See supra text accompanying note 131; Fredrichs v. Tracy, 33 P. 750 (1893) (replevin is an action at law). In Illinois, laches is not a defense to replevin. See Hitt, 675 N.E.2d 275 (citing General Motors Acceptance Corp. v. Vaughn, 193 N.E.2d 483, 486) “Since replevin is a legal, not an equitable action, laches would not apply.”

176. See supra text accompanying notes 130, 169.

177. See supra text accompanying notes 28-29.

178. See supra text accompanying note 130. As with Altmann, it is unsettled as to whether or not a due diligence component would be imposed on Bennigson in accordance with the discovery rule. Bennigson cited both Autocephalous, 917 F.2d 278, 288-290 (7th Cir. 1990), and O’Keefe, 416 A.2d 862, (N.J. 1980),
VII. CONCLUSION

There are a number of avenues currently available for claimants to recover Nazi-looted artwork that did not exist in the first 50 years following World War II. In addition to litigation, which is the focus of this paper, a number of museums and nations have willingly opened their collections and archives to scrutiny by potential claimants. As a result, an extraordinarily large number of works have been returned. The return of these works has been achieved, for the most part, through cordial negotiations or seemingly fair administrative processes. However, as this paper has demonstrated, the return of Nazi-looted artworks is not yet a fait accompli. When the economic stakes are high, the process becomes adversarial. And, when placed under the legal microscope, problems of proof and conflicting principles of

in relation to his analysis of the replevin issue. Application for T.R.O, Bennigson, No. BC287294 (Cal. Sup. Ct. 2002). It is significant that both of these cases impose a due diligence component to the discovery rule, and if the court were to incorporate a due diligence component into either CAL. CODE CIV. P. § 338 or CAL. CODE CIV. P. § 354.3, Bennigson might have difficulty explaining his objective efforts to discover the painting’s location. See California Pioneers, 50 Cal. Rptr. 2d at 873. Bennigson’s attorney alleges that the Picasso was not viewed publicly while in Alsdorf’s possession until it was sent to the Tunkl Gallery in the Fall of 2001. E-mail from E. Randol Schoenberg, attorney for Bennigson (April 24, 2003, 16:24:03 CST) (on file with author). However, Alsdorf alleged that “the Picasso had been viewed as her residence by a number of individuals and institutions.” Bennigson, No. BC287294 (Cal. Sup. Ct. 2002).


180. See supra text accompanying notes 26, 76, 95. See also Sophia Kishkovsky, A New Glasnost On War’s Looted Art, N.Y. TIMES, March 11, at E1 (detailing Russian and German efforts to return Nazi-looted art).

181. Id.
international law create a complex litigation environment that can get very expensive, very quickly. In this scenario, only claimants with some level of personal wealth and claims to paintings of considerable value will likely take the litigation route. For these claimants, however, it is encouraging to note that all three branches of the United States government have been willing to expend resources,\textsuperscript{182} effect legislative change,\textsuperscript{183} and stretch the limits of legal interpretation\textsuperscript{184} to create an environment that provides substantially greater opportunities to recover the works of art taken from their families during Nazi occupation.

In final analysis, the results of efforts to recover Nazi-looted artwork, either through litigation or less adversarial avenues, transcend secondary concerns of simply restoring valuable works of art to family coffers. The battles of Jaray, Altmann, Bennigson, as well as others, highlight a theme of central importance to civilized society; that the cultural heritage of a people is not something subject to erasure by callous disregard, or even by brute force. By clinging to the notion that what was taken by the Nazis should be returned, no matter what the cost or the course of intervening events, entire nations have been persuaded to join the battle to restore that stolen cultural heritage. And perhaps, as artifacts and artworks looted from Iraq during the recent conflict begin to make their way into the world marketplace, the framework is in place to restore those works to their rightful owners without the difficulty faced by victims of Nazi looting during World War II.

\textsuperscript{182} See Wally III, 2002 U.S. Dist. LEXIS 6445.
\textsuperscript{183} See supra text accompanying notes 72, 130.
\textsuperscript{184} See Wally III, 2002 U.S. Dist. LEXIS 6445; Altmann II, 317 F.3d 954.