Legal and Ethical Problems in Art Restitution

CLE Materials

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OVERVIEW

Litigation of claims concerning antiquities and Nazi-looted art is on the rise, which may indicate a decreasing willingness for compromise in this area with little black letter law. One need only open a newspaper to find reports of FBI raids, brazen thefts, civil litigation, and extra-legal demands relating to museum-quality cultural items. These CLE materials and the corresponding panel presentation explore the reasons for the recent increased attention being given to the art/cultural property/cultural heritage legal field, current litigation of such claims, modern out-of-court settlement discussions, and the market impact of these developments. It will analyze both the legal and ethical aspects of representing parties on different sides of such disputes. Discussion will implicate not just Federal Rule of Civil Procedure 11, but also Model Rules of Professional Conduct 1.13, 1.6, 3.4, and 4.1. The focus is settlement and resolution, emphasizing how legal defenses, such as statutes of limitation, and moral issues should be rectified with the interests of particular clients and the requirements of ethics codes.

Section I discusses the cultural heritage/cultural property field and the identity issues driving the art reparations movement. Section II highlights Italy's recent high-profile and successful efforts using negotiation and criminal prosecutions to reclaim cultural objects from museums, dealers, and collectors. Section III discusses just a few of the recent cases concerning Nazi-looted art. Finally, appended are the most relevant Model Rules of Professional Conduct implicated by lawyers' assertion, negotiation and settlement of claims to cultural objects.

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and has written and lectured extensively on archaeological subjects and Holocaust-era looted art and provenance research.

I. CULTURAL HERITAGE, CULTURAL PROPERTY, AND IDENTITY

The term "cultural property" is defined in the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science."[1] The Convention enumerates eleven categories of property, including such items as flora, fauna, elements of archaeological sites that have been dismembered, antiquities over one hundred years old and objects of ethnological interest.[2] In Article 2, the Convention speaks on broader terms and acknowledges that illicit import, export and transfer of ownership of cultural *property* is one of the main causes of impoverishment of "the cultural *heritage* of the countries of origin of such property."[3]

How, then, may we distinguish the term "cultural property" from "cultural heritage?" One expert has distinguished "heritage" as being essentially a collective and public notion, belonging by definition in the realm of public interest and held for the public good.[4] In contrast, cultural "property" is "that specific form of property that enhances identity, understanding, and appreciation for the culture that produced the particular property."[5] Thus, cultural "property" may be interpreted in a more limited sense as most often referring to an object or group of objects based on the significance of

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[1] UNESCO Convention on the Means of prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *opened for signature* Nov. 14, 1970, 823 U.N.T.S. 231; 9 I.L.M. 289.
[2] *Id.*, at Art. 1 (a) – (k).
[3] *Id.*, at Art. 2 (emphasis added).
[4] Randall Mason, *Conference Reports: Economics and Heritage Conservation: Concepts, Values, and Agendas for Research, Getty Conservation Institute, Los Angeles (December 8 – 11, 1998),* 8 INT'L J. CULTURAL PROPERTY 550, 561 (1999); *see also* Lyndel V. Prott and Patrick J. O'Keefe, *"Cultural Property" or "Cultural Heritage,"* 1 INT'L J. CULTURAL PROPERTY 307 (1992).
[5] Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 BOSTON UNIV. L. REV 559, 569 (1995).

the object as one of archaeological, scientific or historic importance. The importance of the object as a source of information, its aesthetic qualities and age are also factors in determining a definition of cultural "property."[6]

The most famous case where the definitions of cultural property and heritage intersect is that of the sculptures of the Parthenon, removed from the Temple of Athena on the Acropolis in Athens, shipped to England by Lord Elgin in the opening decades of the Nineteenth Century and housed since 1816 in the British Museum.[7] To the Greeks, these sculptures are the quintessential symbol of the Greek nation – its cultural heritage – and they have been fighting for their restitution for decades. There was a significant push to secure the Parthenon sculptures back in Greece for the 2004 Olympic Games, and now the push focuses on returning the sculptures to the Greek museum at the foot of the Acropolis optimistically designed to house them.[8]

There are increasing instances where the definitions of cultural heritage and cultural property have become inseparable. The Ethiopian Parliament had threatened to break diplomatic ties with Italy if the Axum Obelisk were not restituted to Ethiopia. The obelisk was taken from the holy city of Axum in 1937 on orders from Benito Mussolini and has stood in Rome's Piazza di Porta Capena ever since; Ethiopia had been asking for the return of the obelisk since 1947. To Ethiopians, the obelisk is a symbol of their ancient civilization and their identity, history and culture.[9] The obelisk is thus an object

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[6] Frank G. Fechner, *The Fundamental Aims of Cultural Property Law*, 7 INT'L J. CULTURAL PROPERTY 376, 380 (1999).
[7] David Rudenstine, *The Legality of Elgin's Taking: A Review Essay of Four Books on the Parthenon Marbles*, 8 INT'L J. CULTURAL PROPERTY 356 (1999); *see also* David Rudenstine, *Did Elgin Cheat at Marbles?,* THE NATION, May 29, 2000.
[8] Mark Rose, Double Standards, ARCHAEOLOGY MAGAZINE, May/June 2002, at 14, *available at* www.museum-security.org/02/033.html, March 19, 2002 (last visited Feb. 25, 2008).
[9] Nita Bhalia, *Storm over Ethiopian Obelisk Lightning Strike*, ADDIS TRIBUNE, June 1, 2002, *available at* http://www.museum-security.org/ (last visited Feb. 25, 2008).

of cultural property and cultural heritage. In May 2002, lightning struck the obelisk and broke off parts of the top. On July 19, 2002, the Italian government decided to return it to Ethiopia, but pledged to repair it before sending it home. Ethiopia's ambassador to Italy responded: "We have been waiting a long time, but we had reached a point where we decided we would wait no longer. It is a symbol of our history, our glorious time."[10] The obelisk was returned April 2005.

Cultural property merges with cultural heritage in many areas of the globe, especially among the indigenous peoples of North and South America. The destruction of the cultural record – whether through decay, destruction or pillage – can give rise to cultural "memories" that take on a greater power as a re-invention of the culture heritage. Thus, cultural artifacts serve to reify the past, whether the historical past or a re-invention of that past, to assert a cultural lineage connecting the present members of the society to their ancestors. This concept has recently found more formal expression in the UNESCO Universal Declaration on Cultural Diversity, which states that, "particular attention must be paid to. . .the specificity of cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods."[11] This tendency is in direct conflict with the commodification of cultural objects and antiquities that is at the heart of most cultural property lawsuits.[12]

This use of cultural property as a reification of identity is evident on another level in the current effort to restitute works of art looted from Jewish families during the Holocaust. The restitution of a rare object of Judaica, an Eighteenth Century silver and

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[10] Daniel Williams, *Italy Vows to Return Ethiopia's Obelisk*, WASH. POST, July 20, 2002, at A15.
[11] UNESCO Universal Declaration of on Cultural Diversity, November 2, 2002, *available at* http://www.unesco.org/confgen/press_rel/021101_clt_diversity.shtml (last visited Feb. 25, 2008).
[12] *See, e.g.*, *Peru v. Johnson*, 720 F.Supp. 810 (C.D. Cal. 1989), *aff'd sub nom., Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991).

gilt Torah Breastplate, involved research into the whole history of a family, of which only the father of the claimant survived. The Torah Breastplate disappeared when the family was forced to sell their house and business in a small town in Bavaria and flee to Munich in 1938. As the successful claimant observed, "[I]t is such a wonderful story of redemption."[13]

Other families that have been successful in their efforts to locate and recover works of art looted during the Holocaust have expressed similar emotions. Nick and Simon Goodman, along with their Aunt Lili, searched for years for their family collection, including paintings and objects of decorative art. Friedrich Gutmann, grandfather of Nick and Simon and father of Lili, was a banker of German descent who lived in Holland and who was forced to surrender his large collection to the Nazis. He was beaten to death at Theresienstadt. In June 2002, it was announced that 233 works that had been in Dutch custody since the end of World War II were to be returned to the Goodman heirs. Upon hearing the news, Nick Goodman said, "We've been vindicated."[14]

The inseparability of "cultural heritage" from the more strictly legal definition of "cultural property" is an emerging concept and one with which the law will have to grapple. At present, cultural property law is a mixture of national and international law, applied differently in different jurisdictions, and according to principles of both national law and international conventions. As one author has suggested, if the goal is the

[13] Celestine Bohlen, *Museum Helps Jewish Family Regain Stolen Relic*, N.Y. TIMES, Aug. 29, 2001, at E1. Professor Roussin represented the family in this restitution.
[14] Marilyn Henry, *Dutch Return Gutmann Works*, ARTNEWS, June 2002, at 50.

protection of both cultural property and the cultural heritage, "in a modern world of global markets, national and international rules must also be harmonized."[15]

II. CULTURAL PROPERTY IN THE PRESS: ITALY'S CULTURAL PATRIMONY RECOVERY

Popular press lately attributes Italy's recent success reclaiming its cultural patrimony to the book MEDICI CONSPIRACY by Peter Watson and Cecilia Todeschini. Although the book is interesting and revealing, the truth is that Italy's recent successes have resulted from events dating back to 1902 when it passed its first "in-the-ground" statute, which vests ownership of unearthed ancient artifacts in the state. Italy ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 1978. In 2001, Italy signed a Memorandum of Understanding (MOU) with the United States, also a party to the UNESCO Convention.[16] Pursuant to the MOU, which was renewed in 2006, the United States agreed to protect pre-Classical, Classical and Imperial Roman architectural material. Thus, U.S. customs and enforcement agents have been committed to the goal of recovering covered artifacts. Italy, however, has not sat back and waited for the United States to do the heavy lifting.

In the mid-1990s, Italy began to firmly press U.S. museums to return objects Italy believed had been illegally exported. It has long been understood that artifacts illegally excavated in Italy are transported through Switzerland before reaching the international market. Accordingly, Italian police sought assistance from Swiss police in 1995 to conduct raids on the Geneva warehouses of Italian art dealer Giacomo Medici. As

[15] Fechner, *supra* note 6, at 377.
[16] The U.S. ratified in 1983 although the U.S. Congress via the Cultural Property Implementation Act has implemented only Paragraphs 7(b) and 9.

relayed in the MEDICI CONSPIRACY, the raid uncovered a vast treasure trove of smuggled antiquities – many fresh from the ground and others in various stages of the market preparation process. A parallel investigation in Italy uncovered a piece of paper that seems to reflect an organization/flow chart of a vast smuggling ring implicating key players in the international antiquities market, including a number of U.S. museums, former J. Paul Getty Museum (the Getty) curator Marion True and prominent art dealer Robert Hecht. The author of the chart, however, was dead by the time it was found. The chart alone cannot tell us about the knowledge possessed by these key players about the provenience of antiquities they purchased. Nonetheless, the Italian government viewed the chart in conjunction with other evidence, particularly photographs found at the Medici warehouses, and brought criminal charges against key and lesser players.

Medici was arrested in 1997 and convicted in 2004 after a lengthy trial in Rome with testimony by Italian *tomboroli*, "tomb raiders." Medici was sentenced to ten years in jail and fined € 10 million. He remains free pending his appeal. Hecht and True were indicted in 2002 for conspiracy to traffic in antiquities. Hecht was (in)famous for having sold the *Euphronios krater* to the Metropolitan Museum of Art for a controversial $1 million in 1972, the first million-dollar sale of a piece of antiquity.[17] True, who had tightened the Getty's questionable acquisition policies during her tenure as curator there, was the first U.S. museum employee ever to be indicted for allegedly illegal antiquities trading.

Negotiations between the Italians and the Getty were difficult – it took several years before they could agree on exactly which antiquities the Getty would return to Italy. Additionally, it was reported in the press that the Getty tried to condition the return upon

[17] A raid of Hecht's residence uncovered his personal journal, which has been pivotal in his prosecution.

the dropping of charges against True and that the Italians refused this request.[18] On October 25, 2007, the Getty formally agreed to return 40 of the 51 artifacts demanded, including the prized *Cult Goddess* limestone and marble statue. In the agreement, the Italian Culture Ministry agreed that the *Cult Goddess* could remain on display at the Getty until 2010, but the other artifacts were to be returned immediately.[19] Italy will loan other artifacts and engage in "cultural cooperation," including research projects and joint exhibitions. In the midst of the negotiations in August, Italy dropped the civil charges against True and reduced the criminal charges, but the criminal trial of True and Hecht continues.

Additionally, the Greek government charged True with antiquities smuggling, and the Getty returned four objects to Greece, including the prized gold funeral wreath, a photo of which used to grace the cover of the Getty's brochure. A Greek judge dismissed the criminal charges against True, which pertained solely to the gold funeral wreath, in late November on statute of limitations grounds.

True vigorously maintains her innocence, claiming that she never knew any of the antiquities in question were looted. In late December 2006 in the midst of the negotiations, in a two-page letter she wrote to her former colleagues at the Getty, she railed against their "calculated silence" and "lack of courage and integrity." She wrote

[18] One report seems to contradict this characterization of events. The L.A. TIMES quoted Getty spokesman Ron Hartwig as having stated: "Marion's situation is tragic . . . . . We have, however, tried throughout this process to keep the two issues separate, and focus on resolving the claims for the objects with Italy with the great hope that it would have a positive impact on Marion's situation." Ralph Frammolino and Jason Felch, *The Return of Antiquities a Blow to Getty*, L.A.TIMES, Aug. 1, 2007, at 1.

[19] In late November an Italian judge ruled that a local cultural group's claim to the bronze *A Victorious Youth* was barred by the statute of limitations. The Italian government and the Getty are continuing negotiations concerning the statue, with the Getty claiming it had been found in international waters and thus is not subject to restitution.

specifically in regard to the return of the gold funerary wreath and other objects to Greece:

> Once again you have chosen to announce the return of objects that are directly related to criminal charges filed against me by a foreign government . . . without a word of support for me, without any explanation of my role in the institution, and without any reference to my innocence.[20]

Many curators of U.S. museums have publicly supported True; others have distanced themselves.

Meanwhile, the Italian government on February 21, 2006, finalized negotiations with the Metropolitan Museum of Art for the return of the prized *Euphronios krater*, other vases and Hellenistic silver.[21] The Boston Museum of Fine Arts in September 2006 agreed to return thirteen objects, including a statue of Sabina. On October 26, 2007, the Princeton University Art Museum agreed to return four objects immediately and four more in four years. In January 2008, the University of Virginia agreed to return two ancient Greek sculptures. Italy has proudly displayed many of the returned objects in the Presidential Palace, the Quirinal, in Rome.

No museum acknowledged any wrongdoing; all received promises for future loans of Italian antiquities or other "cultural cooperation." Not all objects initially demanded by Italy were returned.

The Italians reportedly have since turned their sights on to other museums, dealers and collections implicated in the photo chain linking *tomboroli* looting to the market. New York art dealer Jerome Eisenberg of Royal Athena Galleries agreed to return eight Etruscan and Roman artifacts on November 6, 2007. Collector Shelby White returned nine spectacular objects January 2008. Other major players in the international

[20] Associated Press, *Ex-Getty Curator Says She's Taking Fall*, Dec. 29, 2006.
[21] The museum disputes Italy's claim that the silver's find spot is located in Morgantina.

antiquities market reportedly targeted by Italy but not yet having reached any public agreement include the Cleveland Museum of Art, New Carlsberg Glyptotek (Copenhagen, Denmark), the Miho Museum (Shiga, Japan), the Barbara and Lawrence Fleishman collection, the Maurice Tempelsman collection, dealer Robin Symes (UK, who in 2005 served 7 months of a 2-year sentence for antiquities smuggling), dealer Fritz Bürki (Switzerland), Galerie Nefer (Switzerland, owned by Frida Tchacos, wife of Werner Nussberger who donated two items to the Getty), and Atlantis Antiquities.[22]

Earlier reports mentioned the Toledo Museum of Art and Minneapolis Institute of Arts, but recent statements by Francesco Rutelli, Culture Minister of Italy, have not mentioned these two institutions. Additionally, the Bunker Hunt collection, which constitutes part of the Shelby White – Leon Levy collection was mentioned separate and apart from the Shelby White restitution. And a bronze krater is currently on loan to the Museum of Fine Arts in Houston from the Shelby White –Leon Levy collection, and there are calls for the museum to release its provenience history.

Finally, the Italian government has recently busted an international ring of antiquities smugglers, which will lead to the largest criminal case against antiquities smugglers to date.

III. RECENT JUDICIAL DECISIONS IN NAZI-ERA LOOTED ART CASES

It is now internationally acknowledged that vast quantities of artworks were looted during World War II, not randomly, but as official policy of the Nazi

[22] For more minor players implicated, see David Gill and Christopher Chippindale, *From Malibu to Rome: Further Developments on the Return of Antiquities*, 14 INT'L J. CULTURAL PROPERTY 205 (2007).

government.[23] Any estimate of the numbers of stolen artworks must remain speculative; however, some estimates put the figure at 600,000 works of painting, sculpture and tapestries, of which anywhere from 10,000 to 100,000 works are still missing.[24]

The popular interest in the fate of the art looted during the War is due, at least in part, to the current market value of high quality art. But it must be borne in mind that during and immediately after World War II, artworks – even of the best quality – were not very expensive. As Gerald Reitlinger has noted:

> The market remained rationed until at least 1951. In the previous years heavy price rises could only be sustained by purely native or resident buyers in such protected areas as the U.S.A. In the early fifties it was still said that the cheapest thing you could buy was a work of art. . . .Nor were the prices of the later fifties, particularly the prices of nineteenth and twentieth century French art, altogether the 'coup de foudre' which the popular Press made them to be.[25]

The dramatic escalation of prices of art began in the 1960's, reached a peak in the late 1980's and then declined, but has again escalated to remarkable sums.[26]

Although many claimants in the U.S., either in court or through settlements, have been successful in their efforts to gain restitution of artworks lost through confiscation or forced sales, there are some U.S. court decisions that have denied claims on various legal grounds. For example, at the very end of 2006, in an unusual twist to art restitution

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[23] For widely accepted histories of Nazi looting and the impact on the international art market ever since, see the following sources: MICHAEL J. KURTZ, AMERICA AND THE RETURN OF NAZI CONTRABAND: THE RECOVERY OF EUROPE'S CULTURAL TREASURES 15 (2006); NORMAN PALMER, MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES AND PRACTICE 7-8 (2000); JONATHAN PETROPOLOUS, THE FAUSTIAN BARGAIN: THE ART WORLD IN NAZI GERMANY (2000); PETER HARCLERODE & BRENDAN PITTAWAY, THE LOST MASTERS: THE LOOTING OF EUROPE'S TREASUREHOUSES (1999); LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1994); JONATHAN PETROPOULOS, ART AS POLITICS IN THE THIRD REICH 54 (1996); HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART (2d ed. 1997).

[24] Statement of Jonathan Petropoulos before the House banking Committee, U.S. House of Representatives, Hearing of February 10, 2000, *available at* http://financialservices.house.gov/banking/21000pet.htm (last visited Feb. 25, 2008).

[25] GERALD REITLINGER, THE ECONOMICS OF TASTE 220 (1961)

[26] Carol Vogel, *$491 Million Sale Shatters Art Auction Record*, N.Y. TIMES, Nov. 9, 2006, at B1.

claims involving art sold during the Nazi-era, the Toledo Museum of Art bought an action to quiet title against the claimants, the heirs of Martha Nathan, a collector from Frankfurt.[27] The work of art at issue is Gaugin's *Street in Tahiti* painted in 1891, said to be worth between $10 and $15 million, which the Toledo Museum acquired in 1939 for $25,000. Both parties sought declaratory relief, and the heirs also brought substantive claims for restitution and conversion. Another painting, *The Diggers* by Van Gogh, in the Detroit Institute of the Arts, is the subject of another law suit involving the Nathan heirs, which is discussed below.

Martha Nathan was the widow of prominent art collector, Hugo Nathan, of Frankfurt, Germany, who died in 1922. With the rise of Nazi persecution of the Jews, she moved to Paris in 1937, where she obtained French citizenship. She returned to Germany to sell her house and sent some of her household goods to France. Although she was forced to surrender some works of art to the Nazi government, the Gaugin was not among the aryanized works. According to the provenance report issued jointly by the Toledo and Detroit museums, Mrs. Nathan transferred her art collection, including the Gaugin, to Basel, Switzerland, in 1930, three years before the Nazis came to power in Germany, where it remained until she sold it in 1938.[28] In December 1938, Mrs. Nathan invited art dealer George Wildenstein to view the art in Basel, which resulted in the sale of the Gaugin and the van Gogh to a consortium of art dealers – Wildenstein, Galerie Thannhauser and Alex Ball – the van Gogh for 40,920 Swiss Francs ($ 9,364) and the

[27] *Toledo Museum of Art v. Claude George Ullin, et al.*, 2006 U.S. Dist. LEXIS 93627 (N.D. Ohio, Dec. 28, 2006).
[28] The Detroit Institute of Arts and the Toledo Museum of Art, *Press Release*, Jan. 25, 2006, *available at* http://www.toledomuseum.org/PDF/Provenance_Research.pdf (last visited Feb. 25, 2008).

Gaugin for 30,000 Swiss Francs ($6,865).[29] The heirs dispute the legitimacy of the sales, citing the lack of any bill of sale or exchange of consideration, or, in the alternative, the unconscionability of purchase price.[30]

The court in the Toledo Museum case rejected all these arguments, stating that "this sale occurred outside Germany by and between private individuals who were familiar with each other. The Painting was not confiscated or looted by the Nazis; the sale was not at the direction of, nor did the proceeds benefit, the Nazi regime."[31] Moreover, the court cited Martha Nathan's efforts to seek restitution and/or reparations for her losses after the war.[32]

The court considered five points in its determination for a declaratory judgment.

1. whether the judgment would settle the controversy;

2. whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue;

3. whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or to "provide an arena for a race for *res judicata"*

4. whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and

5. whether there is an alternative remedy that is better or more effective.[33]

Having decided that all five factors were met, the court concluded that "because a declaratory judgment action is a procedural device used to vindicate substantive rights, it

[29] *Id.*
[30] 2006 U.S. Dist. LEXIS 93627, at *6.
[31] *Id.* at *7.
[32] *Id.* at *8.
[33] *Id.* at *3-4.

is time-barred only if relief on a direct claim would also be barred."[34] The court then went on to consider the statute of limitations and the defendants' lack of due diligence. Ohio uses the discovery rule, which provides that the applicable statute of limitations begins to run when, with the exercise of reasonable care, the claimant should have discovered the whereabouts of his property. The fact that Martha Nathan pursued restitution and damages for property she lost due to Nazi persecution after the war, but never sought nor filed claim for this painting, weighed heavily in favor of the museum. The court did not go so far as to impute the claimants with Mrs. Nathan knowledge, but stated they should have made inquiry into the whereabouts of the painting well before asserting their claim to the museum. The defendants' reliance on the American Association of Museums Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era to support their claim that the museum had waived any statute of limitations and laches defense was rejected by the court. "The Guidelines were not intended to create legal obligations or mandatory rules but rather were intended to facilitate 'the ability of the museums to act ethically and legally as stewards' through 'serious efforts' on a 'case by case basis.'"[35] The court thus granted the museum's motion to dismiss the heirs' claims.

The Nathan heirs also raised a claim to Van Gogh's *The Diggers* in the Detroit Institute of Arts without filing suit. They claimed that it, too, was sold under duress. The Detroit Institute of Arts responded by filing a declaratory judgment action in the U.S. District Court for the Eastern District of Michigan very similar to that filed by the Toledo

[34] *Id.* at *10 (citation omitted).
[35] *Id.* at *19.

Museum.[36] The Detroit Institute of Arts received *The Diggers* in 1969 as a donation from collector Robert H. Tannahill, who bought it in 1941 for $34,000. It is now worth approximately $15 million.

On March 31, 2007, the Detroit Institute of Arts court ruled against the Nathan heirs using similar – but not identical logic – to that of the Toledo Museum case. In contrast to the Toledo Museum case, the court ruled that the discovery rule did not apply because Michigan policy favors market certainty in cases alleging commercial conversion. Thus, the court expressly ruled that the claim accrued in 1938, which means the three-year Michigan statute of limitations expired in 1941.

In December 2007, the trend for museums filing declaratory actions in relation to claims as to art sold during the Nazi-era, the Museum of Modern Art ("the Modern") and the Solomon R. Guggenheim Foundation ("the Guggenheim) jointly filed a declaratory judgment action in the Southern District of New York seeking to clear their titles to two Picasso paintings.[37] *Boy Leading a Horse* (1906) was donated to the Modern by William S. Paley, founder of CBS, in 1964. *Le Moulin de la Galette* (1900) was donated to the Guggenheim by Justin K. Thannhauser, a prominent art dealer who also was victimized by the Nazis. The claimant is Julius H. Schoeps, great-nephew of German Jewish banker Paul von Mendelssohn-Bartholdy, the original owner of the paintings who was forced to flee Germany. Schoeps claims the paintings were sold under duress in Nazi Germany. The museums maintain that the paintings had never been part of a forced sale and rightfully belong to them. The court has not yet ruled.

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[36] *Detroit Institute of Arts v. Ullin,* Slip Copy, 2007 WL 1016996 (E.D. Mich. 2007).
[37] *Museum of Modern Art v. Schoeps*, Cmplt., 1:07-cv-11074-JSR.

In mid-January, 2008, the Museum of Fine Arts, Boston, filed a quiet title action against an Austrian woman, Dr. Claudia Seger-Thomschitz, who had claimed Oskar Kokoschka's *Two Nudes (Lovers)* (approx. 1913). It seems that the claimant alleges a duress sale argument similar to that of Mr. Schoeps. The museum's complaint, filed in the U.S. District Court for the District of Massachusetts, states: "The painting was never confiscated by the Nazis, was never sold by force as a result of Nazi persecution, and was not otherwise taken from" the claimant's relative.[38] Dr. Seger-Thomschitz has been sued in another declaratory action by Ms. Sarah Blodgett Dunbar in the Eastern District of Louisiana in connection with Kokoschka's *Portrait of a Youth (Hans Reichel)* (1910).

Another decision made by the Supreme Court of New York in September, 2006 similarly ruled against claimants. It found that the heirs sat on their rights and thereby lost ownership of a painting by Edvard Munch's *Strasse in Kragero*.[39] In this case, the painting had been owned by Professor Curt Glaser, who had been a director of the State Museum in Berlin. He left it with his brother when he and his second wife, Maria Glaser, fled to Switzerland due to Nazi persecution. The brother, an art dealer, sold the painting without his knowledge. The painting has a rather complicated history. It was acquired by steel magnate Albert Otten some time after 1933, and in 1936 Professor Glaser offered to buy it back from him. However, in 1937 Otten, too, fled the Nazis and settled in New Jersey. Professor Glaser died in Lake Placid, New York, on November 23, 1943, at which time his property passed to his wife. The Otten family consigned the painting to Sotheby's in 2002, where it was sold for $1.5 million.

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[38] *Museum of Fine Arts, Boston v. Seger-Thomschitz*, Cmplt., 1:08-cv-10097-RWZ.
[39] *In re Ellen Ash Peters, as Executrix for the Estate of Maria Ash v. Sotheby's Inc.*, 2006 N.Y. Slip Op 6480, 821 N.Y.S.2d 61 (N.Y. App.Div. LEXIS 10693, Sept. 14, 2006).

The petitioner in this case was the executrix of Maria Glaser's estate. This action was brought against Sotheby's to force the auction house to reveal the name of the purchaser.[40] The lower court found that the papers adequately framed a meritorious cause of action for wrongful detention of the painting and ordered Sotheby's to reveal the name of the purchaser. This court, however, did not consider the issues of laches or the statute of limitations, upon which the Appellate Court based its decision.[41]

On appeal, the court parsed the New York rule governing an action to recover converted property purchased in good faith, which is the Demand and Refusal Rule. Under this New York rule, the action accrues three years after the refusal of a demand for the property's return.[42] Moreover, under the New York rule there is no requirement of due diligence although the doctrine of laches does apply.[43] The Appellate Court thus found that the statute of limitations began to run when the Professor demanded the return of the painting, and it, therefore, expired seventy years ago.

More significant is that the court here found that the pre-action demand for discovery was barred by the doctrine of laches, usually considered an issue of fact to be decided at trial. Here, the court found that neither Professor Glaser nor his widow made any post-war claim for the painting from the German government and no one in the Glaser family ever made any attempt to recover the painting even though it had been exhibited as part of the Otten family collection in prominent museums and galleries. Thus, the court stated, "where the original owner's lack of due diligence and prejudice to the party currently in possession are apparent, the issue may be resolved as a matter of

[40] N.Y. Civ. Prac. L. & R. 3102(c) "Pre-action Discovery" (McKinney 1990 & Supp. 1996).
[41] *Id*. at ***8.
[42] N.Y. Civ. Prac. L. & R. 214 (3) (McKinney 1990 & Supp. 1996).
[43] *Guggenheim v. Lubell*, 77 N.Y.2d 311, 319, 569 N.E.2d 426, 567 N.Y.S.2d 623 (1991).

law."[44] Accordingly, the order of the Supreme Court granting pre-action discovery was dismissed, the action that directed Sotheby's to reveal the name of the purchaser was reversed, the order vacated, the application denied, and the petition dismissed.[45]

This decision and the decisions in the Toledo Museum of Art and Detroit Institute of Arts cases set a high standard for families seeking to recover artworks to prove that they diligently sought to recover the artworks from the time they were aware of their whereabouts.

Another claim to a rare illuminated manuscript was recently rejected by the Supreme Court of New York.[46] The plaintiffs alleged that the manuscripts had been restituted to the wrong family by the French government after the war, and that this error was discovered only recently. The court held that French law both set a limitations period of December 31, 1947, and barred claims after the possessor, even a bad faith possessor, has had peaceful, continuous and open possession for thirty years. The court declined to apply the narrow "material impossibility" exception, which may have provided a French judge discretion to extend the limitations and repose periods if it had been materially impossible for the claimants to claim the property in question before the time bar. The court found that the exception could only be applied to nullify transactions to looted property that had been subsequently *purchased*. The court ruled the exception inapplicable to the family's claim to the manuscripts because the manuscripts had been

[44] *In re Ellen Ash Peters* at ***19. *Seealso Wertheimer v. Cirker's Hayes Storage Warehouse*, 300 A.D.2d 117, 752 N.Y.S.2d 295 (2002).
[45] *Id.* at ***20. In *Bakalar v. Vavra*, 2006 U.S. Dist. LEXIS 55438 (S.D.N.Y., Aug. 10, 2006), the court denied Bakalar's motion for summary judgment based on the equitable doctrine of laches, finding that there were issues of fact to be determined either through discovery or at trial. The case concerns the ownership of a 1917 Egon Schiele gouache purchased by Bakalar in 1963 and now claimed by the heirs of Fritz Grünbaum, who was deported to Dachau and died in 1941.
[46] *Warin v. Wildenstein*, 13 Misc. 3d 1201(A), 824 N.Y.S.2d 759 (June 23, 2006), *aff'd*, 45 A.D.3d 459, 846 N.Y.S.2d 153 (N.Y. App. Div. – 1st Dep't – Nov. 27, 2007).

restituted by the French government – allegedly erroneously – to the current possessors – but not *purchased* by them.

These decisions denying restitution of works of art to the original owners or their heirs are complex and problematic. A limitations period of 1947, as established in the French law, or that of December 31, 1948, as required by the Jewish Restitution Survivor Organization and Jewish Cultural Reconstruction, were unrealistic – hundreds of thousands of people who had owned valuable property were still in displaced persons camps and certainly not concerned with their property.[47] Even those who, like Martha Nathan, were able to find refuge in neutral countries often had to sell their property because their bank accounts in Germany were blocked. Under the terms of the Declaration of London, the Allies and a number of other nations reserved their rights

> to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder or of transactions apparently legal in form, even when they purport to be voluntarily effected.[48]

The tenets of this Declaration were enforced in the U.S. zone of occupation in Germany through the enactment of Military Law 59, which not only reiterated the presumption of confiscation, but also put the burden of proof upon the possessor of the property rather than on the claimant.[49]

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[47] Military Law 59, *Restitution of Identifiable Property*, 12 Fed. Reg, 7983 (1947) ("Military Law 59"); *see also* NEHEMIAH ROBINSON, INDEMNIFICATION AND REPARATIONS (1944).
[48] Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, 8 DEP'T OF STATE BULL. 21 (1943).
[49] Military Law 59, at Part II, art. 3.

Many question whether there should even be a statute of limitations in cases involving Nazi-looted art. Under the Charter of the International Military Tribunal of Nuremberg, the plunder of public or private property is a war crime.[50] Those responsible for the looting of art objects – most notoriously Alfred Rosenberg – were prosecuted as war criminals at the Nuremberg trials.[51] Under international law even as interpreted by U.S. courts, there are no statutes of limitation with respect to war crimes, excluding the Torture Victim Protection Act.[52] The principle of non-applicability of statutory limitations to certain violations of international law has been recognized in international instruments. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity provides that no statutory limitations period shall apply to war crimes and crimes against humanity.[53] Although the U.S. is not a signatory to the Convention, at least one federal judge has recently said that this Convention should be recognized as part of customary international law.[54]

If it is customary international law, then this principle applies equally to civil actions. For an increasing number of experts in the field favoring liberal recovery, the policy behind the treatment of the plunder or any forced transfer of cultural property – even when seemingly voluntary – "impels the conclusion that the Statute of Limitations should be inapplicable in civil cases brought to recover property originally plundered during war time, or at least that special rules should be adopted limiting its applicability

[50] THE CHARTER AND JUDGMENT OF THE NÜRNBERG TRIBUNAL: HISTORY AND ANALYSIS 61 (1949).
[51] *The Nurnberg Trial,* 6 F.R.D. 69, 120 (1946); TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 316, 340, 364 *et passim* (1992).
[52] 28 U.S.C. § 1350.
[53] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, art. 1, *available at* 754 U.N.T.S. 73, 75.
[54] *Nguyen Thang Loi v. Dow Chem. Co. (In re Agent Orange Prod. Liab. Litig.)*, 373 F. Supp. 2d 7, 147 (E.D.N.Y. 2005).

in such cases."[55] Courts will be increasingly pushed to consider – at the very least – a relaxed standard for application of statutes of limitations and laches in cases involving property looted during World War II.

[55] Lawrence M. Kaye, *Cultural Property Theft During War: Application of the Statute of Limitations, in* LEGAL ASPECTS OF INTERNATIONAL ART TRADE 217-228 (M. Briat and J.A. Freedberg, eds., 1995).

APPENDIX

APPLICABLE MODEL RULES OF PROFESSIONAL CONDUCT
[Listed in likely order of discussion: 3.4, 4.1, 1.13, 1.6 & 1.0 (Definitions Only)]

Advocate
Rule 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Transactions With Persons Other Than Clients
Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Client-Lawyer Relationship
Rule 1.13 Organization As Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when

the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Client-Lawyer Relationship
Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

Client-Lawyer Relationship
Rule 1.0 Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate

under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.