WHISTLING PAST THE GRAVEYARD ISN'T ENOUGH

US May Seek to Confiscate Painting Lent by Austrian Museum which Allegedly Knew it was Nazi Loot[†]

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Introduction

In a surprise reversal, based on new facts, a US federal court has overturned its prior decision and ruled that the United States may seek to confiscate a painting loaned to New York from an Austrian museum, on the claim that the museum knew it was stolen property taken from a Jew by a Nazi.

Overturning of 'Recovery' Doctrine as Applied to *Portrait of Wally*

In a third ruling in the US government attempt to confiscate the Egon Schiele painting *Portrait of Wally*, the Manhattan federal trial court in April 2002 rescinded its earlier holding[1] that *Wally* had ceased being 'stolen' under US federal law when US armed forces recovered it in Austria after the Second World War. Rather, it was held in *Wally III* that, the armed forces' possession of the painting did not amount to legal 'recovery', and the painting remained stolen if the United States proves its claims. The United States confiscation attempt, previously blocked, could therefore go forward.[2]

† *United States v. 'Portrait of Wally', A Painting by Egon Schiele*, 2002 US Dist. LEXIS 6445 (U.S. District Court S.D.N.Y.)

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1 105 F.Supp. 2d 288 (S.D.N.Y. 2000) (hereinafter '*Wally I*').

2 2002 U.S. Dist. LEXIS 6445 (hereinafter '*Wally III*') at 42-50.

A Second US Decision to Reject Austrian Defenses in Lawsuits over Alleged Nazi Loot

The decision is the second recent federal ruling rejecting Austria's attempts to keep claims for art works said to have been stolen from Jews by Nazis, and now showpieces in prize Austrian museums, out of US courts.

The *Wally III* court rejected arguments by the Austrian Leopold Museum, and the Republic of Austria as amicus, that the act of state and political question doctrines, and the Austrian State Treaty, barred consideration by a US court of the actions in Austria of an Austrian agency.[3] Earlier, in 2001, the federal trial court for Los Angeles had ruled that the Republic of Austria was not immune under federal law from a California lawsuit seeking return of six Klimt paintings said to be stolen by Nazis and now in the Austrian National Gallery.[4]

A Borrowing Museum has Standing in Lawsuit over Loaned Painting

The court also issued the important ruling that the Museum of Modern Art in New York, which borrowed *Wally*, had standing to join the lawsuit and contest the confiscation.[5] But the court rejected attempts by the Leopold Museum to dismiss the heirs of Lea Bondi, the painting's original owner, from the lawsuit.[6]

Again the NSPA

The case again highlights the approval, by the United States District Court for the Southern District of New York, of the use of the National Stolen Property Act (NSPA)[7] as a tool in the effort to stem trafficking in stolen art. In recent years, that court has allowed invocation of the NSPA by the United States in two important art law cases, an action to confiscate an imported antique *phiale* claimed by Italy,[8] and a criminal

3 *Ibid.* at 25-38.

4 *Altmann v. Republic of Austria*, 142 F.Supp. 2d 1187, 2001 U.S. Dist. LEXIS 6011 (C.D. Cal. 2001) (hereinafter '*Altmann v. Austria*').

5 *Wally III* at 12-18.

6 *Ibid.* at 94-97.

7 18 U.S.C. 2314 (1994).

8 *United States v. An Antique Platter of Gold, Known as a Gold Phiale Mesamphalos, c. 400 B.C.*, 900 F. Supp. 222 (S.D.N.Y. 1997), *aff'd on other grounds*, 184 F.2d 131 (2d Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000). For a discussion of this case, see Martha Lufkin, 'Forfeiture of an Antiquity Claimed by Italy: the Steinhardt case' (2000) V *Art Antiquity and Law* 57.

prosecution of an art dealer for conspiracy to receive stolen Egyptian antiquities,[9] in both cases basing the definition of "stolen" under the NSPA on a foreign nation's laws declaring state ownership of antiquities.

In the *phiale* case, museum groups pointed out in an amicus brief that confiscation proceedings based on the NSPA require a lower level of proof – the government need only establish probable cause to believe that the property was knowingly imported stolen property – than the higher degree of evidence that would be required for a claimant to prove ownership of an art object in a recovery action against the possessor.[10] As the dispute over *Portrait of Wally* goes to trial, such protests may again be heard, especially if it is not clear how much proof of ownership the United States will require of the heirs of Lea Bondi if the government succeeds in confiscating the painting from the Leopold Museum.[11]

Not Time-Barred

The *Wally III* court also dismissed the arguments by the Leopold Museum and Austria that any claim regarding *Wally* was barred under various statutes of limitation.[12]

PROCEDURAL HISTORY

The Leopold Museum lent the Egon Schiele painting, *Portrait of Wally*, to the Museum of Modern Art (MoMA) in New York in 1997 for a retrospective exhibit on Schiele's work. Shortly thereafter, claims were raised that it had been stolen from its original owner, Lea Bondi, in 1939. The painting was then subpoenaed by the Manhattan District Attorney in 1998 for an investigation into whether it was stolen property being criminally possessed contrary to New York law. After the New York Court of Appeals rejected the subpoena,[13] the United States Government seized the painting. It then commenced the lawsuit

9 *United States v. Schultz*, 178 F.Supp.2d 445 (S.D.N.Y. 2002). For a discussion of this case, see Martha Lufkin, "End of the Era of Denial for Buyers of State-Owned Antiquities: *United States v. Schultz*," (2002) 11 *International Journal of Cultural Property*, forthcoming.

10 See Martha Lufkin, 'Forfeiture of an Antiquity Claimed by Italy,' above, n. 8, at pp. 60-61.

11 Discussion of the author with art lawyer, July 2002.

12 *Wally III* at 59-71.

13 For a discussion of the New York State proceedings relating to the subpoena, see Martha Lufkin, 'The Subpoena Heard Round the World', (1999) IV *Art Antiquity and Law* 363.

that is the subject of this article, seeking civil forfeiture of *Wally* under the NSPA[14] as property worth at least $5,000 which was imported with knowledge that it was stolen. The work is valued at close to $10 million.[15]

The Leopold Museum-Privatstiftung (the 'Leopold'), MoMA, and various alleged heirs of Lea Bondi joined the government's forfeiture suit, contesting the action as claimants.

In *Wally I*, Judge Michael B. Mukasey granted the Leopold's motion to dismiss the confiscation action, relying on the 'recovery' doctrine, as discussed further below. In *Wally II*,[16] Judge Mukasey allowed the United States to file a Third Amended Complaint. The Government did so, and the Leopold and MoMA moved to dismiss the case.[17]

For purposes of these motions to dismiss the lawsuit, all facts alleged are taken as true, and are construed in the light most favorable to the plaintiff.[18] Therefore, while the following facts were assumed true for purposes of *Wallys III*'s rulings on law, they remain unproved and would have to be proved by the United States at trial for confiscation to succeed.

FACTS ALLEGED IN *WALLY III*: THE GOVERNMENT'S THIRD AMENDED COMPLAINT

In *Wally I*, Judge Mukasey ruled against the United States on the theory that *Wally* ceased being stolen long before it entered the county, when US armed forces seized it in Austria after the war. Relying on a 'recovery' doctrine developed in US sting operation cases, the court ruled that the US armed forces who took possession of the painting did so as Lea Bondi's agent, just as police officers recover stolen property on behalf of true owners. Once having entered the hands of US law enforcement agents, who acted as Bondi's agent, the painting ceased being stolen, the *Wally I* court said, and could not be forfeited as illegally imported stolen property.[19]

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14 The forfeiture statutes tied to NSPA violations include 18 U.S.C. sec. 545, 19 U.S.C. sec. 1595a(c), 22 U.S.C. sec. 401(a).

15 Martha Lufkin, 'Landmark Legal Reversal over Schiele Lent to New York Exhibition from Austria', 125 *The Art Newspaper* May 2002.

16 *United States v. A Portrait of Wally*, 2000 U.S. Dist. LEXIS 18713, No. 99 Civ. 9940, 2000 WL 1890403 (S.D.N.Y. Dec. 28, 2000) ('*Wally II*').

17 Citing Federal Rules of Civil Procedure 12 (b) (1) and (6).

18 *Wally III* at 3.

19 105 F.Supp. 2d 288 (S.D.N.Y. 2000).

In its Third Amended Complaint, the United States presented its factual allegations, now supplemented to contest application of the recovery doctrine to the case. The alleged facts are as follows.

In April 1938, shortly after Austria was annexed by the Third Reich, the Austrian Friedrich Welz, who later became a member of the Nazi Party, 'aryanized' the Vienna art gallery of Lea Bondi, using the procedure whereby Jews were forced to sell their property to 'aryans' at artificially low prices. After this transaction, Welz visited Bondi's private apartment, saw *Portrait of Wally* by Egon Schiele hanging on her wall, and insisted that he have it as part of the 'aryanization' of the gallery. Bondi responded that *Wally* was part of her private collection and had nothing to do with the aryanization. As alleged by the United States:

> Welz continued to pressure [Bondi] for the painting until [Bondi's] husband finally told her that, as they wanted to leave Austria, perhaps as soon as the next day, she should not resist Welz, because 'you know what he [Welz] can do.'

Bondi surrendered the painting to Welz and fled to London.[20]

After the Second World War, US armed forces in Austria seized all of Welz's possessions, and Welz was interned on suspicion of war crimes. Such property seized by the United States was sorted and turned over to the country of origin. US armed forces transferred *Wally* to the Austrian government authority designated to take custody of such seized artwork, the Bundesdenkmalamt (BDA).[21]

The BDA was not charged with the return of artworks to the true owners, the United States alleged in its Third Amended Complaint. Indeed, the government now clarified, under the Ban on Cultural Assets Code in effect in Austria after the war, the BDA could impede the return of artwork to successful claimants residing outside Austria, if it found that the 'public interest' required the preservation of such assets in Austria. In deciding such cases, the BDA would consult with Austrian museums including the Austrian National Gallery. Often the BDA would allow export approval for certain artworks only if the owner agreed to give, or sell at a low price, other artworks to Austrian museums.[22]

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20 *Wally III* at 4.
21 *Ibid.* at 5.
22 *Ibid.* at 5 n.2.

US armed forces in possession of *Wally* did not know the painting was stolen nor did they know it belonged to Bondi, the United States alleged in the Third Amended Complaint. Instead they thought it may have been the property of a holocaust victim, Dr Heinrich Rieger; both collections included portraits of females. US armed forces questioned whether *Wally* belonged among the Rieger artworks, and called attention to their doubts in their cover letter to the BDA, noting that according to Welz the artwork was not Dr Rieger's.[23]

When Dr Rieger's heirs later sold artworks to the Austrian National Gallery ('Belvedere'), *Wally* was erroneously shipped to the Belvedere as part of the sold Reiger collection. The director of the Belvedere noted his own title for *Wally* in his inventory, which differed from the title it had been shipped with.[24]

After the war, Bondi had several contacts with Dr Rudolph Leopold, a collector of Schieles. According to the United States, Bondi told Dr Leopold clearly that Wally was hers and asked for his help in getting it back. Instead, he bought it from the Austrian National Gallery, swapping another Schiele painting he owned, *Rainerbub*. Bondi never commenced a lawsuit for the painting. In about 1969 she died having not recovered it.

In 1994, Dr Leopold sold *Wally* to the Leopold Museum, of which he was a member of the board of directors, and museological director for life.[25]

In 1997, the Leopold Museum sent *Wally* as part of an Egon Schiele retrospective to MoMA in New York. After New York's high court quashed the district attorney's subpoena of the painting on 21st September, 1999, the United States immediately seized the painting, and commenced the forfeiture proceeding the next day.

I. BORROWING MUSEUM MAY JOIN A LAWSUIT SEEKING TO CONFISCATE A PAINTING LENT TO IT

The court rejected the government's motion to strike MoMA from the lawsuit, saying that MoMA had standing to sue as a claimant even though it was only the borrowing museum. This was true even though the Leopold, which claimed to own the painting, had also joined the confiscation proceeding.

23 *Ibid.* at 6.
24 *Ibid.* at 7.
25 *Ibid.* at 7-11.

First, the court said, MoMA had met procedural requirements by stating that it had the legal right to possess the painting under its loan contract with the Leopold,[26] and by naming the Leopold as owner in its claim. MoMA's claim could not be dismissed as superfluous, because at least one case had permitted both bailee and bailor to contest a forfeiture, the court said.[27] The court also rejected the government's claim that MoMA lacked constitutional standing.

To establish constitutional standing, the court said, a claimant had to show that it had a "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy'",[28] and must allege "a distinct and palpable injury to himself" resulting from the contested action that is "likely to be redressed by the requested relief."[29]

Standing Based on Injury to the Borrowing Museum

In civil confiscation proceedings, the court said, a claimant with a possessory interest in property that has been seized generally will have standing because he "suffers an injury that can be redressed ... by the return of the seized property."[30] Injury is the 'ultimate focus' of any standing inquiry, the court said.[31] MoMA had demonstrated that it had lawful possession of the painting under its loan contract with the Leopold, the court said, and the government's seizure of the painting had interfered with MoMA's rights and obligations under the contract. Also, the Leopold had threatened MoMA with liability for any damage it suffered. "This lawful possession and financial stake is sufficient to confer standing", the court said.[32] MoMA was therefore allowed to remain in the lawsuit.

Interestingly, Judge Mukasey dismissed a further argument made by MoMA, that it was also injured because the forfeiture would reduce the likelihood that other art of questionable ownership would be available for loan to MoMA. The judge rejected this, saying that:

26 *Ibid.* at 13.

27 *Ibid.* at 15, citing *United States v. $38,000 in U.S. currency*, 816 F.2d 1538 (11th Cir. 1987).

28 *Ibid.* at 16, quoting *United States v. Cambio Exacto, S.A.*, 166 F.3d 522 at 526-27 (2d Cir. 1999) ('Cambio Exacto'), (quoting *Sierra Club v. Morton*, 405 U.S. 727 (1972)).

29 *Ibid.* at 16, quoting *Cambio Exacto*, 166 F.3d at 527.

30 *Ibid.*, quoting *Cambio Exacto, ibid.*

31 *Ibid.*, citing *Cambio Exacto, ibid.*

32 *Ibid.* at 17-18, citing *Cambio Exacto at* 527-28.

> This projected hardship in the competition to display stolen art is the sort of speculative injury that would be insufficient to confer standing, and thus saves me the interesting if distasteful task of deciding whether enforcing an interest in displaying stolen art would violate public policy.[33]

However, it is highly doubtful that MoMA intended to argue that it has a right to display stolen art and would suffer injury by the loss of potential donors who would cease lending stolen objects if *Wally* were confiscated. Rather, Judge Mukasey's dismissal of this argument does not address a subtle problem potentially faced by borrowing museums, which is that since the institution of the proceedings against *Portrait of Wally*, lenders may be hesitant to loan objects.[34] This may especially be so where a nervous lender has any worry about a title attack – such as a provenance gap; a false claim to an artwork which a lender may fear could be revived by a US prosecutor; or even no grounds for worry at all but for a general concern generated by the *Wally* seizure.[35]

But in totally rejecting the dampening effect of the *Wally* seizure on loans to museums as a "hardship in the competition to display stolen art", the court seemed to think that a loss to borrowing museums of potential loans of works with dubious or uncertain provenance was not much of a loss.

II. Austrian State Treaty, Act of State and Political Question Immunities Rejected

The court rejected all of the arguments by the Leopold Museum, and by the Republic of Austria in an amicus brief,[36] that the act of state doctrine, the political question doctrine and the Austrian State Treaty disqualified the question of *Wally*'s ownership from justiciability in US courts.

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33 *Ibid.* at 18 n. 4.

34 Discussions of museum lawyers with the author. Museum directors submitted affibidavits and letters to the New York district attorney protesting his subpoena of *Wally* and arguing that the legal action over the painting would put at risk the ability of New York museums to put together loan shows. See Martha Lufkin, 'The Subpoena Heard Round the World', above, n. 13, at p. 365 n. 9.

35 Discussions of museum lawyers with the author, 1998.

36 The court allowed Austria to file an amicus brief despite the fact that it provides substantial funding to the Leopold Museum and appoints half of its directors, because "to the extent that Austria is an interested party, that interest has been disclosed." *Wally III* at 20 n. 6.

Austrian State Treaty no Block to Justiciability in US Court

The Austrian State Treaty of 1955 defined Austria's responsibility to return property seized improperly from citizens during Nazi rule.[37] According to the Leopold and Austria, this Treaty designated Austria as the sole authority responsible for disposing of such seized property. Therefore, no US court had jurisdiction to consider or decide issues, including the confiscation of *Wally*, relating to Austria's disposition of such seized property.[38]

But the court found the argument "without merit", noting first that the Treaty "on its face does not state that the Austrian government has exclusive jurisdiction over such property", and that the Leopold had provided no case law supporting its "novel interpretation" of the Treaty. The restitution laws enacted to fulfill Austria's obligations under the Treaty, the court said, "have never been viewed as the exclusive means for restoring property"; indeed, Judge Mukasey wrote, citing *Altmann v. Austria*, "other restitution actions have been filed in the United States."[39] Nothing in the Austrian State Treaty, concluded the judge,

> suggests that this court is without jurisdiction to hear a forfeiture case which includes issues of ownership of property taken by the Nazis.[40]

Further, the court pointedly said, under the Treaty, Austria was supposed to transfer all unclaimed property to an agency to help victims of the holocaust; it therefore made no sense that the Treaty "could be invoked by the Leopold to support its title to the painting."[41] Had Austria taken control of *Wally* as unclaimed property under the Treaty, "it would have breached the Treaty" to allow the painting to remain at the Austrian National Gallery or give it to Dr Leopold. Instead, all such property should have gone to Assembly Centers for eventual liquidation to help Nazi victims.[42]

In any event, the court said, *Wally* was not even unclaimed property, but rather was mistakenly sent to the Austrian National Gallery when the Rieger heirs sold their artworks. The fact that Austria under the Treaty was supposed to return all

37 6 U.S.T. 2369, 217 U.N.T.S. 223, Article 26.
38 *Wally III* at 23.
39 *Ibid.* at 23-24, citing *Altmann v. Austria*, 142 F.Supp. 2d 1187 at 1208.
40 *Ibid.* at 24.
41 *Ibid.* at 24.
42 *Ibid.* at 24.

improperly seized artworks to their owners "does not deprive this court of jurisdiction", the court said, which "in this case would seem unobjectionable" .[43]

Nor Does the Act of State Doctrine Block a US Court's Review

The Leopold and MoMA argued that the case should be dismissed under the US act of state doctrine, under which US courts "will not sit in judgment on the acts of the government of another [nation] done within its own territory."[44] Applying this doctrine, the Leopold and MoMA argued, the court could not invalidate Austria's disposition of *Wally* to the Austrian National Gallery as part of the Rieger collection.

But the court said it was "far from clear" that the act of state doctrine applied to the act of handing over *Wally* to the Austrian Gallery. First, the painting was never legally transferred to the Rieger heirs by an official government act; rather, the BDA erroneously attributed *Wally* to the Rieger collection and mistakenly shipped it with that collection to the Austrian Gallery. These do not seem to have been "the public acts of a sovereign," the court said.[45] The BDA had no authority to dispose of *Wally* other than through the Austrian Restitution Commission, the court noted, and the act of state doctrine "does not insulate unlawful actions" unratified by the foreign State.[46] Finally, the court said, "the balance of interests in this case counsels against applying" the act of state doctrine, where the US executive branch itself had brought the forfeiture action and the court's action would not interfere with executive primacy in foreign affairs.[47]

Nor Does the Political Question Doctrine Bar a US Court's Consideration

The Leopold further argued that the suit was barred by the political question doctrine, which bars adjudication in US courts of certain issues committed to the political branches of government.[48] But

43 *Ibid.* at 25.
44 *Ibid.*, quoting *Underhill v. Hernandez*, 168 U.S. 250, 252, 42 L.Ed. 456, 18 S.Ct. 83 (1897).
45 *Ibid.* at 27, 28.
46 *Ibid.*, citing *Galu v. Swissair*, 873 F.2d 650, 654 n. 3 (2d Cir. 1989).
47 *Ibid.* at 30-31.
48 *Ibid.* at 34, citing *Baker v. Carr*, 396 U.S. 186, 210-11, 7 L.Ed. 2d 662, 82 S.Ct. 691 (1962). The *Wally III* court found that none of the six factors required to be found by the *Baker* court for the political question doctrine to apply were present in the *Wally* case.

the court said that it was wrong to argue that every case touching foreign relations is beyond judicial resolution; tort claims in US courts had not been barred against the Palestinian Liberation Organization or against the leader of Bosnian-Serbia forces by the political question doctrine.[49] The court was not being asked to judge the adequacy or implementation of Austria's restitution scheme, the court said; instead:

> this is an *in rem* action seeking forfeiture of a painting pursuant to United States law. The court's review of Austrian law is limited to determining the predicate issue of ownership. This question alone is not a political question.[50]

A Second Nazi-Looting Case Rejecting Claim of Immunity by Austria: *Altmann v. Austria*

It should be noted that in a separate case, a federal trial court in May 2001 rejected the Republic of Austria's claim that it could not be sued in California for return of six Gustav Klimt paintings allegedly stolen by Nazis from Ferdinand Bloch-Bauer, now in the collection of the Austrian National Gallery (ANG). In what appeared to be the first such ruling, the court said that Austria was not immune from suit in US courts because the plaintiff had established a claim that the Klimts were taken in violation of international law.[51] The disputed paintings are owned by Austria, but exhibited by the ANG. In interesting contrast to the *Wally* case, where jurisdiction could arise because the painting was on loan to New York, the paintings were not required to be in the United States for the suit to proceed in California.

Normally, a foreign State may assert immunity from lawsuit in the United States courts, under the Foreign Sovereign Immunities Act (FSIA).[52] But the FSIA sets out certain exceptions, providing the sole means for US courts to gain jurisdiction over a foreign State or its agencies. The California court held that the 'expropriation' exception applied in this

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49 *Ibid.* at 35-6.
50 *Ibid.* at 38.
51 *Altmann v. Austria,* 2001 LEXIS Dist. 6011 at 32-43. Bloch-Bauer died impoverished in 1945 after his vast collection of porcelains and paintings was stolen by Nazis and dispersed to Hitler, Göring and others. The plaintiff, an heir, sought a court declaration that the disputed Klimts be returned to her, under a 1998 Austrian law which returns artworks that were donated under duress to State museums in exchange for export permits after the Second World War. She further sought return of the paintings under California law and other remedies.
52 28 U.S.C.S. sec. 1601 *et seq.*

case. To meet the exception, the plaintiff, Maria V. Altmann, had to establish a "substantial and non-frivolous" claim that the Klimts were taken in violation of international law, that the works were "owned or operated" by an agency of a foreign State, and that the agency engaged in commercial activity in the United States.[53] She succeeded in establishing these points for jurisdictional purposes and the case could go forward, the court said.

The court said Altmann had established a claim that a taking in violation of international law occurred twice – once at the time of "aryanization," and a second time as a result of Austria's own requirement that the paintings be "donated" to national collections in order for Bloch-Bauer's family to obtain export permits on other artworks in 1948. That taking was not for a valid public purpose, because "Austria's own laws required their return to their rightful owners", the court said. Austria's "acknowledged practice" of requiring export licenses for artworks stolen by Nazis "singled out aliens for regulation by the State", the court said, because aliens would be more likely than Austrian citizens to seek export of their artworks, the court said. Because Austrian law required return of Nazi loot to its owners, the exchange of certain artworks for export permits on other artworks could not "be viewed as just compensation", it said.[54]

The *Altmann* decision is now on appeal.

III. THE GOVERNMENT'S BURDEN OF PROOF FOR FORFEITURE: PROBABLE CAUSE

We now return to *Wally III*. Under the NSPA:

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise or money, of the value of $5,000 or more, knowing the same to have been stolen, converted, or taken by fraud [shall be guilty of a crime].[55]

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53 *Altmann v. Austria*, 2001 LEXIS Dist. 6011 at 38-43.

54 *Ibid.* The court also found that Austria had engaged in commercial activity in the United States sufficient to meet the expropriation exception under the FSIA and thus allowing the suit to go forward, based on the alleged facts that the ANG had published a guibidebook in English for purchase in the United States, advertised its collection in the United States, and received US visitors, all of which activities were available to U.S. citizens within the court's jurisdiction. The Gallery had also lent '*Adele Bloch-Bauer I*, one of the disputed paintings, to the United States.

55 Above, n. 7.

To obtain forfeiture of *Wally*, the government at trial would have to prove that the Leopold transported *Wally* to the United States knowing it to have been stolen by Friedrich Welz or converted by Dr Leopold. At trial, the government would need to show probable cause to believe that the property was subject to forfeiture.[56] The court noted that in forfeiture actions, special procedural rules accommodate for "the drastic nature of the civil forfeiture remedy." [57]

The difficulty with forfeiture actions, museums have noted, is that the burden of proof required – "probable cause" – seems slim. MoMA and the Leopold argued that the standard of proof should not be "probable cause", but "preponderance of the evidence", because in 2000, a new statute, the Civil Asset Forfeiture Reform Act,[58] raised the government's standard of proof in forfeiture cases to "proof by a preponderance of the evidence" rather than a showing of probable cause.

The court rejected these arguments, saying that the new statute applied only to forfeiture proceedings commenced after 23rd August 2000.[59]

IV. THE *WALLY III* REVERSAL: PAINTING WAS NOT 'RECOVERED' AND REMAINED STOLEN

In *Wally I*, the court held that US federal law determines whether an object is stolen for purposes of the NSPA. The court then relied on the 'recovery doctrine' of US federal law, under which stolen objects cease being 'stolen' when law enforcement officers, acting as agents of the true owners, retrieve them. The recovery doctrine grew out of a string of 'sting' cases in which courts held that the receipt of so-called 'stolen' goods by defendants, in situations set up by police who had already recovered the property, did not qualify as the criminal receipt of 'stolen' goods. The *Wally I* court found that the seizure of *Wally* by US armed forces in Austria after the war was as an agent of the true owner, Lea Bondi, and purged the painting of the stolen taint that it had.[60]

Reacting to the decision in *Wally I*, the United States vigorously protested the court's characterization of US armed forces in

56 *Wally III* at 41, citing *United States v. Daccarett*, 6 F.3d 37, 55 (2d Cir. 1993).
57 *Ibid.* at 40, quoting *United States v. Daccarett*, above, n. 56 at 47, and citing the Supplemental Rules for Certain Admiralty and Maritime Claims.
58 Pub. L. No. 106-185, 114 Stat. 202.
59 *Wally III* at 41-44.
60 *Wally I*, 105 F.Supp. 2d at 294.

Austria as an agent of Lea Bondi, and set forth further facts in its Third Amended Complaint.

Reviewing those facts, the *Wally III* court held that the recovery doctrine did not apply because US forces were not an agent of Bondi.[61] The recovery doctrine, the court said, "applies only where an agency relationship can be said to exist",[62] because the theory is that when stolen goods are recovered by the police, an agency-principal relationship is legally imputed between the true owner and the government officers who recover it, "who are deemed to act on her behalf because they are charged by law with doing so."[63]

The government's prior complaint had alleged that US forces in Austria were charged with returning stolen objects to their countries of origin, "in order for those countries to return them to their rightful owners," Judge Mukasey wrote in *Wally III*. That statement in the earlier complaint had suggested in the *Wally I* proceedings that US armed forces were "acting on behalf of the true owners, and it was on that basis that I found them to be an implied agent of Bondi," Judge Mukasey said in *Wally III*.[64]

But in its newly amended Third Complaint, the United States retracted the allegation that US forces in Austria were holding artworks "with an eye towards their eventual restitution", which was what "formed the predicate of the implied agency". Rather, the United States now alleged more completely that pursuant to Military Decree No. 3 then in effect in Austria, US armed forces seized all of the property of suspected war criminals, whether it was stolen, 'aryanized', or legitimately acquired. The recovered property – including "millions of items of property" – was transferred to the countries of origin. Under these circumstances, the *Wally III* court said:

> It can no longer be said that the United States military acted as Bondi's agent when it came into possession of Wally. Rather than 'recovering' stolen property, the United States armed forces were simply collecting all property. They did not even know that Wally was stolen. [*citation omitted*].

They were not:

> 'charged by law' with holding Wally on Bondi's behalf or with securing Wally's eventual return. [*citation*

61 *Wally III* at 46 .
62 *Ibid.*
63 *Ibid.*, quoting *Wally I*, 105 F. Supp. 2d at 293.
64 *Ibid.* at 46-47, citing *Wally I* at 294.

> *omitted*]... The lack of both knowledge and duty makes this case unlike every other case cited to the court that applied the recovery doctrine to the police or other implied agents. It negates the existence of the requisite agency relationship.[65]

The recovery doctrine should not be applied, the court said, where property merely "passed through the hands'"of unaware government officers, because "[t]he point" of the recovery doctrine rested on the agent's knowledge that stolen goods had been recovered. Judge Mukasey therefore rescinded his ruling in *Wally I*.[66]

He also rejected the argument that the BDA had 'recovered' the painting as subagent of the United States. As the US armed forces had no agency relationship with Bondi, the court said, the BDA could not be held to have been a subagent or joint agent of US forces, in such a fashion as to relieve the painting of its stolen character. The BDA did not know *Wally* was stolen, not was it even authorized to return the painting to Bondi, the court said.[67]

BDA's Conflict of Interest with Holocaust Victims

The court said that the BDA had "divided loyalties" between protecting the interests of art owners and its own interests, because it was also responsible for deciding what artworks would be given export permits to leave Austria. The United States alleged that the BDA, along with the Austrian National Gallery, "often sought to keep certain works in Austria and place them in Austrian museums". The court noted that "the BDA ignored information" provided by US forces that *Wally* was not properly grouped with the Rieger collection, "information that would have prevented the [Austrian National Gallery] from acquiring it". This "underlying conflict of loyalties precluded any agency relationship between the BDA and the true owners of Holocaust property", the court said.[68]

The recovery doctrine thus did not apply and *Wally* remains stolen property, the judge concluded.

V. A NAZI'S CRIMINAL INTENT

The court rejected the Leopold's argument that the painting could not be considered stolen property under the NSPA because

65 *Ibid.* at 47-48.
66 *Ibid.* at 48-9.
67 *Ibid.* at 49.
68 *Ibid.* at 49-50.

the government had not alleged that the Nazi who took it, Friedrich Welz, had the required specific criminal intent.

Instead, the Leopold said, Welz acquired the painting:

> in connection with his Aryanization of [Bondi's] gallery, which, although repugnant, was legal at the time... 'There is] no allegation that he knew he was wrong.'

The court called this argument "utterly meritless".[69] Instead, the court said, the United States alleged that Welz demanded the painting even after Bondi told him that it belonged to her individually and was not part of the aryanization. Criminal intent was present "on the facts alleged" of a taking under protest and with pressure, the court said.[70]

VI. NO TITLE TO *WALLY* BY PRESCRIPTION

To state a violation of the NSPA, the United States had to show not only that Welz stole the painting, but also that it remained stolen when imported into the United States in 1997. The court rejected the Leopold's argument that the painting was not then stolen because it had acquired title to the painting by 1997 under the Austrian doctrine of prescription. Under Austrian law, the court said, a possessor may acquire title to property if the possession is based on purchase or exchange, lasts for the required statutory period, and is "accompanied by the possessor's belief that the possession is lawful."[71] In other words, the Leopold could have no doubt that it was the legal possessor of the painting during the prescription period.

No Prescription for the Austrian National Gallery

The court looked to Lea Bondi's letter, cited by the United States, stating that she had visited the Austrian National Gallery ('Belvedere') after the Second World War and made a claim to her painting. If the government proved that Bondi had presented a claim to the Belvedere, that would overcome any presumption of good faith which was required under Austrian law for it to gain title by prescription, the court said. Thus, the Leopold Museum could not rest any claim to title on the prescriptive possession of *Wally* by the former possessor, the Belvedere.[72]

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69 *Ibid.* at 50-52.
70 *Ibid.* at 51-52.
71 *Ibid.* at 53.
72 *Ibid.* at 56.

No Prescription for Dr Leopold

Again, the court said, good faith possession will not be found where the possessor knew or should have known that he was not the legal possessor. The court therefore found that Dr Leopold did not gain title by prescription, because the United States alleged that Bondi informed Dr Leopold more than once of her claim to the painting, in 1953 and at least twice afterwards. Bondi's claims had raised "an objective doubt in his mind that he was the legal owner", the court said.[73]

Whistling Past the Graveyard is not Enough

MoMA further argued that if Dr Leopold, despite being aware of Bondi's claim, believed even erroneously that he had title to the painting, then his belief would allow him to gain title by prescription under Austrian law. But the court said this was not reason to dismiss the case, stating that the United States had alleged sufficient facts to rebut the argument that Dr Leopold had the requisite confidence to become *Wally's* legal owner. Judge Mukasey wrote:

> the allegation that Bondi told Dr. Leopold of her claim is enough. 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.[74]

VII. STATUTES OF LIMITATION DEFENSES RAISED BY THE LEOPOLD ARE REJECTED

The Leopold invoked every statute of limitation conceivably applicable to the controversy – in sharp contrast to the position taken by two American museum groups in 1999 that in cases of art looted in the Nazi era and not restituted,

> in order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses.[75]

For a US museum, such an 'equitable and appropriate resolution' might include, in addition to ethical or moral issues,

73 *Ibid.* at 57.
74 *Ibid.* at 58-9.
75 Guibidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, American Association of Museums and the U.S. National Committee of the International Council of Museums, 1999 at 4.f

the public relations consequences of using a 'time-barred' defense to hold on to a Nazi-looted object.[76] In several cases where art in museum collections has been found to have been taken during the Second World War and not restituted, museums have worked out arrangements of returning or paying a partial purchase price for artworks allegedly looted during the Second World War.[77]

The Leopold, however, argued that owing to the passage of time, Bondi and her heirs lost any chance to claim the painting, because statutes of limitation expired before the property reached the United States in 1997. Therefore, the Leopold said, *Wally* could not be confiscated as 'stolen' property because there was no one with a claim to the painting superior to its own.

The court found that Austrian law did not bar a claim by Bondi's heirs, that New York law and its statutes of limitation did not apply, and that the record was as yet insufficient to support a finding of laches.

Regarding laches – the theory that Bondi and her heirs unreasonably delayed starting an action, and that the Leopold suffered undue prejudice as a result – the court said that this would require too fact-intensive an inquiry to allow dismissal of the government's case at this point.[78]

Statute of Limitations Defense a Factor in Altmann Decision to Allow Suit in California

It should be noted that Austria's intent to resort to a statute of limitations defense in Austrian proceedings was a factor cited by the US federal court in *Altmann* in deciding that the plaintiff's claim to recover six Klimt paintings could proceed in California; in Austria, the court reasoned, there would not be an adequate forum to hear Altmann's claim.

In addition to claiming immunity, Austria had sought to dismiss the lawsuit by citing the inconvenience of California as a location

76 Conversations of the author with museum lawyers, 1999.

77 Conversations of the author with museum lawyers. Of interest to researchers, Stephen W. Clark, Associate General Counsel, MoMA, and Ari Wiseman have prepared an enormously valuable and useful summary of cases involving claims to artworks at museums said to have been looted from original owners during the Second World War. See Stephen W. Clark and Ari Wiseman, 'World War II Restitution Cases' in *Legal Problems of Museum Administration March 20-22 2002*, Course of Study Materials at 181, published by American Law Institute-American Bar Association. The summary discusses 26 US and foreign cases, both resolved and ongoing.

78 The statutes of limitations and laches discussion can be found in *Wally III* at 59-71.

for the suit. But a party seeking to use this doctrine must demonstrate the existence of an "adequate alternative forum", the California court said, and Austria did not provide such an "adequate alternative forum". Instead, the court said, Altmann would most likely be barred from suit in Austria by the statute of limitations, and would be "left without a remedy". The court said that the Republic and ANG had "refused to waive" the statute of limitations defense.[79]

VIII. FORFEITURE BASED ON ILLEGAL CONVERSION BY DR LEOPOLD

In its Third Amended Complaint, the United States added a new assertion that *Portrait of Wally* could be forfeited not just as knowingly imported stolen property, but also on the independent theory that Dr Leopold, when he acquired the painting from the Belvedere knowing it rightfully belonged to Bondi, committed an act of criminal conversion. The NSPA also makes it a crime knowingly to import converted property.

The Leopold Museum protested that Dr Leopold's acquisition of *Wally* could not be a conversion unless he first lawfully possessed the painting and then later took an action to deprive the true owner of it. But the court held that the definition of criminal conversion under federal law is broader than that, including the "knowing and unauthorized exercise of dominion over another's property" whether possession is wrongful at the start or first lawfully obtained.[80] A broad definition of conversion had been read into the NSPA, the court added, stating that the language of the NSPA "reflects a congressional purpose to reach all ways by which an owner is deprived of the use or benefits of his property".[81] Conversion thus would include Dr Leopold's wrongful acquisition of Bondi's property if the government could prove this at trial, the court said.

The Leopold further argued that the United States had not specifically alleged Dr Leopold's intent for criminal conversion; on the alleged facts, it said, he could be presumed only to know that Bondi had owned the painting in the past, not that she still did.

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79 Another reason that Austria would not provide an adequate forum, the court said, was that Austria would charge the plaintiff court fees of $130,000 to $200,000, which were "oppressively burdensome". Austria had argued that Altmann should pay even greater fees, the court said. *Altmann v. Austria*, 2001 U.S. Dist. LEXIS at 6017-18.

80 *Wally III* at 73, quoting *United States v. Wilkinson*, 124 F.3d 971 at 977 (8th Cir. 1997).

81 *Wally III* at 73, quoting *United States v. Evans*, 579 F.2d 360, 361 (5th Cir. 1978).

But the court said that the United States had indeed alleged that Bondi had told Dr Leopold that the painting was "her property," and that Dr Leopold acquired *Wally* for himself "despite [his] knowledge of Bondi's ownership". If so, the painting would have remained converted property at the time of import in 1997, the court said.[82] At this stage of the lawsuit, it said, this was enough to see the case go forward.

IX. KNOWLEDGE OF THEFT OR CONVERSION: WHAT DID DR LEOPOLD KNOW?

The NSPA makes it a crime to transport property knowing it to have been stolen or converted. The final attack by the Leopold and MoMA against the confiscation action was that even if *Wally* were stolen or converted, the United States could not establish that the Leopold Museum knew the painting's status when importing it in 1997.

As to who might have had such knowledge, all the parties conceded that Dr Leopold's knowledge could be imputed to the Leopold Museum because he was its Museological Director at all relevant times. But the Leopold argued that Dr Leopold lacked the requisite *mens rea* to satisfy the knowledge requirement of the NSPA.[83] Instead, said the Leopold, the United States had alleged only that Dr Leopold was aware that Bondi had some claim to *Wally*. But the court disagreed, saying that the government had alleged that Bondi told Dr Leopold of her ownership and that she twice reminded him of this.[84]

"It is reasonable to infer from these allegations that Dr Leopold either knew or could deduce that Wally was stolen, particularly given the historical backdrop of Nazi persecution", the court said.[85] The court pointed to two further allegations supporting knowledge by Dr Leopold: Bondi reported that he acted self-consciously after she confronted him about the painting; and he changed the published provenance of the painting to include a sale by Bondi to Dr Rieger, "although he knew Bondi's claim to the contrary".[86]

82 *Ibid.* at 75-76.
83 *Ibid.* at 76-77.
84 *Ibid.*
85 *Ibid.* at 78.
86 *Ibid.*

Deliberate Ignorance no Defense: What are Museums to do?

The court added that "deliberate ignorance is no defense".[87] The case therefore could not be dismissed, because the government said it could show probable cause that the Leopold Museum, through Dr Leopold, knew *Wally* to have been stolen at the time of import.[88]

The court's statement that deliberate ignorance is no defense highlights a due diligence question for museums. In checking incoming objects for a loan show, or new acquisitions, museums have taken great efforts in recent years to investigate the provenance of art that could possibly have been stolen in the Second World War era.[89] But how far is a museum to go in probing a potential lender's or donor's personal knowledge about possible ownership claims? Apparently, pretty far. It would seem that a museum, to avoid being embroiled in legal controversies over disputed gifts or loans, should take pains not to accept any such item where the lender or donor even hints that there might be an ownership claim – because 'deliberate ignorance' is no defense. It would be interesting to know whether museums routinely ask whether any such claims exist for incoming acquisitions or loans – even though the question might reveal information they wish they had not known.

The Schultz Decision

After the recent decision in *United States v. Schultz*,[90] for example, concern has been raised over instructions given by the judge to the jury about how to treat a finding that the defendant deliberately avoided knowledge that would have rendered him guilty. *Schultz* involved a criminal prosecution under the NSPA of an antiquities dealer for knowingly receiving stolen property. In that case, the 'stolen' nature of the property arose from the declaration under Egyptian law that all antiquities of archaeological or historical importance discovered after 1983 are State property.

At trial, a critical question was whether the defendant, Mr Schultz, knew what the Egyptian law said. If he did, then his involvement in an arrangement to import and sell the antiquities would make him guilty of violating the NSPA, because he would have known that he was receiving and selling Egypt's property.

87 *Ibid.* citing *United States v. Boothe*, 994 F.2d 63, 69 (2d Cir. 1993).
88 *Ibid.* at 78-9.
89 *See* Martha Lufkin, 'The Subpoena Heard Round the World', above, n. 13 at p. 368.
90 Above, n. 9.

In his instructions to the jury, the judge said that the United States had to prove that Schultz "was at least aware" that under Egyptian law, Egypt owned all recently owned antiquities. Schultz said that he did not. But the judge went on to say that Schultz could "not purposefully remain ignorant" to escape the consequences of the law. Specifically, as to the defendant's knowledge in the *Schultz* NSPA case, the court charged the jury that:

> ...if the defendant here honestly believed, even if erroneously, that the Egyptian antiquities he was seeking to acquire from [the co-conspirator] ... were not obtained in violation of any Egyptian ownership right, he would not be guilty of the alleged [NSPA] conspiracy.
> However, a defendant may not purposefully remain ignorant of either the facts or the law in order to escape the consequences of the law. Therefore, if you find that the defendant, not by mere negligence or imprudence but as a matter of choice, consciously avoided learning what Egyptian law provided as to the ownership of Egyptian antiquities, you may infer, if you wish, that he did so because he implicitly knew that there was a high probability that the law of Egypt vested ownership of these antiquities in the Egyptian government. You may treat such deliberate avoidance of positive knowledge as the equivalent of such knowledge, *unless you find that the defendant actually believed* that the antiquities were not the property of the Egyptian government. (*emphasis added*)[91]

One wonders what the judge's instructions would be about Dr Leopold's knowledge if *Wally* involved a jury determination. On the basis of the above language, if Dr Leopold actually believed he owned *Wally*, then the scienter requirement could not be met to allow forfeiture. In the end, therefore, even if the government can prove that the painting was stolen or converted, it appears that the question in *Wally* will boil down to whether or not Dr Leopold knew it.

MoMA argued that such a knowledge requirement could never be met, because the painting's ownership was in reasonable dispute under Austrian law, and therefore the Leopold Museum had a colorable claim to title. But the court said that questions

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91 *United States v. Frederick Schultz*, 01 Cr. 683 (JSR), Court's Instructions of Law to the Jury at 16-18. See also Martha Lufkin, 'Museums Worry about Jury Instructions in Antiquities Conviction Case', 128 *The Art Newspaper*, September 2002.

under Austrian law about statutes of limitations periods were not critical to whether Dr Leopold gained title by prescription. Rather, the key uncertainties in whether title was gained by prescription were Dr Leopold's and the museum's own confidence that they legally possessed the painting.[92]

Second, the court said, the government had shown it was prepared to prove that Bondi owned the painting under Austrian law; the painting was therefore "not the subject of an objectively colorable ownership dispute." Moreover, the allegations included conduct by Dr Leopold suggesting his guilty knowledge, the court said. The case could not be thrown out, because the court could not say as a matter of law that the United States could not show the requisite knowledge in Dr Leopold at trial. Instead, Dr Leopold's knowledge would be 'a question of fact for trial'.[93]

X. CONSTITUTIONAL AND STATUTORY ARGUMENTS REJECTED

No Lack of Due Process

The court rejected arguments by the Leopold and MoMA that because Austrian law is so unclear on who owns *Wally*, the Leopold could have had no constitutional 'fair warning' that importation of the painting would violate the NSPA. The rule of lenity and due process, the museums argued, preclude application of the NSPA to property that is the subject of a genuine ownership dispute.

But the court said that these doctrines had no application here, where the government's forfeiture theory was that the Leopold imported *Wally* knowing it to have been stolen or converted. The court further disagreed with the Leopold and MoMA that Austrian law was an unclear foreign pronouncement of *Wally's* ownership, and would cause them a loss of due process if the case went forward in US courts. At this stage, Austrian law could not be said to be so unclear as to deprive Dr Leopold or the Leopold Museum, both of whom were Austrian, of fair notice, the court said.[94]

Statutory Purpose

The Leopold and MoMA argued that the NSPA's purpose was not vindicated here where the statute was not being used to

92 *Wally III* at 79-80.
93 *Ibid.* at 80-81.
94 *Ibid.* at 81-84.

supplement Austrian law enforcement efforts; Austria, they said, was not seeking to punish Dr Leopold. In fact, they said, the Leopold Museum had participated in "an arms-length cultural exchange with a world-renowned museum".

But the court said that a forfeiture was being sought of illegally imported stolen or converted property, which would serve the NSPA's purpose by discouraging the receiving and taking of stolen goods. "[A]rt on loan to a museum – even a 'world-renowned museum' – is not exempt", wrote Judge Mukasey. The United States need not concern itself, he said, with a foreign nation's prosecution decisions in cases involving property deemed stolen or converted under US law.[95]

XI. STANDING OF HEIRS

The court rejected the Leopold Museum's motion to dismiss the heirs of Lea Bondi from the case. It also, however, rejected the claim of a grandson of Lea Bondi's husband, who was stricken from the lawsuit.[96]

CONCLUSION

As shown in the court's refusal to dismiss the *Wally* case before trial, unresolved controversies over artwork that changed hands during the Second World War are subject to fact-intensive, highly detailed analysis and likely disagreement. An unusual feature here is that a person involved in the present controversy also has first-hand knowledge of the events of decades ago. As the case proceeds to trial, many will be watching the outcome.

95 *Ibid.* at 84-87.
96 *Ibid.* at 95-101.