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What the Lady Has Wrought: The Ramifications of the Portrait of Wally Case

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On July 20, 2010, on the eve of trial, the case of *United States v. Portrait of Wally*, which our firm litigated for more than ten years, was finally resolved by stipulation and order. The U.S. Attorney in Manhattan commenced the case in the fall of 1999 by seizing the painting, “Portrait of Wally” by Egon Schiele (Wally), while it was on loan for exhibition at the Museum of Modern Art in New York. The case has been credited with awakening governments around the world, as well as museums, collectors, and others in the global art community, to the problem of Nazi-looted art almost seventy years after the beginning of the Nazi era in Europe. Although this case will surely be commented on and analyzed for many years to come – including in a documentary film due to be released in the spring – as the attorneys for the claimant in the case, we thought it would be helpful to provide some thoughts from our unique vantage point.

Basics of the Case

Herrick, Feinstein represented the Estate of Lea Bondi Jaray throughout the litigation. Ms. Bondi Jaray was a Jewish art dealer in Vienna who fled for London in 1939 after her gallery was “Aryanized” by a Nazi agent. She was also forced by him to give up a prized personal possession that she kept in her home: Egon Schiele’s haunting portrait of his lover and favorite model, Wally Neuzil. After the war,

Wally was mistakenly mixed in with the artworks of Heinrich Rieger, a collector who had perished in a concentration camp. Along with Rieger's artworks, Wally was transferred by Allied troops to the Austrian government. Wally ended up at the Austrian National Gallery (the Belvedere) despite the fact that it clearly had never been part of the Rieger collection. Ms. Bondi Jaray later asked Rudolf Leopold of Vienna, a Schiele collector, to help her get her painting back, but instead he arranged to acquire it himself and refused her demands to return it to her. Ms. Bondi Jaray died in 1969.

Eventually, Leopold established the Leopold Museum in Vienna and Wally became part of its collection. In the 1990s, Leopold made the fateful decision to loan several of the Museum's Schiele works, including Wally, to the Museum of Modern Art (MoMA) in New York. In early 1998, near the end of the exhibition, Ms. Bondi Jaray's heirs notified MoMA of their claim and then contacted the District Attorney of New York County, who subpoenaed the painting in connection with a criminal investigation that he commenced to determine if Wally constituted stolen property present in New York in violation of New York law. MoMA moved to quash the subpoena on the ground that New York law prohibits seizure of an artwork on loan from out of state. The case worked its way up to the state's highest court, which ruled in MoMA's favor.

Immediately thereafter, the U.S. Attorney for the Southern District of New York commenced an action to have the Leopold Museum forfeit Wally on the ground that it was stolen property unlawfully imported into the United States. The U.S. Customs Service seized the painting, marking the start of more than ten years of litigation during which Herrick worked closely with the U.S. Government in its attempts to recover the painting and return it to the Estate of Lea Bondi Jaray.

The case was finally settled a week before trial was scheduled to begin. Most of the issues in the case had been resolved by motion last fall and the sole remaining issue for trial was whether Leopold knew

that Wally was stolen when he, through the Leopold Museum, imported it into the United States for the MoMA exhibition.

Ramifications of the Wally Case and Its Settlement

Rather than attempting to analyze the many legal issues presented by the case, we highlight here several key points that concern the importance of Wally to Nazi looted art claims worldwide.

1. Helping to Bring the Problem Posed by Nazi-Looted Art to the Forefront

The commencement of the New York State and federal litigation in the Wally case “changed everything,” as a recent headline in the Art Newspaper declared. The fact that a loaned artwork at MoMA could be seized by U.S. Government authorities sent shockwaves throughout the world and was a major factor in causing governments, museums, collectors, and families of Holocaust victims to focus their attention on Nazi-looted art. It helped open a global reexamination of the massive looting of art fomented by the Nazi regime, as well as the post-war policies of the U.S. and European governments that were purportedly designed to deal with looted art recovered from the Nazis but, in many cases, resulted in the failure to return it to its true owners.

A specific outgrowth of this renewed interest, and an important stimulus to its further development, was the adoption in 1998 by 44 nations of the Washington Principles concerning Nazi-looted art. One principle states that pre-war owners and their heirs should be encouraged to come forward to make known their claims to art that was confiscated by the Nazis and not subsequently restituted; another states that once they do so, steps should be taken expeditiously to achieve a just and fair solution. This led several European governments to create restitution commissions to examine or reexamine claims by victims and their families. And museums all over the world, as well as governments with art collections of their own, started placing on the Internet images and information about artworks in their collections for which there was a gap in ownership

history, or provenance, between the years 1933 and 1945, asking those with further information about these works to contact them and perhaps make a claim for recovery. Claims to recover Nazi-looted art have been brought all over the world over the past decade. And each year, new litigations are commenced, especially in the United States, and many settlements are announced.

2. The Role of the U.S. Government in Nazi-Looted Art Matters

What most distinguishes the Wally case from the many subsequent cases brought to recover Nazi-looted art is the fact that it was commenced by the U.S. Government. Indeed, critics of the case repeatedly questioned why the Government was committing substantial resources to what some considered to be nothing more than a title dispute between the Leopold Museum and the Bondi Jaray family – a dispute that should have been resolved in a civil lawsuit between them. Indeed, they asked why the Government was involved at all.

This question is critically important because it raises the issue of whether the U.S. and other governments should play a significant role in trying to resolve Nazi-looted art claims. Despite the misgivings expressed by many, it is clear that this civil forfeiture action was consistent with, and fully promoted, the express public policy interests of the United States regarding Nazi looted art. The Government's complaint alleged that Wally was stolen by a Nazi agent from Lea Bondi in 1939, wrongfully acquired by Leopold, and then knowingly imported by the Leopold Museum into the United States in violation of the National Stolen Property Act. In other words, what was alleged against the Leopold Museum was that it knowingly trafficked stolen property in the United States. After an exhibition at one of this country's foremost museums, the Leopold was going to take this stolen property out of the country, while the heirs of the true owner, among them several U.S. citizens, stood by helplessly. The heirs could not ask a court to attach the property pending a resolution of the matter because New York State law immunizes from judicial seizure art loaned from outside New York. So the U.S. Government acted to assure that the stolen property did not leave the country.

As former Chief Judge (and later Attorney General) Michael B. Mukasey determined in one of the early decisions in the case: “On its face, [the National Stolen Property Act] proscribes the transportation in foreign commerce of all property over \$5,000 known to be stolen or converted. Although the museum parties and *amici* would have it otherwise, art on loan to a museum – even a ‘world-renowned museum’ – is not exempt.” Explaining further, the court added that “if Wally is stolen or converted, application of [the National Stolen Property Act] will ‘discourage both the receiving of stolen goods and the initial taking,’ which was Congress’s apparent purpose.” The court concluded that “there is a strong federal interest in enforcing these laws.” But the U.S. Government’s interest in discouraging the trafficking of stolen goods is only part of the story. The United States also led the way in urging governments around the world to develop methods to effectuate the policy of identifying Nazi-looted art and returning it to its rightful owners. It was the U.S. Government that convened the 1998 conference of government officials, art experts, museum officials, and other interested parties from around the world to consider and debate the many issues raised by the continuing discovery of Nazi-looted assets including artworks, resulting in the promulgation of the Washington Principles. The U.S. Government continued its participation in this area by playing a critical role in the 2009 Holocaust Era Assets Conference that took place in the Czech Republic and joining in the Terezin Declaration, which reaffirmed and expanded the Washington Principles.

One of those principles encouraged the resolution of these disputes by “alternative dispute resolution,” where possible, to avoid long, drawn-out litigation. Throughout the Wally litigation, there was criticism that this lengthy litigation in state and federal courts was the wrong way to go about resolving Nazi-looted art claims. But alternative dispute resolution is not always possible, particularly where one of the parties is unwilling to participate in good faith. In the Wally case, the U.S. Government brought the forfeiture action to prevent the Leopold from sending the painting to Austria, thus placing it beyond the reach of any plausible attempt at resolution. Furthermore, the Austrian Government, while adopting a

law in 1998 that purportedly was designed to ensure the careful review of claims for Nazi-looted artworks in the Austrian Government's possession, had determined that, as a "private foundation" under Austrian law, the Leopold Museum was not covered by that statute (despite the fact that the Austrian Government provided a substantial amount of its funding and appointed half of its board of directors).

In any litigation it is usually in all of the parties' interests to reach a mutually acceptable resolution as early as possible. But as is often the case, it is only after the court issues a decision resolving many of the issues in the litigation, as happened in the Wally case last fall, that the parties become better focused on the likely outcome of the case. But regardless of when this case was finally settled, commencing this forfeiture action and securing the artwork in the United States certainly promoted the U.S. Government's interest in fairly resolving these cases and preventing the trafficking of property looted in the Holocaust.

One final note about the U.S. Government's role in these cases. Although the Government sometimes takes a position adverse to the claimants in these kinds of cases, especially where a foreign government is the party in possession of the disputed artwork and issues relating to sovereign immunity are involved, an important lesson of the Wally case for potential claimants is not to ignore the very helpful and often critical role that the U.S. Government can play with respect to individual claims.

3. The Settlement Terms

Since this case involved the resolution of a government forfeiture action, there was little question that the settlement would be filed with the court and its terms open to public scrutiny and review. This is rarely the case in private civil litigations, however, where the confidentiality of the terms of settlement is almost always agreed to by both parties. As a result, the public has been made aware not only of the precise amount of monetary compensation paid to the Bondi Jaray Estate by the Leopold Museum

(reflecting the painting's market value), but also of the non-monetary settlement terms, including the opening ceremony and temporary exhibition of Wally at the Museum of Jewish Heritage in New York before it was transported to Austria, and the specific signage that must accompany Wally at any exhibition sponsored by the Leopold Museum, either at the Museum or anywhere else in the world.

It is important to recognize that Nazi-looted art claims involve very deep emotions occasioned by the horrific experiences of the claimant families during the Holocaust. As a result, even where a claim can be resolved by payment of the full value of the claimed artwork, other interests of the claimant must often be satisfied before the case can be settled. These interests include "correction of the record" concerning the true provenance of the artwork, and providing public and permanent recognition of the true historical facts. The importance of exhibiting the artwork at a museum dedicated to the remembrance of the Holocaust, even temporarily, cannot be overstated. Thus, potential settlements of Nazi-looted art claims should always give heed to the importance of recognizing the emotional needs of the claimants to try to correct the historical, but still deeply felt, injustices of the Nazi era.

4. The True Impact of the Wally Case

The real importance of the Wally case, however, is what it means for both claimants and possessors of Nazi-looted artwork. First, it sends a clear message throughout the world that the U.S. Government will not tolerate trafficking of stolen property within its borders and will commit the resources required to see that the victims of looted art are treated appropriately. Second, it tells the families of Holocaust victims everywhere that they can stand up for their rights and persevere even in the face of intransigence and procrastination by the current possessors of their property. When their efforts seem hopeless, let them remember Wally.

1. See *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009).

2. See Martha Lufkin, *Portrait of Wally Case Settled for \$19m*, *The Art Newspaper* (July 20, 2010),

<http://www.theartnewspaper.com/articles/%3Ci-Portrait-of-Wally-i-case-settled-for-19m/21273>.

3. Washington Conference Principles on Nazi-Confiscated Art, available at <https://ecf.nysd.uscourts.gov/cgi-bin/login.pl>.

4. *United States v. Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445, at *86 (S.D.N.Y. Apr. 11, 2002).

5. Terezin Declaration of June 30, 2009, available at http://www.holocausteraassets.eu/files/200000215-35d8ef1a36/TEREZIN_DECLARATION_FINAL.pdf. See L. Kaye & A. Saz-Bolder, *June 2009 in Prague: The Washington Holocaust Era Conference Revisited* (Herrick/Art & Advocacy), Spring 2009, page 5; H. Spiegler, *The June 2009 Prague Conference and Terezin Declaration: A New Beginning?* (Herrick/Art & Advocacy), Summer 2009, page 4.