

LOOT AND THE LAW

**A NEW YORK AMERICAN INN OF COURT
PRESENTATION
APRIL 23, 2014**

NEW YORK AMERICAN INN OF COURT

APRIL 23, 2014

LOOTING AND THE LAW

6:30 WELCOME AND INTRODUCTION

**6:35 EARLY DEVELOPMENTS IN LOOTED
ART LAW IN NEW YORK**

MENZEL V. LIST

**6:50 INTERNATIONAL ASPECTS AND
CONCERNS**

THE CASE OF THE POLISH RIFLE

7:00 NATURAL ARTIFACTS

***A MONGOLIAN DINOSAUR COMES TO
NEW YORK***

7:25 MORE NAZIS – THE GURLIT AFFAIR

7:50 *FLAMENBAUM* DECISION 2013

Team Members

DAVID ABRAMS

JOSHUA LIPSMAN

RISHI BHANDARI

PAUL MAHONEY

ALLISON CHARLES

CARLOS RAMOS-MROSOVSKY

LISA COHEN

MICHAEL PATRICK

EVAN FENSTERSTOCK

ANTHONY PRESTA

LAUREL FENSTERSTOCK

SHAWN RABIN

JEFFREY GROSS

CHYRSSA VALLETTA

MARTA IZAK

DAVID WEILD III

MEREDITH JONES

CAROL ZIEGLER

EUGENE KUBLANOVSKY

SPECIAL THANKS TO:

ARNOLD & PORTER

STEWART AARON

VINSON & ELKINS

FRAGOMEN WORLDWIDE

DAVID G. ABRAMS

David G. Abrams is a Special Assistant Attorney General in the New York Office of the Attorney General, Medicaid Fraud Control Unit. He is in the Civil Enforcement Unit, where he has worked on a wide-range of matters to recover unlawfully retained taxpayer money. He has also represented the interests of several states on teams comprised of members of the National Association of Medicaid Fraud Control Units, in cases involving nationwide allegations of fraud. In addition to his civil work, he is currently serving as lead prosecutor on a criminal matter.

Prior to joining the Office of the Attorney General, Mr. Abrams was an associate at the litigation boutique Schlam Stone & Dolan LLP, where he specialized in complex commercial litigation. He served as lead associate on matters for some of the largest companies in the world, as well as personally represented basketball legend Julius Erving in a contract dispute matter. He also handled various other cases, including trademark and unfair competition disputes, and claims against a New York City-based developer under the Interstate Land Sales Act.

Prior to joining Schlam Stone & Dolan, Mr. Abrams was an associate at Buchanan Ingersoll & Rooney, where he primarily handled commercial creditors'-rights cases, as well as general litigation matters.

Mr. Abrams is a 2007 graduate of the Benjamin N. Cardozo School of Law, where he was awarded a Dean's Scholarship and was a Public Interest Law Students Association Summer Stipend recipient. Originally from Chicago, Mr. Abrams briefly returned there during law school, to work as a judicial extern for the Hon. George Lindberg, a U.S. District Court Judge in the Northern District of Illinois. Mr. Abrams is a 2002 graduate of New York University, where he was awarded a Draper Scholarship.

He is admitted in New York state court, as well as the Federal Courts for the Eastern and Southern Districts of New York.

Rishi Bhandari is a partner at Mandel Bhandari LLP, which he co-founded. He is a highly respected trial attorney who has been selected as a Rising Star by the New York Super Lawyers magazine. Mr. Bhandari's vast litigation experience includes the representation of company founders and owners in disputes involving partnership agreements, equity allocations, and employees, among other things.

Mr. Bhandari has been lead counsel or co-lead counsel in many lawsuits that have resulted in verdicts or settled on very favorable terms on the first day of jury selection or shortly after opening statements.

He has achieved outstanding results for his clients, including a jury verdict that was more than nine times larger than the defendants' final settlement offer and the settlement of claims worth tens of millions of dollars. Mr. Bhandari started his legal career at the business litigation powerhouse Quinn Emanuel Urquhart & Sullivan, where he represented Fortune 500 companies, helped formulate the litigation strategy on behalf of one of the world's largest dairy producers, and worked closely with one of the name partners on behalf of a major Hollywood talent agency embroiled in a legal malpractice and bad faith insurance action.

Before co-founding Mandel Bhandari, Mr. Bhandari practiced at the highly regarded white collar and commercial litigation boutique Brune & Richard, where he represented billion-dollar hedge funds, sizable private equity funds, and many different types of operating companies, from the publisher of business-to-business magazines, to one of the nation's largest temporary staffing agencies, to a leading manufacturer of video game accessories.

Mr. Bhandari has also devoted considerable time to public interest causes. He was a Teach for America Corps member and teacher in Baltimore and Washington, D.C. and worked for the Democratic National Committee's voter protection unit.

Rishi Bhandari
Mandel Bhandari LLP
11 Broadway, Suite 615
New York, NY 10004

Allison M. Charles

Formerly an Associate at Fensterstock & Partners, Ms. Charles has represented a variety of clients in a wide range of disputes. Her diverse practice areas include contract disputes, tax shelter litigations, employment law and entertainment law. Prior to joining Fensterstock & Partners, Ms. Charles was a Staff Attorney and Development Associate at Volunteer Lawyers for the Arts (VLA) in New York, an organization serving low-income artists. While in attendance at Brooklyn Law School she was the Mediation Program Coordinator at VLA, facilitating the organization's mediation program. In addition, she participated in multiple internships and externships at various New York City Firms practicing entertainment law.

Michael D. Patrick is a partner in the New York office of the business immigration law firm, Fragomen Worldwide, which he joined as a senior equity partner in 1990. In addition to his acting career at the Inn of Court, Michael performs on his firm's Finance, Global Compliance, Investor (Chair), and Legal Affairs and Risk Management (Co-chair) committees, and plays a role on the Second Circuit's Committee on Admissions and Grievances.

When he was in high school at LREI in Greenwich Village, Michael was an active member of the drama department. He did television commercials through college and law school, which supplemented his waitering activities. When he is not acting, Michael hunkers down as an Immigration Columnist for The New York Law Journal and the Metropolitan Corporate Counsel and tries to keep his annual listings in *Best Lawyers in America*, *Super Lawyers* and *Chambers USA: America's Leading Business Lawyers*. Michael thanks his wife, Carol Sedwick, now retired after 33 years as an Associate Director in soap operas, for reading him his lines.

Lisa C. Cohen is a founding partner of Schindler Cohen & Hochman LLP, a litigation boutique that handles litigation and arbitration in a wide variety of complex commercial areas. Her litigation experience includes disputes involving structured financial products, commercial fraud, contracts, intellectual property, patents, securities, suretyship, and RICO. She also has extensive experience in issues involving issues of foreign law, particularly Brazilian and Russian law, and she routinely counsels clients around the globe who have U.S.-based litigation and arbitration.

Ms. Cohen received her B.A. from Brandeis University with highest honors and graduated from Columbia University School of Law as a Harlan Fiske Stone Scholar before clerking for the Hon. Irving R. Kaufman on the Court of Appeals for the Second Circuit.

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About Us

Anthony Presta

Tel: 646-218-7560

Fax: 646-218-7510

Anthony.Presta@lawbhs.com

[Download vcard](#)

Biography

Mr. Presta focuses his practice on commercial litigation, lemon law and warranty litigation, insurance coverage litigation, contract formation, and insurance defense litigation. He has experience in nearly all phases of litigation, from pleadings through appeals.

While in law school, Mr. Presta participated in a foreign study program in Sorrento, Italy. He also studied abroad at the University of Limerick, Ireland as an undergraduate.

Insurance Coverage Litigation & Commercial Litigation

Mr. Presta has extensive experience representing various clients in the insurance industry regarding the viability of insurance claims, both prior to litigation and as counsel for any litigation arising out of any coverage disputes. Mr. Presta also represents both insurance companies and their insureds in subrogation matters and matters relating to contribution to insurance claims.

Lemon Law & Warranty Litigation

Mr. Presta also has substantial experience litigating, as well as providing counsel for, matters relating to breach of warranty and violation of lemon law claims raised throughout the northeastern region of the United States.

Contract Formation

Mr. Presta is experienced in providing counsel to clients in the insurance industry, education industry, healthcare industry, entertainment industry, and various other commercial and not-for-profit industries on any and all issues revolving around contract negotiation and formation. Mr. Presta provides counsel on various aspects of contract negotiation and formation with a particular focus on insurance, subrogation, and indemnification protection.

Insurance Defense Litigation

Mr. Presta has substantial experience as an attorney dealing in various aspects of insurance defense litigation, including matters related to both personal injury and property damage.

Education

- J.D., *cum laude*, St. John's University School of Law, 2006, Associate Articles & Notes Editor of *St. John's Law Review*
- B.B.A., Finance, *cum laude*, University of Massachusetts, 2001, Golden Key National Honor Society

Bar Admissions

- New York, 2007
- New Jersey, 2006

Court Admissions

- U.S. District Court for the Southern District of New York
- U.S. District Court for the Eastern District of New York
- U.S. District Court for the District of New Jersey
- U.S. Court of Appeals for the Second Circuit

New York City Office

One Grand Central Place
60 East 42nd Street
New York, N.Y. 10165
Phone: 646-218-7560
Fax: 646-218-7510

Westchester County Office

411 Theodore Fremd Avenue
Suite 206S
Rye, N.Y. 10580
914-925-3585

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KASOWITZ

KASOWITZ BENSON TORRES & FRIEDMAN LLP



Evan S. Fensterstock

ASSOCIATE | NEW YORK

T (212) 506-3303

F (212) 506-1800

<http://www.kasowitz.com/evan-steele-fensterstock/efensterstock@kasowitz.com>

Evan Fensterstock's practice focuses on complex commercial litigation and white collar defense in state and federal courts. Evan has prosecuted and defended companies and individuals in a wide range of industries including financial services, hospitality, and gaming. He has handled disputes involving breach of contract, breach of fiduciary duty, misappropriation of trade secrets, dissolution, malpractice, negligence, defamation, false light invasion of privacy, fraud, conspiracy, and internal investigations. Evan has participated in authoring and teaching CLE presentations in the areas of Research Strategies, Election Law, and Trial Practice.

Evan also devotes his time to pro bono work. He is the coordinator of Kasowitz's Holocaust Survivor Representation Pro-Bono Project, which helps Holocaust survivors recoup pensions and payments from the German government for work performed in ghettos during World War II. He also worked at the Lenox Hill Neighborhood House with the Health Care Access Project to help low income seniors choose a Medicare Part D plan. In 2013, he received the Legal Aid Society Pro Bono Publico Award for his service to Hurricane Sandy victims and initiating interest at Kasowitz in unemployment insurance benefits cases leading to the Unemployment Insurance Project.

During law school, Evan interned for the Honorable Raya S. Dreben in the Massachusetts Appeals Court, the Honorable Charles T. Spurlock in Suffolk Superior Court, and the Legal Division of the Massachusetts Department of Correction in Boston, Massachusetts. In 2007, he was elected Vice-Magister of the Bradlee Inn Chapter of the International Legal Honor Society Phi Delta Phi, and in 2008 he received the Phi Delta Phi Balfour Scholarship for outstanding service to Bradlee Inn.

Notable Representations

- The founder and chairman of an international gaming and racing company in a defamation, false light invasion of privacy, and conspiracy action brought by a competitor in Maryland state court. In September 2013, the claims against this individual were dismissed.
- Gibraltar Private Bank & Trust in an action against its former parent

RELATED INFORMATION

PRACTICE AREAS

Commercial Litigation

EDUCATION

- New England School of Law (J.D., *cum laude*, 2009)
Executive Literary Editor, *New England Law Review*
- Bowdoin College (B.A., 2006)
Class President

BAR ADMISSIONS

- Connecticut, 2009
- New York, 2010

COURT ADMISSIONS

- U.S. District Court, Eastern District of New York, 2010
- U.S. District Court, Southern District of New York, 2010

company, Boston Private Financial Corporation, concerning the interpretation and implementation of a stock purchase agreement.

- Hilton Worldwide in an action alleging trade secret misappropriation and corporate espionage brought by Hilton's competitor, Starwood Hotels & Resorts, and in a grand jury investigation conducted by the United States Attorney's Office (S.D.N.Y.) relating to the same underlying facts.

Laurel S. Fensterstock

Vinson&Elkins



Biography

Laurel is an associate in the complex commercial litigation practice group.

Laurel S. Fensterstock

Associate

666 Fifth Avenue

26th Floor

New York, NY 10103-

0040

Tel +1.212.237.0280

Fax +1.917.849.5312

l Fensterstock@velaw.com

Education and Professional Background

- Columbia Law School, J.D., 2012 (Senior Editor, *The American Review of International Arbitration*)
- University of Vermont, B.A., Psychology, 2009
- Admitted to practice: New York, 2013; U.S. District Court for the Southern District of New York

Activities and Affiliations

- Member: New York State Bar Association, New York City Bar Association, The New York Inn of Court, New York County Lawyers Association

Publications and Presentations

- "[From Revlon to Galaviz: Judicial Treatment of Forum-Selection Clauses in Corporate Charters or Bylaws,](#)" *V&E Securities Litigation Insights*, Issue 10, Spring 2013 (co-author)

Industries/Practices

Commercial and
Business Litigation



EUGENE D. KUBLANOVSKY

Eugene is the founder and Managing Member of Kublanovsky Law LLC. Prior to opening the firm, he was a partner in a prominent New York City commercial litigation boutique where he handled a wide variety of matters for individuals, start-ups, and established private and public companies. Eugene draws on his over 12 years' experience to effectively and efficiently represent his clients' interests. He does so with a keen understanding of the financial pressures many companies and individuals face today. Eugene approaches his matters with urgency and a meticulous attention to detail. His clients appreciate his responsiveness and value his thoughtful, common-sense advice which is specifically tailored to their needs.

Whether in a court, before a regulatory or administrative agency, in an arbitration, or at the negotiating table, Eugene provides compelling, high-quality legal representation for his clients at a fraction of what larger law firms charge. Eugene takes a hands-on approach to his clients' matters. Eugene personally handles every aspect of his cases, from drafting pleadings and motions to attending court conferences, efficiently managing discovery, and conducting depositions, hearings and trials. Eugene also conducts internal and external investigations on behalf of boards of directors, special committees, and human resources and compliance departments, and represents clients in state attorneys general investigations.

Eugene is an active member of several bar associations, including the New York American Inn of Court, of which he is Executive Vice President, Secretary and Treasurer. The New York American Inn of Court is a local chapter of the American Inns of Court, a national organization whose mission is to foster excellence in professionalism, ethics, civility, and legal skills. In 2011, Eugene was honored to receive his Inn's Leadership Award for his service and commitment to the organization.

REPRESENTATIVE MATTERS

- Alabama and Massachusetts patent infringement actions between a broadband-over-power-line-technology manufacturer and a communications company;
- International arbitration involving contract and patent dispute between a domestic broadband technology company and its foreign reseller;

- Trademark infringement and unfair competition action between competing Alzheimer's charities;
- Breach of contract and performance rights dispute between a filmmaker/musician and ASCAP;
- Numerous court actions in various jurisdictions related to employees' breaches of restrictive covenants;
- Representing a former director of a national consulting company in age discrimination lawsuit;
- Multiple arbitrations and court actions concerning a partnership dispute between current and former partners in a dental practice;
- Multiple court actions and arbitration proceedings involving dispute between major accounting firm and its retired partners;
- Numerous state and federal court actions and arbitration proceedings against corporate and individual defendants related to their professional malpractice and fraudulent conduct in marketing and promoting illegal tax-shelters;
- South Carolina and New York state court actions and arbitration proceedings involving a dispute between the former officers, directors, and shareholders in a privately held company;
- Representing a broker-dealer in a FINRA arbitration against a former registered representative;
- New York state court action against a major investment bank for breach of contract and other causes of action relating to certain mortgage-backed securities;
- Defending breach of contract and declaratory judgment action by a private investment fund against a public company regarding the purchase and sale of stock warrants;
- New York state and federal court actions seeking to enjoin NASDAQ's delisting of a publicly traded company;
- Representing a broker-dealer and assisting its compliance department in a SEC inquiry;
- New York federal court action involving insurance coverage dispute between nursing homes and their insurer related to damages sustained from Hurricane Sandy;
- Pre-judgment attachment and preliminary injunction proceedings in New York state and federal courts between a domestic water filtration equipment manufacturer and a Bahrain company;
- Representing limited partner against general partner and other limited partners in action concerning disputed proceeds from sale of commercial real estate;
- Conducting an internal investigation on behalf of a special committee concerning a former board member's allegations of impropriety;
- Conducting an internal investigation on behalf of home-owners association;
- Representing law firm in a New York State Attorney General investigation;
- "Drafting business formation documents and negotiating commercial lease agreements for partnerships and start-ups.

HONORS AND AWARDS

- 2013 Super Lawyers New York Metro Rising Star
- 2011 Leadership Award, The New York American Inn of Court

PUBLICATIONS AND PRESENTATIONS

- "When We First Practice to Deceive: The Ethics of Deception" – May 2013, the New York American Inn of Court
- "The First Amendment Meets the Internet: Struggle Trying to Distinguish Wide-Open, Often Vitriolic, Commentary on the Internet" – March 2012, the New York American Inn of Court
- "Grey Goods, Sonny Bono, and Stravinsky: SCOTUS on Copyright" – September 2011, the New York American Inn of Court
- "Pumpkins, Panic and Perjury: The Trial of Alger Hiss" – November 2010, the New York American Inn of Court
- "Winds of Change – Changes in the Legal Profession" – February 2009, the New York American Inn of Court
- Co-Author, "The Complaint," Commercial Litigation in New York State Courts, Second Edition (West, 2007 Update)

EDUCATION

- Brooklyn Law School, J.D., 2005
- Bard College, B.A., 1998

ADMISSIONS

- New York
- New Jersey
- Southern District of New York
- Eastern District of New York
- District of New Jersey
- Second Circuit
- Sixth Circuit

PROFESSIONAL ORGANIZATIONS AND ASSOCIATIONS

- The New York American Inn of Court
- New York County Lawyers Association
- New York State Bar Association
- New Jersey State Bar Association

 www.edklaw.com	Eugene D. Kublanovsky, Esq. Kublanovsky Law LLC	
	<u>New York</u> 817 Broadway 5th Floor New York, NY 10003	<u>New Jersey</u> 26 Park Street Suite 2178 Montclair, NJ 07042
Phone: 212-729-4707 Email: eugene@edklaw.com		

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Associate

T +1 212 230 2858

+1 215 341 3661

F +1 212 480 9930

mizak@fragomen.com

7 Hanover Square
New York, NY 10004-2756
United States of America

MARTA A. IZAK

Marta is an Associate at our New York office. In this role, she works on employment- and family-based nonimmigrant and immigrant petitions, including petitions for intracompany transferees, treaty investors, and individuals with extraordinary ability. Her clients include companies in the advertising, media, investment, software and technology, and real estate industries, as well as nonprofit organizations.

Prior to joining Fragomen, Marta served as an Attorney Advisor to over 30 immigration judges at the New York Immigration Court, as part of the U.S. Department of Justice Attorney General's Honors Program.

PROFESSIONAL ACCOMPLISHMENTS

MEMBERSHIPS

- Member, American Inns of Court, 2013
- Member, American Immigration Lawyers Association, 2012
- Former Honorary Co-Chair, Immigration and Nationality Committee, New York County Lawyers' Association (2008-2010)

AWARDS

- Recipient, New York Law School Public Service Certificate, 2010
- Recipient, Ramapo College Lee Sennish Award, 2006

BAR ADMISSIONS

- New Jersey
- New York

EDUCATION

- New York Law School, J.D., 2010, cum laude
- Ramapo College of New Jersey, B.S./B.A., 2006, magna cum laude

SPOKEN LANGUAGES

- Polish

People



Jeffrey E. Gross

Jeffrey Gross is a partner in the New York office of Reid Collins & Tsai LLP. Jeff has represented clients in a wide variety of high-stakes, complex commercial litigation through trial. He has represented clients in diverse matters and industries, including cases arising from financial frauds, business and partnership disputes, technology and intellectual property matters, and employment matters. Jeff received his J.D. from the University of Pennsylvania Law School, where he was an Arthur Littleton Legal Writing Instructor. He is a Phi Beta Kappa graduate of the University of Virginia, where he was an Echols Scholar.

CONTACT

- > (212) 344-5211 office
- > [Email Jeff](#)
- > [vCard#](#)

EDUCATION

- > University of Pennsylvania Law School, 1998
Arthur Littleton Legal Writing Instructor
Associate Editor, Journal of International Economic Law
- > University of Virginia, B.A. 1995
Phi Beta Kappa
Echols Scholar

ADMITTED TO PRACTICE

- > New York, New Jersey,

NOTABLE REPRESENTATIONS:

- | *Obtaining \$60M jury verdict on behalf of FDIC in a fraud case concerning sub-prime pools of equipment leases*
- | *Representing two sureties in a billion dollar case against JPMorgan Chase arising out of the Enron bankruptcy, leading to settlement after a four-week jury trial*
- | *Prosecution of \$500 million fraud claims on behalf of a European bank against two large U.S. banks relating to a foreign exchange rogue trading scheme*
- | *Representation of minority shareholders in judicial dissolution and breach of fiduciary duty claims against majority shareholders of closely-held businesses, leading to favorable settlements*
- | *Representation of parties in injunction proceedings concerning non-competes and trade secret litigation.*
- | *Representation of staffing company in multi-year litigation over development of custom software program. Other technology and IP disputes include representing apparel company in Lanham Act proceedings against competitors and representation of development phase biotech company in dispute with investors over convertible debt secured by the company's patents.*

PUBLICATIONS AND SPEAKING ENGAGEMENTS:

Pennsylvania (inactive)

- U.S. District Courts for the Eastern, Southern, and Western Districts of New York and the District of New Jersey
- U.S. Court of Appeals for the Second and Third Circuits
- United States Supreme Court

- | *Social Media and Employment Litigation, Strafford webinar series, August 8, 2012.*
- | *Re-Thinking Privilege Logs in the Age of E-Discovery, New York Law Journal, July 11, 2011.*
- | *The Future of E-Discovery: "Predictive Coding" and Computer-Assisted Document Review, May 17, 2011, CLE presentation available for download at www.lawline.com.*
- | *Preservation, Cost-allocation, and Cooperation: An Exploration of E-Discovery Issues in the Hypothetical Case of In re Bugacide, New York Inn of Court, March 2011.*
- | *Second Circuit Rules That Arbitrators Must Decide Whether to Consolidate Multiple Proceedings, NYSBA Commercial & Federal Litigation Section Newsletter, Spring 2009, Vol. 15 at pp. 5-7.*
- | *"Circuit Explores 'Wagoner' Rule on Corporate Management Fraud, New York Law Journal, March 5, 2009.*
- | *Preparing for a Rule 26f Conference, CLE presentation available for download at www.lawline.com, 2009.*
- | *Solicitation or Shrewd Tactics: The Ethics of Speaking for Ex-Employees, New York Law Journal, December 8, 2008, p.4.*
- | *The Needle in the Electronic Haystack: Preserving, Searching, and Producing Relevant Documents in the Age of Electronic Discovery, November 2008. Hudson Valley Bank CLE series*
- | *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure, 64 N.Y.U. Ann. Surv. Am L. 201 (2008).*
- | *Comparing the Utility of Keyword and Concept Searches, 7 Digital Discovery & Electronic Evidence, 188-90 (2007).*

He also maintains a [blog](#) on litigation and technology issues.

Before joining Reid Collins & Tsai LLP, Jeff was a Partner at Vandenberg & Feliu LLP and Special Counsel to Cooley LLP. He has been recognized by Martindale Hubbell with the highest "AV" rating.

Austin | Dallas | New York | Washington, D.C.

RCT FILES \$50 MILLION CLAIM AGAINST BUDDY FLETCHER AND OTHERS

On March 31, 2014, RCT filed a lawsuit in New York State Supreme Court against Alphonse "Buddy" Fletcher, Fletcher Asset Management, and others related to their alleged mismanagement of various offshore funds whose claims were pooled pursuant to a confirmed plan of reorganization that was

MEREDITH J. JONES

Meredith J. Jones is the General Counsel of the New York City Economic Development Corporation and the New York City Industrial Development Agency. NYCEDC's mission is to encourage economic growth in each of the City's five boroughs by strengthening the City's competitive position and facilitating investments that build capacity, generate prosperity and catalyze the economic vibrancy of City life as a whole. NYCEDC engages in real estate development, property management, construction infrastructure development. It also provides advice to businesses in, or seeking to locate in, the City through its Client Coverage department. NYCIDA programs provide companies with access to triple tax-exempt bond financing and tax benefits to acquire or to create capital assets, such as purchasing real estate, constructing or renovating facilities, and acquiring new equipment.

Immediately before joining NYCEDC and NYCIDA, Jones was Special Counsel to Gray Cary Ware & Friedenrich (now DLA Piper), located in the firm's the Palo Alto, California office, where she engaged in a financial transactional practice. Prior thereto, Jones was Chief of the Cable Services Bureau of the Federal Communication Commission in Washington, D.C., involved in multichannel video and telecom competition issues. Before joining the FCC, Jones was General Counsel to the National Oceanic and Atmospheric Administration in Washington, D.C., which includes the National Weather Service and is the nation's trustee for marine mammals and anadromous fish and the lead agency for oceanic and atmospheric issues. Jones was Senior Counsel to financial and equity components of the Bechtel group of companies in San Francisco, California and was a partner in a San Francisco law firm. Jones began her legal career in the City at Cleary, Gottlieb, Steen & Hamilton.

Jones is a graduate of the Yale Law School and Swarthmore College. She is a member of New York County Lawyers' Association and of the Transportation Committee of the Association of the Bar of the City of New York.

Long Island: (516) 328-2300

Manhattan: (212) 279-9200

Brooklyn Metrotech: (718) 215-5300

Brooklyn: (718) 257-2305

Rochester: (585) 218-9999


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1111 Marcus Avenue
Suite 107
Lake Success, NY 11042

Tel: (212) 279-9200

Fax: (212) 279-0600

Email: [Send Email](#)



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Joshua Lipsman

Of Counsel

Dr. Joshua Lipsman is Of Counsel at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP.

Dr. Lipsman is a licensed, active physician and a practicing attorney. In 2009, Dr. Lipsman completed nearly 10 years as Westchester County Health Commissioner.

In over two decades as a physician executive, Dr. Lipsman has successfully managed large and complex agencies, programs, budgets and personnel in sophisticated regulatory and political healthcare environments. He has worked at all levels of government and in the non-profit and corporate sectors. He has been active in organized medicine and Bar Association volunteer work, including holding leadership positions in local, state and national professional and specialty societies and organizations.

Dr. Lipsman received the B.A. with General Honors in Biology and the M.S. in Biochemistry from the University of Chicago. His M.D. is from the Albert Einstein College of Medicine. He has an M.P.H. from the University of North Carolina at Chapel Hill, School of Public Health.

While serving as Westchester County Health Commissioner, he attended Pace Law School, where he graduated Magna Cum Laude in 2006. He was a member of the Pace Law Review and received the Dean's Award for the graduate of the Class of 2006, part-time division. He earned First Place in the New York State Bar Association (NYSBA) 2005 Barry Gold Health Law Student Writing Competition. While a student, Dr. Lipsman was a summer Legal Intern with the New York State Attorney General.

Dr. Lipsman is Board Certified in the specialty of Public Health and General Preventive Medicine and is a member of the Association of the Bar of the City of New York.

Education

Pace University School of Law, White Plains, New York-2006

Honors: Magna Cum Laude

Honors: Dean's Award for the Graduate of the Class of 2006

Honors: First Place in the New York State Bar Association (NYSBA) 2005

Honors: Barry Gold Health Law Student Writing Competition

Law Review: Pace Law Review, Member

University of North Carolina at Chapel Hill School of Public Health

M.P.H.

Major: Health Policy and Administration

University of Chicago

M.S.

Major: Biochemistry

University of Chicago

B.A.

Honors: General Honors in Biology

Honors and Awards

Fellow, American College of Preventive Medicine (ACPM)

Fellow, American Academy of Family Physicians

Professional Associations and Memberships

American Board of Preventive Medicine, Past Trustee and Treasurer

Medical Society of the State of New York, Past Chair, Preventive Medicine and Family Health Committee

ACPM, Past Chair, Environmental Health Committee

NYSBA, Committee on Public Health/Policy

Association of the Bar of the City of New York, Member

Association of the Bar of the City of New York, Art Law Committee, Past Health Law Committee Member

Public Health Law Association

New Rochelle Bar Association, Past Member

Long Island

1111 Marcus Avenue, Suite 107
Lake Success, NY 11042
Tel:(516) 328-2300
Fax:(516) 328-6638

Manhattan

630 Third Avenue, 5th Floor
New York, NY 10017
Tel:(212) 279-9200
Fax:(212) 279-0600

Brooklyn Metrotech

1 MetroTech Center, Suite 1704
Brooklyn, NY 11201
Tel:(718) 215-5300
Fax:(718) 215-5304

Brooklyn

9306 Flatlands Avenue
Brooklyn, NY 11236
Tel:(718) 257-2305
Fax:(347) 750-8344

Rochester

160 Linden Oaks, Suite E
Rochester, NY 14625
Tel:(585) 218-9999
Fax:(585) 218-0562



Paul J. Mahoney is an Assistant Deputy Attorney General in the Office of the New York State Attorney General Eric T. Schneiderman and supervises 55 attorneys and over 250 other staffers investigating and prosecuting criminal and civil fraud and patient abuse by healthcare providers in the \$40 billion-per-year New York Medicaid program. Paul has resolved some of the largest healthcare investigations in New York, both in financial terms and through creative use of non-financial remedies including independent monitors and reform packages. Paul also contributes to New York State legislative initiatives, including the nationally-recognized Internet System to Track Over-Prescribing (I-STOP) law of 2012 to combat the increasing harm resulting from opioid and other prescription controlled substance abuse. Paul was previously Chief of the Civil Enforcement Division of the Medicaid Fraud Control Unit. He has been awarded the *Louis J. Lefkowitz Memorial Award* for outstanding performance by an assistant attorney general by Attorney General Eliot Spitzer and Attorney General Andrew M. Cuomo.

From 1997 to 2004, Paul Mahoney served as an Assistant District Attorney, later Senior Investigative Counsel, in the Frauds Bureau of New York County District Attorney Robert M. Morgenthau. His major prosecutions included a seven-month trial of a securities firm and its principals, several other major securities fraud operations, and numerous prosecutions of banking, accounting, and financial frauds.

Before joining the District Attorney's Office, Paul was a litigation associate for seven years at Paul, Weiss, Rifkind, Wharton & Garrison in New York City with extensive experience in securities litigation, advertising and unfair trade practices, and products liability, and was recognized for *pro bono* work by the Legal Aid Society.

Paul J. Mahoney is a graduate of Cornell Law School and Williams College.

SUSMAN GODFREY L.L.P.



Shawn J. Rabin

560 Lexington Avenue, 15th Floor
New York, New York 10022-6828

srabin@susmangodfrey.com
212.471.8347

Overview

Shawn Rabin successfully tries cases for plaintiffs and defendants in state and federal courts across the country. He has represented clients in breach of contract, fraud, patent, antitrust, class action, will contents, securities, and other complex business disputes. Rabin handles all aspects of his cases, from evaluating claims before a complaint is filed to selecting juries and seeing cases through to verdict.

No matter whether he is working by the hour, on a fixed fee, or a contingency fee arrangement, Rabin litigates efficiently and cost effectively. Unlike lawyers who follow the same model and structure for every type of case, Rabin's creativity and strategic thinking give his clients the extra margin necessary for victory. In recognition of his success, Super Lawyers has recognized Rabin as a "Rising Star" every year from 2007 to 2013. Rabin was also elected to membership in the Fellows of the Texas Bar Foundation and has a perfect Avvo rating. And after winning a major trial victory in the state of Kentucky, the Governor of Kentucky appointed Rabin to the Honorable Order of Kentucky Colonels and bestowed upon him the title of "Colonel Shawn Rabin."

Notable Representation

In 2013, Rabin was hired to argue and draft the appellate brief for a case pending before an en banc panel of the Delaware Supreme Court. Rabin represented the former stockholders of Harmonix Music Systems against Viacom in an appeal involving Viacom's acquisition of Harmonix and the Guitar Hero and Rock Band video games. The Delaware Supreme Court affirmed the lower-court judgment in a published opinion that can be accessed here: *Winshall v. Viacom Intern. Inc.*, 76 A.3d 808 (Del. 2013) (en banc).

In 2013, Rabin helped secure a ruling significantly reducing the potential damages sought by the National Hockey League against Rabin's client. In that case, the NHL sued Jerry Moyes and his family stemming from their ownership of the Phoenix Coyotes hockey team and sought more than \$140,000,000 in damages. The case was originally filed in New York state court. Rabin devised a successful plan to have the case removed from New York state court to New York federal court to Arizona federal court and then to

an Arizona Bankruptcy court. After successfully moving the case back to Arizona (article discussing the move here), Rabin took and defended the key depositions in the case and then successfully moved for summary judgment eliminating most of the NHL's claims. An article discussing the decision can be accessed here.

In 2012, Rabin was hired by a world-renowned surgeon to represent him in cases pending in federal court and arbitration against a medical device manufacturer. As lead trial counsel, Rabin formulated the trial strategy, took and defended the key depositions, and handled most of the direct and cross-examinations at trial. The lawsuits resulted in a confidential settlement after trial.

In 2012, Rabin was hired by a widow to defend a multi-million dollar will contest that was filed by the deceased husband's children. After taking key depositions, winning several rulings before the Probate Court, and devising a strategy to prove the deceased had the proper mental capacity to execute his will, Rabin was able to position the case for a confidential settlement before trial.

In 2012, Rabin was hired by Trover Solutions to defend a putative class action filed against it and several insurance companies in federal court in the Southern District of New York. The case involved whether New York law prohibited placing liens on personal injury or wrongful death settlements. After extensive briefing and argument, Judge Patterson dismissed all of the Plaintiffs' claims resulting in a total victory for Rabin's client. The published decision can be accessed here: *Meek-Horton v. Trover Solutions, Inc.*, 915 F.Supp.2d 486 (S.D.N.Y. 2013).

In 2011, Rabin won a defense verdict on behalf of The Rawlings Company in a class action challenging the company's classification of its employees as exempt from the overtime laws. During the three-week jury trial in Kentucky state court, Rabin picked the jury, handled the direct examinations of many of the company's witnesses--including the company's top executive--and cross-examined Plaintiffs' witnesses. This complete victory for Rabin's client was achieved in one of the first wage and hour class actions to go to trial in Kentucky. The verdict was featured in the American Lawyer here and Law360 here.

In 2010, Shawn Rabin was hired by a family to represent them in a shareholder oppression case. Rabin engineered a strategy that placed the family in the best litigation position without harming the company in which they owned substantial shares. Rabin's outside-the-box approach led to an arbitration and then a confidential settlement.

In 2009, Shawn Rabin represented an international company against a subsidiary of a large New York bank in a contract dispute regarding the failed purchase of a company. Rabin briefed the crucial motion to dismiss and handled preparing the case for expedited discovery and trial. Shortly after Rabin filed the response to the Motion to Dismiss, the defendants chose to settle the case--a substantial victory for Rabin's client.

In 2008, Shawn Rabin tried a patent infringement case before the Honorable Judge T. John Ward and a jury in the Eastern District of Texas for their client

C2 Communications. The case involved whether the nation's largest telecommunication carriers infringed a voice over internet protocol (VoIP) patent. The case settled after the third day of trial, following the close of C2's case-in-chief and Rabin's direct examination of the patent's owner and C2's damages expert. For more information about this case, please see this article.

In 2008, Bill Carmody and Shawn Rabin settled a lawsuit involving a horrific drunk driving collision. In 2005, a drunk driver struck a hotel van transporting a family to the airport. A young girl was killed and members of the family were severely injured. Rabin performed an extensive investigation before filing suit to determine exactly how and where the drunk driver became intoxicated. This pre-complaint investigation resulted in confidential settlements with some of the wrong-doers. Rabin then filed a complaint against the two bars where the drunk driver had consumed alcohol. All of the defendants chose to settle after Rabin took damaging depositions of the key witnesses. The value of these significant settlements are confidential.

In 2008, Brian Melton and Shawn Rabin represented a defendant against claims that it wrongfully terminated its former CEO. After several rounds of discovery and several victories before the trial court judge, the opposing party agreed to settle the case for a minimal amount.

In 2007, Shawn Rabin spent almost one-quarter of the year in trial defending a large company against a wage and hour class action. Rabin performed the direct and cross examination of more than a dozen fact and expert witnesses. A description of Rabin's cross-examination of the first trial witness was published by news services across the world (the article can be accessed by clicking here).

In 2005 and 2006, Shawn Rabin represented a Fortune 100 company in a highly confidential accounting dispute against a major accounting firm. The allegations in the case included breach of fiduciary duty, breach of contract, and accounting malpractice. Before filing a lawsuit, both parties agreed to brief the issues before a former Texas Supreme Court Justice. Rabin took the lead for Susman Godfrey's client and, after several months of negotiation, the parties reached a favorable settlement.

In 2004, Shawn Rabin achieved a key victory in a case representing a class of residential and business customers against the major telecommunications companies, including Sprint and AT&T by writing the winning briefs in an appeal before the United States Court of Appeals for the Tenth Circuit. The court's unanimous opinion can be accessed here. The claims against AT&T eventually proceeded to a jury trial in which Susman Godfrey successfully obtained a favorable jury verdict (news article can be accessed here).

Education

Shawn Rabin graduated with Honors from Georgetown University's School of Foreign Service with a major in International Politics and Security. At Georgetown, he was awarded the Dean's Citation given to a graduate who displays high academic achievement and service to the community. Rabin obtained his J.D. from the University of Texas, where he received the distinctions of Chancellor and Order of the Coif. Rabin also served as an Associate Editor of the *Texas Law Review*.

Judicial Clerkship

After law school, Shawn Rabin clerked for the Honorable Juan R. Torruella of the United States Court of Appeals for the First Circuit.

Honors and Distinction

Super Lawyers named Rabin a "Rising Star" in 2007, 2008, 2009, 2010, 2011, 2012 and 2013. Rabin was also elected to membership in the Fellows of the Texas Bar Foundation.

In 2011, the Governor of Kentucky appointed Shawn Rabin to the Honorable Order of Kentucky Colonels and bestowed upon him the title of "Colonel Shawn Rabin."

Professional Associations and Memberships

Shawn Rabin is admitted to the state courts of New York and Texas and the United States Court of Appeals for the 1st, 5th and 10th Circuits and the United States District Courts for the Northern, Southern, Eastern, and Western Districts of Texas.

Rabin works with a variety of legal organizations in their efforts to help the public. Most recently, Rabin has been assisting Mothers Against Drunk Driving (MADD) by training volunteers on civil litigation. Rabin was also quoted extensively in the Winter 2009 issue of the MADDvocate, which can be accessed [here](#).

Rabin is also an active member of the Litigation Committee of the New York City Bar and is a Barrister in the New York American Inn of Court.

Recent Wins

Johnston et al v. The Rawlings Company, L.L.C — Neal Manne, Shawn Rabin and Kalpana Srinivasan win a full defense verdict after a three-week jury trial on behalf of The Rawlings Company in wage and hour class action.



David Weild III, (*Polish Diplomat*) a Senior Partner in Edwards Wildman Palmer LLP, has participated in proceedings before various domestic and foreign courts, the USPTO and its foreign counterparts, as well as the Commission of the EEC in connection with intellectual property related litigation. He supervises the creation, exploitation and enforcement of intellectual property portfolios in support of diverse clients' activities and initiates, conducts and supervises foreign as well as domestic dispute resolution.

He is a graduate of Yale College and the Yale Law School.



Carol L. Ziegler

**Attorney at Law
21 Willow Place
Brooklyn, New York 11201
Phone 718-596-8081**

Ziegler21wp@aol.com

Carol L. Ziegler has practiced and taught in the area of professional responsibility and legal ethics for more than two decades.. From 2003 until 2008, when the New York Rules of Professional Conduct were adopted, she served as a Reporter for the New York State Bar Association's Committee on Standards of Attorney Conduct to comprehensively redraft the disciplinary rules governing lawyers relating to conflicts of interest. From 1988 to 2004, she was a member of the full-time faculty of Brooklyn Law School, where she taught courses in the area of professional responsibility and legal ethics, and served as an associate dean from 1994-2004. Ms. Ziegler most recently taught professional responsibility and legal ethics as an Adjunct Professor of Law at Columbia Law School.

She received her B.A. with honors from Cornell University, College of Arts and Sciences in 1968, her J.D. *cum laude* from New York University School of Law in 1973, and was admitted to the New York Bar in 1974. She is a member of Phi Beta Kappa, the Order of the Coif and a Life Fellow of the American Bar Association. Ms. Ziegler was a staff attorney with Brooklyn Legal Services Corporation "A" and the Public Education Association, where her practice consisted of civil rights and education rights class action litigation (1974-1979), served as Special Assistant Counsel and Counsel to the Chancellor of the New York City Public Schools (1979-1985) and General Counsel to the New York City Commission on Human Rights (1986-1988). She was a member of the Ethics Commission for the New York State Court System from its inception in 1989 until 1997. She has also served as a member of the Advisory Committee/Committee on Civil Litigation for the United States District Court for the Eastern District of New York, the New York Bar's Committee on Professional Discipline and the New York State Bar Association's Committee on Professional Ethics.

Ms. Ziegler currently serves as a member of the Magistrate Merit Selection Panel for the United States District Court for the Eastern District of New York. She is a frequent lecturer on issues relating to professional ethics.



Freshfields Bruckhaus Deringer



Carlos Ramos-Mrosovsky

Senior associate

Carlos is an associate in our international arbitration group.

Practice

Disputes

About

Carlos represents clients in arbitral proceedings and before United States federal and state courts.

His experience also includes counseling clients on rulemaking proceedings before agencies including the U.S. Securities and Exchange Commission (SEC) and the U.S. Commodity Futures Trading Commission (CFTC), as well as on litigation challenges to U.S. federal and state regulations.

Carlos has also advised clients on matters arising under the U.S. Foreign Corrupt Practices Act (FCPA) as well as under U.S. economic sanctions and export control regulations.

Recent deals/Highlights

Some of Carlos' recent engagements include:

- representing a U.S. energy company in a New York-sited ICC arbitration against various subsidiaries of a Latin American State-owned oil company;
- representing a leading luxury goods company in a high-value NAI arbitration arising from a strategic joint venture;
- representing the Federative Republic of Brazil in an international money laundering and asset recovery action in federal district court;
- representing a global engineering, construction and services company in an action brought by plaintiffs alleging violations of international human rights and labor standards under the Alien Tort Statute;
- advising a SIPC-appointed Trustee on international aspects of efforts to recover funds for investors in Bernard L. Madoff Securities LLC;
- advising Oxfam America and Ghanaian civil society organizations on the implementation of the Ghana Petroleum Revenue Act (2010);
- advising a leading financial information company on CFTC regulation of swaps and derivatives trading under the U.S. Dodd-Frank Act;
- advising an international nonprofit organization on SEC rulemaking proceedings to implement resource revenue transparency provisions of the U.S. Dodd-Frank Act and related litigation; and
- advising a U.S. government contractor with operations in more than 60 countries on an internal investigation of export control, sanctions and Foreign Corrupt Practices Act (FCPA) violations.

Career to date

Associate, Freshfields Bruckhaus Deringer US LLP, 2012-Present

Associate, Baker & Hostetler, LLP, 2007-2012

Qualifications and education

- United States District Court, Eastern District of New York, 2011
- United States District Court, Southern District of New York, 2010
- United States District Court, Northern District of Florida, 2010
- United States District Court, Southern District of Texas, 2009
- United States Court of Appeals for the District of Columbia Circuit, 2009
- United States District Court for the District of Columbia, 2009
- Attorney-at-law, District of Columbia, 2009
- Attorney-at-law, New York, 2008

- Harvard Law School, J.D. cum laude, 2004-2007
- Princeton University, Woodrow Wilson School of Public and International Affairs, A.B. cum laude, 2000-2004

New York

601 Lexington Avenue

31st Floor

New York, NY

10022

T +1 212 277 4000

F +1 212 277 4001

Direct line

T +1 212 284 4936

F +1 646 521 5736

carlos.ramos-

mrosofsky@freshfields.com

[vCard](#) (Download Carlos's contact details)



[Home](#) » » [Attorneys](#) » » Chryssa V. Valletta
Education:

- Columbia University School of Law, J.D., 1998
- University of Scranton, B.S., 1995, *magna cum laude*

Bar Admissions:

- New York
- U.S. Dist. Ct., SDNY
- U.S. Dist. Ct., EDNY
- U.S. Ct. of Appeals, 2nd Cir.

**Chryssa V. Valletta**

Counsel
 New York Office
cvalletta@phillipsnizer.com
 phone: (212) 841-0728
 fax: (212) 262-5152

[download vCard](#)
Areas of Experience:

- [Litigation](#)
- [Real Estate](#)
- [Labor & Employment Law](#)
- [International](#)

Chryssa V. Valletta is counsel in the New York City office at Phillips Nizer LLP. Her practice focuses on complex commercial litigation, real estate litigation and litigation and arbitration on behalf of international clients. Ms. Valletta has represented clients in all phases of litigation and arbitration, including appeals.

Her experience includes:

- Dismissal of Austrian ski resort client from multi-district litigation concerning a ski train fire;
- Dismissal of multinational manufacturing client from multimillion dollar fraud lawsuit brought by investor;
- Summary judgment in favor of client finding client properly conveyed ownership of hotel in midtown Manhattan;
- Judgment on behalf of major credit card company in trademark infringement suit;
- Summary judgment on behalf of multinational pharmaceutical company in "Agent Orange" action brought by Vietnamese nationals;
- Dismissal of multi-million dollar claim brought against a German bank;
- Negotiation of favorable settlement of class action suit brought against a major internet service provider client;
- Dismissal of breach of contract action against real estate developer.

In 2011, Ms. Valletta was appointed to the Litigation Committee of the Association of the Bar of the City of New York (New York City Bar Association). She will serve a three-year term (2011 - 2014).

Ms. Valletta graduated from the Columbia University School of Law in 1998, where she was a Production Editor of the *Columbia-VLA Journal of Law and the Arts* and Director of the Jerome Michael Jury Trials moot court program. She graduated from the University of Scranton in 1995 with a triple major in biophysics, English and philosophy.

Honors:

- Selected as a 2013 "Super Lawyer" in General Litigation in the *New York Super Lawyers - Metro Edition*

Social Media:

- [LinkedIn Profile](#)

Professional Memberships:

- New York State Bar Association: *Acting editor-in-chief*, Summer 2012 International Arbitration issue of *International Chapter News* (a publication of the International Section); *Co-chair*, International Arbitration and ADR Committee of the International Section
- American Bar Association
- Association of the Bar of the City of New York (*Member*, Litigation Committee)
- New York American Inn of Court (*Member*)

Awards:

- Columbia University School of Law - Harlan Fiske Stone Scholar

[attorney search page](#)


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LOOT AND THE LAW

**A NEW YORK AMERICAN INN OF COURT
PRESENTATION
APRIL 23, 2014**

LOOT AND THE LAW

**A NEW YORK AMERICAN INN OF COURT
PRESENTATION
APRIL 23, 2014**

A Government Office...



April, 2014

Massive Looting throughout History

**THE
MONUMENTS
TEAM**

**THE
MONUMENTS
TEAM**

NAZIS IN NEW YORK

“Le Paysan a L'echelle”
(aka “Jacob’s Ladder”)



July 30, 1965 Time Magazine Cover



Menzel v. List Verdict Sheet

- (1) Does **Albert List** have to return "The Peasant and the Ladder" (the "Painting") to **Erna Menzel**?

In order to find that the Painting must be returned to Menzel, you must determine that the Defendants' affirmative defenses, including Statute of Limitations, the Act of State Doctrine, the Good Faith Purchaser Doctrine, and Abandonment **DO NOT** preclude Menzel's claim.

No Yes

- (2) IF AND ONLY IF YOU ANSWER YES TO THE QUESTION ABOVE, How much, if anything, should the **Perl Gallery** pay **Albert List**?

\$0 _____

\$4,000 plus interest from the date of the verdict _____

\$4,000 plus interest from 1955 _____

\$22,500 plus interest from the date of this verdict _____

**THE
MONUMENTS
TEAM**

**“THE CASE OF THE
POLISH RIFLE”**

The following is based on a true story. The names have been changed to protect the innocent.

And we added a few fictionalized details to help you pay attention.

**MUSEUM OF
ARTIFACTS THAT
HAVE BEEN USED
ONLY ONCE**



The Consular Division of the Polish Embassy

and

The United States Cultural Antiquities Task
Force in the Bureau of Educational and
Cultural Affairs

Ok, It Really Looks like This.

Not All Artifacts are Works of Art



International Conventions

- 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property
- Convention on Cultural Property Implementation Act (“CPIA”) – enacted in 1983 to implement UNESCO Convention



National Stolen Property Act

- Dealing in stolen property is a crime
- Penalties include fines and imprisonment of up to 10 years
- Civil forfeiture remedies



**Pre-
Columbian
Artifacts
Returned to
Peru**



MORGANTINA “VENUS”



THE MONUMENTS TEAM

NATURAL ARTIFACTS

GoAnimate
Go Make Your Own

Parallel civil and criminal complaints

----- X
 UNITED STATES OF AMERICA : SEALED COMPLAINT
 :
 : Violations of
 : 18 U.S.C. §§ 371, 545, 2315
 v. :
 : COUNTY OF OFFENSE:
 ERIC PROKOPI, : NEW YORK
 :
 Defendant. :
 ----- X
 SOUTHERN DISTRICT OF NEW YORK, ss.:

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK
 ----- X
 UNITED STATES OF AMERICA :
 :
 :
 v. : FIRST AMENDED
 : VERIFIED COMPLAINT
 :
 ONE TYRANNOSAURUS BATAAR SKELETON : 12 Civ. 4760
 a/k/a LOT 49315 LISTED ON PAGE 92 :
 OF THE HERITAGE AUCTIONS MAY 20, 2012 :
 NATURAL HISTORY AUCTION CATALOG; :
 :
 Defendant – in - rem. :
 :
 ----- X

Forfeiture Predicates, Part 1

18 U.S.C. § 545:

. . . Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law - -

Shall be fined under this title or imprisoned not more than 20 years, or both

Merchandise introduced into the United States in violation of this Section . . . shall be forfeited to the United States.”



Forfeiture Predicates, Part 2

18 U.S.C. §981:

(a)(1) The following property is subject to forfeiture to the United States: (C) Any property, real or personal, which constitutes or is derived from proceeds traceable to . . . any offense constituting “specified unlawful activity” (as defined in section 1956(c)(7) of this title)

[which includes]

18 U.S.C. §2314:

Whoever transport, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . shall be fined under this title or imprisoned not more than ten years, or both . . .

19 U.S.C. § 1595a(c)(1)(A):

Merchandise which is introduced or attempted to be introduced into the United States contrary to law shall be treated as follows:

- (1) The merchandise shall be seized and forfeited if it—
 - (A) is stolen, smuggled, or clandestinely imported or introduced.”

Constitution of Mongolia, 1992

Art. 7: "Historical, cultural, scientific and intellectual heritages of the Mongolian People shall be under State protection."



Mongolian Law on Cultural Heritage (2001)

Article 3.1. Historical and Cultural Valuable Objects

3.1. The following artifacts that are able to represent certain part of history and period, expressing historical, cultural, scientific importance shall be considered as historical and cultural valuable objects no matter of their ownership . . .

3.1.8. imprints of ancient man, animals, microorganism, findings of fossilated plants and finding places containing them; . . .

Article 13. Historical and cultural findings

13.1. The territory and land bowels where historically, culturally, and scientifically significant objects exist shall be under state protection and any such findings shall be a state property.

Does non-enforcement matter?

If, at a later stage in this case, the Court is called upon to make a determination as to the content of Mongolian law, evidence of Mongolia's active enforcement of its patrimony laws—or lack thereof—may be probative, but the government need not plead active enforcement of these laws in order to state a plausible claim for relief where, as here, the foreign statutes pleaded in the complaint appear on face to vest title in the Defendant Property in a foreign state.

Memorandum and Order Denying Motion to Dismiss, *United States v. One Tyrannosaurus Bataar Skeleton*, No. 12-cv-4760 (S.D.N.Y. Nov. 14, 2012)

The law of June 13, 1929, does proclaim that artifacts in historical monuments are “the property of the State” and that unregistered artifacts “shall be considered to be the property of the State.” Nonetheless, the domestic effect of such a pronouncement appears to be extremely limited . . . There is no indication in the record that Peru ever has sought to exercise its ownership rights in such property, so long as there is no removal from that country. The laws of Peru concerning its artifacts could reasonably be considered to have no more effect than export restrictions . . . export restrictions constitute an exercise of the police power of a state; “[t]hey do not create ‘ownership’ in the state.”

THE MONUMENTS TEAM

MORE NAZIS

Gurlitt and Nazi Art Law Today

Presented By

Evan Fensterstock

Jeffrey Gross

Marta Izak

Josh Lipsman

Who is Cornelius Gurlitt?

- A) Born in Hamburg, Germany in 1932.
- B) Son of Hildebrand Gurlitt, a museum curator and Nazi approved art dealer during the Third Reich.
- C) The owner of a 1,076 square foot apartment in Munich, Germany.
- D) The possessor of over 1,250 paintings, drawings, and prints worth over a billion dollars.
- E) An invisible man.
- F) All of the above.

Who is Cornelius Gurlitt?

F) All of the above.



Gurlitt's apartment



*Don Quichote and
Sancho Panza,*
by Honoré Daumier

How did Gurlitt get discovered?

- A) Aboard a train during a routine “black money” check of passengers, in possession of €9,000, a legal amount.
- B) Rumors that everyone in the know in the art world had “heard that Gurlitt had a big collection of looted art.”
- C) Pursuant to a search warrant issued on the grounds of suspected tax evasion and embezzlement.
- D) Selling *The Lion Tamer* at auction for \$1.17 million.
- E) All of the above.

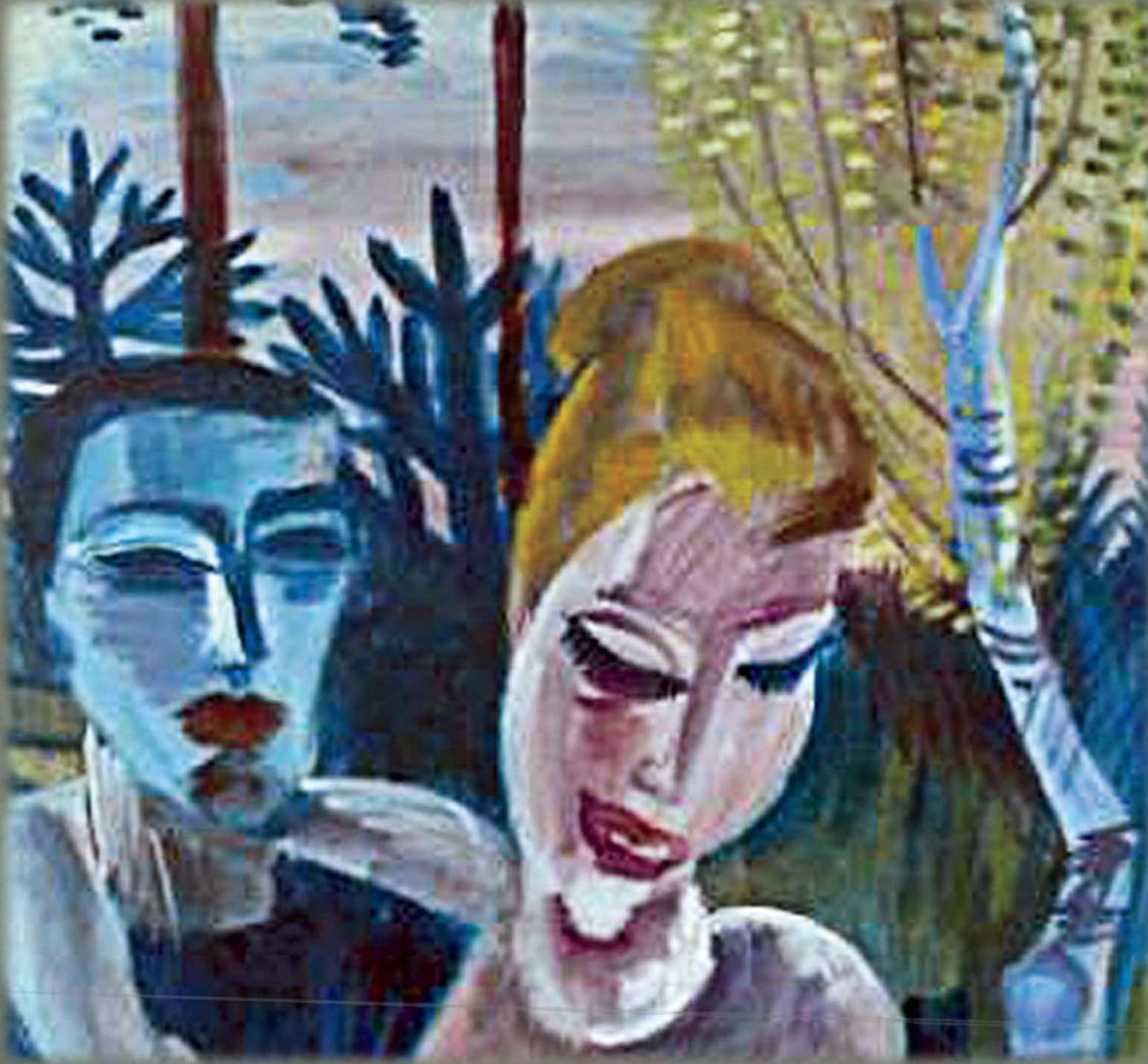
How did Gurlitt get discovered?

E) All of the above.



*Landscape with
Horses, by Franz
Marc*

How did Gurlitt get discovered?



*Couple in a
Landscape,
by Conrad
Felixmueller*

True or False?

Germany has no law preventing an individual or an institution from owning looted art.

True.



A self-portrait, by
Otto Dix

How did Gurlitt get discovered?

In September 2011, a judge issued a search warrant for Gurlitt's apartment on the grounds of suspected tax evasion and embezzlement. Yet, the authorities wanted more.



The Lion Tamer, by
Max Beckmann

True or False?

Immediately after the seizure in February 2012, the chief prosecutor's office made a public announcement of the unprecedented discovery.

False.



Child at a Table,
by Otto Gabriel



*Couple, by Hans
Christoph*

Whenever it's stormy I attach one of my pictures to string and use it as a kite. This is also the only method I know of to get electricity.

The mock twitter feed: @CGurlitt

Cornelius Gurlitt
@CGurlitt

I love my pictures and I want them back, all of them!

[Nov 25](#)

Whenever it's stormy I attach one of my pictures to string and use it as a kite. This is also the only method I know of to get electricity.

[Nov 25](#)

Should I use @kickstarter or @Indiegogo to raise the money to buy back my pictures? (Planning for the worst...) What say you tweeps?

[Nov 23](#)

Pouring out a little liquor, 1,400 times, for the pictures I've lost. [#drunktweet](#)

[Nov 23](#)

Can't wait for the [@MonumentsMovie](#)! I hear there's even a scene featuring my father Hildebrand, played by [@SamuelLJackson](#). [#CastingRumors](#)

Gurlitt and Nazi Art Law Today Mock Attorney and Client Consultation

Law Offices of Marta Izak, Esq.



Collection Agent Osef Gockeln, the mayor of Düsseldorf; Cornelius's father, Hildebrand; and Paul Kauhausen, director of Düsseldorf's municipal archives, circa 1949.



From Picture Alliance/DPA/VG Bild-Kunst., Vanity Fair 2014

Cornelius Gurlitt, 80, pictured left and father Hildebrand Gurlitt, pictured right



© Vantage news.co.uk



© Internet

Paintings were seized from the home of Cornelius Gurlitt, 80, pictured left. It is alleged his father Hildebrand Gurlitt, pictured right, was involved in the systematic looting of Jews



Cornelius Gurlitt



Inset © Markus Hannich/BILD-Zeitung, Vanity Fair, April 2014



**GEORGE CLOONEY
KATE BLANCHETT**

&

MATT DAMON

**WERE NOT ON THIS
TEAM**

**THE MONUMENTS
TEAM
WOULD LIKE TO
THANK:**

**ARNOLD & PORTER
STEWART AARON**

VINSON & ELKINS

**FRAGOMEN, DEL REY,
BERNSEN & LOEWY**

ABRAMS

BHANDARI

CHARLES

COHEN

FENSTERSTOCK, E

FENSTERSTOCK, L

GROSS

IZAK

JONES

KUBLANOVSKY

LIPSMAN

RAMOS-MROSOVSKY

PATRICK

PRESTA

RABIN

VALLETTA

WEILD

ZIEGLER

MAHONEY

LOOT AND THE LAW

**A NEW YORK AMERICAN INN OF COURT
PRESENTATION
APRIL 23, 2014**

49 Misc.2d 300
Supreme Court, New York County, New York,
Special and Trial Term, Part II.

Erna MENZEL, Plaintiff,

v.

Albert A. LIST, Defendant.

Albert A. LIST, Third-Party Plaintiff,

v.

Klaus G. PERLS and Amelia B. Perls, trading under
the name of Perls Galleries, Third-Party Defendants.

Feb. 10, 1966.

Replevin action. The Supreme Court, Special and Trial Term, Arthur G. Klein, J., held that relinquishment by owner of painting in order to flee for life was not voluntary and did not constitute abandonment and that no title was conveyed by Nazis who pillaged and plundered painting as against rightful owner.

Judgment accordingly.

See also [22 A.D.2d 647](#), [253 N.Y.S.2d 43](#).

Attorneys and Law Firms

****806 *301** Peaslee, Brigham, Albrecht & McMahon, New York City (Amos J. Peaslee, Jr. and Gerald J. McMahon, New York City, of counsel), for plaintiffs.

Allan D. Emil, New York City (Melvin A. Albert, New York City, of counsel), for third-party defendants.

Albert A. List, O'Brien, Driscoll & Raftery, New York City (George A. Raftery and John Drew, New York City, of counsel), for defendant and third-party plaintiff.

Opinion

ARTHUR G. KLEIN, Justice.

This action in replevin was tried to the court and a jury. Plaintiff sought to recover a painting by Marc Chagall, which she and her husband had left in their apartment in Brussels when they fled in March, 1941, before the oncoming Nazis.

Treated by the Nazis as 'decadent Jewish art', the painting was seized by the 'Einsatzstab der Dienststellen des

Reichsleiters Rosenberg' on or about March 31, 1941, and a certification or receipt left, indicating that the painting, among other works of art, had been taken into 'safekeeping.'

****807** The Menzels were among the more fortunate who were able to escape. They settled in the United States and lived here since 1941. Mr. Menzel died in 1960.

Search had been made by Mr. and Mrs. Menzel for the painting ever since the end of the war, but they were unable to locate it, until in 1962, it was discovered in the possession of defendant Albert A. List.

Demand, refusal, and this action followed.

***302** List, a well-known art collector, defending, brought in as third-party defendants the proprietors of the gallery from which he purchased the painting, Klaus G. Perls and Amelia B. Perls, doing business as Perls Galleries. Perls likewise is a well-known art gallery.

Plaintiff in her complaint alleges that she is and at all times since 1932 has been the lawful owner of the painting, entitled 'Le Paysan a L'echelle' [The Peasant and the Ladder] and has been and now is entitled to immediate possession of the painting.

On or about March 31, 1941, the complaint alleges, the painting was 'wrongfully and illegally looted and stolen from her former residence by the Nazi Goering-Rosenberg Group'; and 'at no time has any compensation been paid for same by the German or Belgian governments or received by plaintiff from any other source'.

Discovery in November 1962, and demand and refusal, are then alleged; and plaintiff's prayer for relief is in the form customary in replevin actions, praying for possession or, in the alternative, for the value, which the complaint alleged to be \$25,000.

The answer, denying knowledge or information as to the material allegations of the complaint, set up as an affirmative defense that the cause is barred by the New York Statute of Limitations.

In his third-party complaint, List alleges that he purchased the painting from defendants Perls, whose galleries are located at 1016 Madison Avenue, on or about October 14, 1955, for \$4,000; that the painting was entitled 'L'echelle de Jacob [Jacob's Ladder]'; that in the purchase Perls Galleries warranted and represented that their title was valid and that they were empowered to sell the painting to List.

Admitting that List was a *bona fide* purchaser for value, and that they warranted title to the painting, the third-party defendants set up as defenses a Statute of Limitations [presumably New York] and that they, too, were *bona fide* purchasers of the painting in good faith and for value.

As to Mrs. Menzel, the third-party defendants denied she was the owner; denied knowledge or information as to the rest of her complaint and set up as to her, also, a Statute of Limitations and asserted that they were *bona fide* purchasers for value and in good faith, and without any knowledge or information as to the existence of any defect in title.

303** It appears from the record that the Menzels bought the painting in 1932 from the collection of Walter Schwarzenberg through Galerie *808** Georges Giroux, in Brussels, and paid for it 3800 Belgian francs, the equivalent of \$150. The painting remained in the Menzels' Brussels home until they fled in 1941.

The whereabouts of the painting between 1941 and 1955 are unknown.

Perls testified that he bought the painting in July 1955 from Galerie Art Moderne in Paris for \$2800 in French francs.

He further stated that title was not warranted in writing or orally to third-party defendants; that Galerie Art Moderne is one of the leading, most representative, reputable galleries in Paris, as is Perls Galleries in New York; and amongst such galleries the offer of sale of any painting is in and of itself, in the custom of the trade as between galleries, warranty of title. Art galleries of such standing assume, without the necessity of inquiry, that an offer of sale constitutes a representation of authenticity and good title.

The defense also urged before the jury that since the painting was described in the receipt as an oil, but in fact was a gouache, it was not the same painting which the Menzels had left in their apartment.

Likewise, the defendants maintained that the title of the painting having variously been referred to as *Le paysan a l'Echelle* (the peasant and [at] the ladder); *'Nez et Echelle* [Nose and Ladder]'; *'Le Paysan* [The Peasant]'; *'L'echelle sur le Nez* [The Ladder on the Nose]'; and *'L'echelle de Jacob* [Jacob's Ladder]', it could not positively be identified as the same work. In addition, Perls testified that on occasion Chagall prepared two gouaches of the same subject and used only one as the basis for an eventual oil painting. For all of

these reasons, Perls urged the jury that the painting which the Menzels left in Brussels was not the painting received in evidence.

The defendants also raised issues, as to Mrs. Menzel's right to bring this replevin action, in view of Mr. Menzel's death, since the original purchase was made by him.

The jury by its verdict for the plaintiff has established the identity of the painting, by whatever name, and whatever description; Mrs. Menzel's unqualified ownership of the painting; that the painting was looted and stolen from her apartment, as alleged in the complaint, and that the painting, or its value, which the jury fixed at \$22,500, be awarded to Mrs. Menzel; and that List upon delivery of the painting to Mrs. Menzel recover the \$22,500 from Perls Galleries.

***304** The result reached is amply supported by the record, and the motion to set aside the verdict as contrary to the weight of the evidence is denied.

There remain for disposition, on the motion to set aside, numerous questions of law which have been earnestly and forcefully pressed by able counsel for the defense and vigorously opposed by learned counsel for plaintiff.

****809** These include:

- (I) the defense of the Statutes of Limitations of New York and Belgium;
- (II) the plaintiff having fled Belgium, abandoned everything in her apartment;
- (III) the painting was captured by occupying land forces on land and title accordingly passed to the nation prosecuting the war;
- (IV) the painting was lawfully requisitioned by German authority, as an occupying power in the prosecution of the law and as confiscation of the property of its nationals;
- (V) that the defendants are *bona fide* purchasers of the painting for value.

In their supplemental brief, the third-party defendants, planting themselves upon [Banco Nacional de Cuba v. Sabbatino](#), 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), urge with respect to IV, above, the applicability of the Act of State Doctrine; they assert that this Court should not 'assume jurisdiction to determine title as of 1941 to the

property seized, requisitioned, confiscated or expropriated by duly authorized German officers from one of its own nationals, blacklisted as an enemy of the State' because of the 'fortuitous' circumstance that the property was found here.

The court will treat these grounds *seriatim*. The resolution of these problems is made the more difficult in view of the fact that one of two innocent parties must bear the loss.

I

The defense of the Statute of Limitations appears to be based on the lapse of time since 1941 when the painting is asserted to have been stolen from the plaintiff, or since 1955 when List bought the painting from Perls.

[1] This defense, however, has been held unavailable to the defendants in this action, by the decision of Streit, J., February 7, 1964, *affd.* 22 A.D.2d 647, 253 N.Y.S.2d 43 (October 6, 1964). In replevin, as well as in conversion, the cause of action against a person who lawfully comes by a chattel arises, not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel *305 upon demand. *Cohen v. M. Keizer, Inc.*, 246 App.Div. 277, 285 N.Y.S. 488 (1st Dept. 1936) [replevin]; *Gillet v. Roberts*, 57 N.Y. 28 (1874) [conversion].

II

[2] Abandonment is defined as a voluntary relinquishment of a known right, *Franmor Realty Corp. v. LeBoeuf*, 201 Misc. 220, 104 N.Y.S.2d 247 (Sup.Ct. Nassau Co., 1951), *affd.* **810 279 App.Div. 795, 109 N.Y.S.2d 525 (2nd Dept. 1952), with no intent to reclaim. *In re Johnson*, 294 F. 258 (5 Cir.1923); *Matter of Kerns' Guardianship*, 74 Cal.App.2d 862, 868, 169 P.2d 975 (1946); and see, particularly, *Collac c. Etat Serbe-croate-slovene* [Yugoslavia], IX Recueil des Decisions des Tribunaux Arbitraux Mixtes, 195 (Tribunal Arbitral Mixte hungaro-serbe-croate-slovene, 15 Mai 1929).

[3] In *Collac*, it was held that personal property temporarily abandoned at the approach of the enemy, without the relinquishment of the owner's right of ownership, is neither foreclosed nor forfeited.

[4] The relinquishment here by the Menzels in order to flee for their lives was no more voluntary than the relinquishment of property during a holdup (cf. Penal Law, §§ 2120–2122; 77 C.J.S. *Robbery* § 1, page 448); and from the history of

their search for the painting, there was obviously a continuing intent to reclaim.

The court finds, accordingly, as a matter of law, that there was here no abandonment.

III

[5] Nor may this seizure be treated as lawful booty of war by conquering armies.

If the seizure is to be classified at all, it is to be classified as plunder and pillage, as those terms are understood in international and military law.

A.

[6] *Booty* is defined as property necessary and indispensable for the conduct of war, such as food, means of transportation, and means of communication; and is lawfully taken. See V Hackworth, *Digest of International Law*, pp. 682, 689 et seq.; *Planters' Bank v. Union Bank*, 16 Wall. (83 U.S.) 483, 495, 21 L.Ed. 473 (U.S.1872).

Booty is described in the Annex to the Hague Convention of 1907 'between the United States and other Powers relative to the Opening of Hostilities', October 18, 1907, proclaimed February 28, 1910, 36 U.S.Stat. at L. 2259, Art. 53, at 2308: 'An *306 army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.'¹

¹ Cf. Rules of Land Warfare, War Department of the United States:

'292. Means of transportation.—The military occupant exercises authority over all means of transportation, both public and private within the occupied district and may seize and utilize them and regulate their operation.

'321. Two classes of movable property.—All movable property belonging to the State directly susceptible of military use may be taken possession of as booty and utilized for the benefit of the invader's government. Other movable property, not directly susceptible of military use, must be respected and cannot be appropriated.

'329. Pillage is formally forbidden.

'332. What included in rule.—The foregoing rule [art. LIII, par. 2, of the regulations annexed to the Hague convention quoted ante] includes everything susceptible of direct military use, such as cables, telephone, and telegraph plants, horses, and other draft and riding animals, motors, bicycles, motorcycles, carts, wagons, carriages, railways, railway plants, tramways, ships in port, all manner of craft in canals and rivers, balloons, airships, airplanes, depots of arms, whether military or sporting, and in general all kinds of war material.' Basic Field Manual (FM 27–10, 1940) 77, 82, 84.

Similar provisions are contained in the July 1956 revision, Department of the Army, FM 27–10.

****811** The Hitler Government's definition was somewhat broader, but even that definition did not include works of art. A list of the goods decreed by that Government from time to time to be booty, compiled by H. A. Smith, D.C.L. and collated in an article entitled 'Booty of War', published in 23 Brit. Yb. Int'l L. (Oxford, 1946) 227, at 229–230, is set forth in the accompanying footnote.²

- ²
- (a) Cereals and fodder. This covered bread and all other cereal products, all animal fodder (except green staff to be used by the grower), peas, beans, and other pulses, rice, coffee substitutes, and tea.
 - (b) Animals and animal products, including game and wild animals fit for food. Animals could only be slaughtered by official permission.
 - (c) Milk, milk products, oils, and fats.
 - (d) Potatoes and potato products.
 - (e) Sugar-beet, sugar, and other sugar-beet products.
 - (f) Spreads for bread, dried vegetables, onions, and spices. This included all forms of jams and preserves.
 - (g) Eggs and egg products.
 - (h) Fish and fish products.
 - (i) Cocoa, chocolates, and confectionary.
 - (j) Coffee.
 - (k) Textiles and textile articles.
 - (l) Leather and leather products.
 - (m) Furs, fur articles, hides and skins suitable for furs (other than those of tabby cats).

Normal household stocks were excluded in each case, and growing stocks were not subject to seizure before severance from the soil.

The general effect of these decrees, commented Dr. Smith, was:

'That all substantial stocks of the goods specified were regarded as being in law the property of the Reich and therefore liable to seizure as booty of war without any

obligation to compensate individuals, though this did not exclude ex gratia payments in suitable cases.'

***307 B.**

[7] *Pillage*, or *plunder*, on the other hand, is the taking of private property not necessary for the immediate prosecution of war effort, and is unlawful. VI Hackworth, op. cit. supra, at 403.

Where pillage has taken place, the title of the original owner is not extinguished. *Mazzoni v. Finanze dello Stato*, LII Il Foro Italiano 960 (Tribunale di Venezia, 1927); *Collac c. Etat Serbe-Croate-Slovene Yugoslavia*, supra, IX Recueil des Decisions des Tribunaux Arbitraux Mixtes 195; VI Hackworth, supra, at 403.

****812** Said the Venetian Court in *Mazzoni*, as translated and digested in Annual Digest of Public International Law Cases, 1927–1928 (London, 1931) at 564–565:

'The argument that the property of citizens absent from occupied territory is to be considered *res nullius*, or war booty, cannot be admitted. * * *

"The principle based upon the Roman Law according to which property seized during a war is put on an equal footing with the property seized in the air, in the sea or in the earth, and which in a similar way becomes the property of the captor—since the right of war constitutes a just cause of acquisition—may be applicable to things liable or apt to be used for the needs of the army and belonging to the other belligerent. But it cannot be applied to private property which, if it has not become the object of requisition or sequestration, must be restored or compensated. The objects involved in the present case are private property which had not been requisitioned or sequestered as it could not be used for the needs of the army. Their seizure must therefore be considered as having been effected by pillage."

[8] Similarly, in *Collac* (supra), it was held that personal property left behind at the approach of the enemy cannot automatically be considered as war booty; but it must be ascertained whether they belonged to a private person who, having *temporarily abandoned them*, has not relinquished his rights of ownership in such property.

***308** Indeed, the very description of the acts of Einsatzstab Rosenberg, in *United States et al. v. Goering et al.*, infra, is

entitled 'Pillage of Public and Private Property'. 6 F.R.D. at 69, 120.

And in the first order issued by the 21st Army Group, July, 1944, upon the return of Allied Forces to the French beachhead, where the question arose what German property was booty ('butin de guerre'), under the general principles of the laws of war, it was provided:

'The Germans have acquired no title to private movable property * * * which has been acquired by theft, looting, or pillage.' Note to Article by Dr. Smith, supra, 23 Brit. Y.B. Intl. L. at 238-239 (1946).

IV.

We come now to the assertion that the Act of State Doctrine precludes any inquiry by this Court into the validity of the acts of the Nazis.

[9] The Doctrine states, in terms of the most recent opinion on the subject by the Supreme Court of the United States, that 'the Judicial Branch [of the government] will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence **813 of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law'. *Banco Nacional de Cuba v. Sabbatino*, supra, 376 U.S. 398 (1964), at 428, 84 S.Ct. 923, at 940.

In *Sabbatino*, the Supreme Court held that the United States District Court was without power to inquire into the validity of a decree of the Cuban [Castro] Government expropriating sugar which had belonged to a Cuban corporation whose stock was principally owned by United States residents, the effect being that the District Court was compelled to take the Cuban decree at face value.

Analysis of the Doctrine, as thus stated by the Supreme Court, indicates that invocation of the Doctrine rests upon the confluence of four factors:

- (A) the taking must be by a foreign sovereign government;
- (B) the taking must be within the territorial limitations of that government;
- (C) the foreign government must be extant and recognized by this country at the time of suit;

(D) the taking must not be violative of a treaty obligation.

Analysis of the facts in the case at bar and the Court's own research into controlling principles lead inexorably to the conclusion that of these four factors, not one has been met.

*309 A.

The taking was not by a foreign sovereign government.

The receipt in evidence, dated March 31, 1941, was given on the stationery of the 'Militärbefehlshaber in Belgien und Nordfrankreich, Militärverwaltungschef, Einsatzstab der Dienststellen des Reichsleiters Rosenberg.'

While the testimony and depositions before the Court are not clear as to the place of the Einsatzstab and the Reichsleiters Rosenberg as within or without the German Government, the Court has, in the course of its own research, come upon the nub of the relationship.

In the opinion and judgment of the International Military Tribunal in United States, French Republic, United Kingdom and U.S.S.R. v. Goering, Hess, Von Ribbentrop, Ley, Keitel, Kaltenbrunner, Rosenberg, et al., commonly called The Nurnberg Trial, International Military Trials, Nazi Conspiracy and Aggression, office of United States Chief Counsel for prosecution of Axis Criminality (United States Government Printing Office, 1947), likewise reported at 6 F.R.D. 69 (1946), the following lucid description of the activities of the 'Einsatzstab * * * des Reichsleiters Rosenberg' is found (6 F.R.D. at 122-123):

'The defendant Rosenberg was designated by Hitler on the 29th January 1940 Head of the Center for National Socialist **814 Ideological and Educational Research, and thereafter the organization known as the 'Einsatzstab Rosenberg' conducted its operations on a very great scale. Originally designed for the establishment of a research library, it developed into a project for the seizure of cultural treasures. On the 1st March 1942, Hitler issued a further decree, authorizing Rosenberg to search libraries, lodges and cultural establishments, to seize material from these establishments, as well as cultural treasures owned by Jews. Similar directions were given where the ownership could not be clearly established. The decree directed the cooperation of the Wehrmacht High Command, and indicated that Rosenberg's activities in the West were to be conducted

in his capacity as Reichsleiter, and in the East in his capacity as Reichsminister. Thereafter, Rosenberg's activities were extended to the occupied countries. The report of Robert Scholz, Chief of the special staff for Pictorial Art, stated:

“During the period from March 1941 to July 1944 the special staff for Pictorial Art brought into the Reich 29 large shipments, including 137 freight cars with 4,174 cases of art works.’

‘The report of Scholz refers to 25 portfolios of pictures of the most valuable works of the art collection seized in the West, *310 which portfolios were presented to the Fuehrer. Thirty-nine volumes, prepared by the Einsatzstab, contained photographs of paintings, textiles, furniture, candelabra and numerous other objects of art, and illustrated the value and magnitude of the collection which had been made. In many of the occupied countries private collections were robbed, libraries were plundered, and private houses were pillaged.

‘Museums, palaces and libraries in the occupied territories of the USSR were systematically looted. Rosenberg's Einsatzstab, Ribbentrop's special ‘Battalion,’ the Reichscommissars and representatives of the Military Command seized objects of cultural and historical value belonging to the people of the Soviet Union, which were sent to Germany. Thus, the Reichscommissar of the Ukraine removed paintings and objects of art from Kiev and Kharkov and sent them to East Prussia. Rare volumes and objects of art from the palaces of Peterhof, Tsarskoye Selo, and Pavlovsk were shipped to Germany. In his letter to Rosenberg of the 3rd October 1941 Reichscommissar Kube stated that the value of the objects of art taken from Byelorussia ran into millions of rubles. The scale of this plundering can also be seen in the letter sent from Rosenberg's department to von Milde-Schreden in which it is stated that during the month of October 1943 alone, about 40 box-cars **815 loaded with objects of cultural value were transported to the Reich.’

The evidence on which this excerpt from the decision is based is clear and free from doubt.

‘On 29 January 1940 Hitler issued a decree in the following terms:

“The ‘Hohe Schule’ is supposed to become the center for national-socialistic ideological and educational research’ * * *

‘The staff of the Einsatzstab Rosenberg seized not only ‘abandoned’ art treasures but also treasures which had been

hidden, or were left in the custody of depots or warehouses, including art treasures that were already packed for shipment to America.

‘In a letter to Goering, 18 June, 1942, Rosenberg voiced the opinion that all art objects and other confiscated items should belong to the National Socialist Party (NSDAP) because the party has been bearing the brunt of the battle against the persons and forces from whom this property was taken.

‘The National Socialist Party financed the operations of the Einsatzstab Rosenberg.’

International Military Trials, Vol. I, Nazi Conspiracy and Aggression, at pages 1097, 1099, 1100 (Office of United States Chief *311 Counsel for Prosecution of Axis Criminality; United States Government Printing Office, 1946).

[10] In the circumstances, the Court finds that this painting was seized not by a foreign sovereign government but rather by ‘The Centre for National Socialist Ideological and Educational Research’, an organ of the Nazi Party.

B.

The taking was not within the territory of the foreign government.

Since, as indicated, the taking was not by a foreign sovereign, the location of the property as within or without its jurisdiction is moot.

[11] However, assuming, arguendo, that the taking had been by the German Government, it would nevertheless be invalid because not within its own territory.

Brussels, the site of the appropriation of the painting, was the territory of Belgium. The government of the Kingdom of Belgium in exile, in March 1941, was the recognized government of Belgium. The governments of Belgium and Holland ‘continue to exist as international entities’.

**816 ‘Military occupation, by itself, does not confer title, nor extinguish a nation.’

‘[S]o long as a people do not accept military conquest; so long as they can manifest, in one way or another, their inalterable will to regain their freedom, their sovereignty, even though

flouted, restricted, and sent into exile, still persists.’ (35 Am.Journ.Int.Law, 666, 667 [October 1941].)

C.

The Third Reich was neither extant nor recognized by the Government of the United States at the time of trial.

[12] The Third Reich collapsed with the surrender in 1945. See *The Axis in Defeat* [Department of State, Publication 2423] page 45, Declaration regarding Defeat of Germany and Assumption of Supreme Authority by Allied Powers, June 5, 1945.

D.

The seizure of this painting was in violation of specific treaty obligations to the United States.

The Constitution of the United States provides:

‘This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every *312 State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’ Constitution of the United States, Art. VI.

The Hague Conventions, to which Belgium, Germany, and the United States were parties, provided for ‘recourse * * * to the good offices or mediation of one or more friendly Powers * * * before an appeal to arms’. 1899 Convention, Title II, Art. II; 32 Stat. at Large 1779, 1785. A similar clause was inserted in the Convention, for Pacific Settlement of International Disputes, of 1907, Part II, Art. 2; 36 Stat. at L. 2199, 2212.

In the accompanying 1907 Convention Relative to the Opening of Hostilities, Article 1 provided:

‘The Contracting Powers recognize that *hostilities* between themselves *must not commence without previous and explicit warning*, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.’ 36 Stat. at L. 2271. (Italics supplied.)

**817 Article 56 of the simultaneous Convention respecting the Laws and Customs of War on Land provided as follows:

‘The property of municipalities, of religious, charitable, educational, artistic and scientific institutions, although belonging to the State, is to be accorded the same standing as private property. All pre-meditated seizure, destruction or damage of such institutions, historical monuments, works of art and science, is forbidden * * *.’ 36 Stat. at L. 2309; 6 F.R.D. 69, 120.

And Articles 46 and 47 provided as follows:

‘Article 46. Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

‘Private property cannot be confiscated.’ 36 Stat. at L. 2306–2307. (Italics supplied.)

‘Article 47. *Pillage is formally forbidden.*’³ 36 Stat. at L. 2307. (Italics supplied.)

3

The Pact of Paris, also known as the Kellogg–Briand Peace Pact of 1928, was likewise entered into by Belgium, Germany, and the United States. It provided:

‘Outlawry of War.

‘Article I

‘The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

‘Article II

‘The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.’ 46 Stat. at Large 2343 et seq.

*313 Conventions are, of course, treaties and the terms are interchangeably used. V Hackworth, op. cit. supra, p. 3.

1.

The very invasion of Belgium was a violation of these solemn treaty obligations. *United States v. Goering, supra*, 6 F.R.D. at 102, 108.⁴

4

As Henry L. Stimson, the Secretary of State of the United States, said, in 1932:

‘War between nations was renounced by the signatories of the Kellogg–Briand Treaty. This means that it has become throughout practically the entire world * * * an

illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law * * *. We denounce them as law breakers.' Quoted at 6 F.R.D. 108.

2.

The pillage so rampant during Nazi occupation was specifically held to be in violation of Article 56 of the Hague Convention of 1907. *United States v. Goering*, *supra*, 6 F.R.D. at 120–123.

[13] Accordingly, in any view of the case, the Act of State Doctrine has no application.

**818 E.

The application of the 'Bernstein Exception' to the Act of State Doctrine has been both vigorously asserted by the defense and opposed by the plaintiff.

The exception results from the peculiar history of the Bernstein cases.

Since the Court is of the opinion that the Act of State Doctrine itself has no application to the case, it is unnecessary to pass upon an exception to the doctrine.

In view, however, of the arguments advanced by counsel with respect to the exception, and in view of the fact that it touches upon the argument of defendants' good faith, the background and nature of the exception are treated in the accompanying footnote.⁵

⁵ Arnold Bernstein was a shipowner of the Jewish faith who lived in Germany. Under the Nazi regime, his worldly possessions were ruthlessly taken from him. In January, 1937, he was imprisoned in Hamburg, Germany, where he was given reasonable grounds to believe that there were designs on his life as well as his liberty and business interests. While in prison, he was compelled by Nazi officials to execute documents purporting to transfer his shares in Arnold Bernstein Line to a Nazi designee, one Marius Boeger. Boeger transferred his interest to Van Heyghen Freres S.A. and, in Federal Court in New York, Bernstein, who survived, brought an action for conversion against Van Heyghen. Applying the Act of State Doctrine, the United States Court of Appeals, affirming a judgment dismissing the complaint, stated: '[N]o court will exercise its

jurisdiction to adjudicate the validity of the official acts of another state.' *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2 Cir. 1947) at 249–250. Certiorari was denied, 332 U.S. 772, 68 S.Ct. 88, 92 L.Ed. 357 (1947).

In a later suit against Holland–America Line, *Bernstein v. N. V. Nederlandsche–Amerikaansche, etc., et al.*, 173 F.2d 71 (2 Cir. 1949), a similar result was reached, although in an apparent attempt to avoid the applicability of the Act of State Doctrine as enunciated in his prior litigation, his complaint merely alleged duress, without mentioning Nazi officials.

Following the decision of the United States Court of Appeals, plaintiff Bernstein was able to secure an expression of views of the Department of State of the United States, which, for the first time, with respect to acts of the Nazis, relieved the courts of any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

The expression of views, set forth in a letter dated April 13, 1949, to Bennett, House & Couts, Counsellors at Law, New York, and signed by Jack B. Tate, Acting Legal Adviser, and published April 27, 1949, as a press release, and in the Department of State Bulletin, Vol. XX, May 8, 1949, at pp. 592–593, states, among other things, that:

'It is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and * * * to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.'

It was also stated in the letter, citing Military Government Law No. 59, applicable to the United States Area of Control, published in *Military Government Gazette in Amtsblatt der Militärregierung Deutschland, Amerikanisches Kontrollgebiet*, Nov. 10, 1947, that *'this policy applies generally despite the existence of purchasers in good faith.'*

The United States Court of Appeals, in view of this expression from the Department of State, proceeded *Bernstein v. N. V. Nederlandsche–Amerikaansche, etc.*, 2 Cir., 210 F.2d 375 [1954] to amend its mandate so as to permit the District Court to examine and to pass, without restraint, upon the acts of the Nazi officials.

Eventually the Bernstein cases were settled; but the cases did serve to chart a new path and to graft an exception onto the Act of State Doctrine, the exception being that in the case of acts of Nazis, American courts might examine the official acts of another state. And the exception became known as the 'Bernstein exception'.

In *Sabatino*, *supra*, however, the Supreme Court, while not passing on the Bernstein exception, stated:

'It is highly questionable whether the examination of validity by the Judiciary should depend on an educated guess by the Executive as to probable result.' 376 U.S. 398 at 436, 84 S.Ct. 923 at 944.

In view of the Court's conclusion that the Act of State Doctrine is in any event inapplicable, the Court does not reach the question of the applicability of the Bernstein Exception.

****819 *314 V.**

A.

[14] It is of no moment that Perls Galleries may have been a *bona fide* purchaser of the painting, in good faith and for value and without knowledge of the saga of the Menzels. No less is expected of an art gallery of distinction.

*315 Throughout the course of human history, the perpetration of evil has inevitably resulted in the suffering of the innocent, and those who act in good faith. And the principle has been basic in the law that a thief conveys no title as against the true owner. *Silsbury v. McCoon*, 3 N.Y. 379, 383–384 (1850); II Kent Comm. 14th ed., per Holmes, 324–325.

'Provisions of law for the protection of purchasers in good faith which would defeat restitution [of Nazi confiscations] shall be disregarded.' Law #59, U. S. Military Government for Germany, 10 Nov. 1947; Military Government Gazette, *Amtsblatt der Militärregierung Deutschland, Amerikanisches Kontrollgebiet*, Part I, Article 1, Para. 2. Cf. *Re, Developments in Sovereign Immunity*, 1 N.Y.L.F. 160, 201 (1955).

B.

The Court has considered the cases to which its attention was brought in letters dated January 11 and January 20, 1966, addressed to the Court by counsel for the defense.

Republic of Iraq v. First National City Bank, 2 Cir., 353 F.2d 47, 51 (1965) is a restatement of the Act of State Doctrine, and holds that the confiscatory act of even a friendly State will not be given effect where the situs of the property sought to be

confiscated is in the United States and where the confiscation is contrary to our public policy and shocking to our sense of justice. At 51; *Re, supra*, 1 N.Y.L.F. at 201.

In any event the Act of State Doctrine is inapplicable to the case at bar.

So, too, the Court finds nothing in *Hannes v. Kingdom of Roumania Monopolies Institute*, 169 Misc. 544, 6 N.Y.S.2d 960 (Sup. Ct., N. Y. Co., 1938), which touches upon the doctrine of sovereign immunity, inconsistent with the result here reached. And the judgment of dismissal there reached was reversed. 260 App.Div. 189, 20 N.Y.S.2d 825 (1st Dept. 1940; opinion per Callahan, J.).

*320 Finally, in *Upright v. Mercury Business Machines Co.*, 13 A.D.2d 36, 213 N.Y.S.2d 417 (1st Dept. 1961), it was held that an assignment by a corporation organized in East Germany, a country not recognized by the United States, is not *ipso facto* unenforceable; but the Court would look to the validity of the underlying transaction to determine whether it violates our national or public policy (13 A.D.2d 36 at 41, 213 N.Y.S.2d 417 at 422–423); and it is a 'false notion, if it prevail anywhere, that an unrecognized government is always an evil thing and all that occurs within its governmental purview are always evil works.' At 41, 213 N.Y.S.2d at 422.

In the case at bar, the underlying transaction was the looting, plunder and pillage by the Nazis, which was of the very essence of evil. The Mercury case, therefore, has no application.

***316 CONCLUSION**

The jury has found plaintiff to be the sole and rightful owner of the painting. The court has found that she never abandoned it but that it was pillaged and plundered by the Nazis. No title could have been conveyed by them as against the rightful owners. The law stands as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors.

The motion to set aside the verdict is in all respects denied. Judgment may be entered accordingly.

Parallel Citations

49 Misc.2d 300, 267 N.Y.S.2d 804

24 N.Y.2d 91

Court of Appeals of New York.

Erna MENZEL, Plaintiff-Respondent,

v.

Albert A. LIST, Defendant-Appellant,
and Third-Party Plaintiff-Respondent.Klaus G. PERLS et al., doing business
under the Name of Perls Galleries, Third-
Party Defendants-Appellants.

Feb. 26, 1969.

Action in replevin to recover painting, wherein defendant brought third-party action against dealers who sold him painting. The Supreme Court, Appellate Division, [28 A.D.2d 516](#), 276 N.Y.S.2d 608, affirmed as modified a judgment of the Supreme Court, New York County, Special and Trial Term, Arthur G. Klein, J., [49 Misc.2d 300](#), [267 N.Y.S.2d 804](#), and third-party plaintiff and third-party defendant appealed. The Court of Appeals, Burke, J., held that in action by purchaser of painting against seller for breach of implied warranty of quiet possession, measure of damages was value of painting at time of trial of owner's action against purchaser.

Reversed and remitted.

Attorneys and Law Firms

*****979 **742 *92** George A. Raftery, Edmund C. Grainger, Jr. and Rudolph H. Bruer, New York City, for defendant-appellant and third-party plaintiff-respondent.

Gilbert S. Edelson, New York City, for Klaus G. Perls and another, third-party defendants-appellants.

Opinion

*****980 *93** BURKE, Judge.

In 1932 Mrs. Erna Menzel and her husband purchased a painting by Marc Chagall at an auction in Brussels, Belgium, for 3,800 Belgian francs (then equivalent to about \$150). When the Germans invaded ****743** Belgium in 1940, the Menzels fled and left their possessions, including the Chagall painting, in their apartment. They returned six years later and found that the painting had been removed by the German authorities and that a receipt for the painting had been left. The location of the painting between the time of its removal

by the Germans in 1941 and 1955 is unknown. In 1955 Klaus Perls and his wife, the proprietors of a New York art gallery, purchased the Chagall from a Parisian art gallery for \$2,800. The Perls knew nothing of the painting's previous history and made no inquiry concerning it, being content to rely on the reputability of the Paris gallery as to authenticity and title. In October, 1955 the Perls sold the painting to Albert List for \$4,000. However, in 1962, Mrs. Menzel noticed a reproduction ***94** of the Chagall in an art book accompanied by a statement that the painting was in Albert List's possession. She thereupon demanded the painting from him but he refused to surrender it to her.

Mrs. Menzel then instituted a replevin action against Mr. List and he, in turn, impleaded the Perls, alleging in his third-party complaint that they were liable to him for breach of an implied warranty of title. At the trial, expert testimony was introduced to establish the painting's fair market value at the time of trial. The only evidence of its value at the time it was purchased by List was the price which he paid to the Perls. The trial court charged the jury that, if it found for Mrs. Menzel against List, it was also to 'assess the value of said painting at such an amount as you believe from the testimony represents its present value.' The jury returned a verdict for Mrs. Menzel and she entered a judgment directing the return of the painting to her or, in the alternative, that List pay to her the value of the painting, which the jury found to be \$22,500. (List has, in fact, returned the painting to Mrs. Menzel.) In addition, the jury found for List as against the Perls, on his third-party complaint, in the amount of \$22,500, the painting's present value, plus the costs of the [Menzel action incurred by List](#). [49 Misc.2d 300](#), [267 N.Y.S.2d 804](#).

The Perls appealed to the Appellate Division, First Department, from that judgment and the judgment was unanimously modified, on the law, by reducing the amount awarded to List to \$4,000 (the purchase price he had paid for the painting), with interest from the date of the purchase. In a memorandum, the Appellate Division held that the third-party action was for breach of an implied warranty of Quiet possession and, accordingly, held that the Statute of Limitations had not run on *****981** List's claim since his possession was not disturbed until the judgment for Mrs. [Menzel](#). [28 A.D.2d 516](#), [279 N.Y.S.2d 608](#). In addition, the court held that the 'applicable measure of damages was the price List paid for the painting at the time of purchase, together with interest', citing three New York cases ([Staats v. Executors of Ten Eyck](#), 3 Caines 111, 113; [Armstrong v. Percy](#), 5 Wend. 535; [Case v. Hall & Van Elten](#), 24 Wend. 102).

List filed a notice of appeal as of right from the unanimous modification insofar as it reduced the amount of his judgment to \$4,000, with interest from the date of purchase. The Perls filed a *95 notice of cross appeal from so much of the Appellate Division's order as failed to dismiss the third-party complaint, denied costs and disbursements and fixed the date from which interest was to run on List's judgment. The Perls have now abandoned the cross appeal as to the failure to dismiss the third-party complaint and the denial of costs and disbursements, leaving only the issue as to the date from which interest should run.

List's appeal and the Perls' cross appeal present only questions of law for resolution, the facts having been found by the jury and affirmed by the Appellate Division (its modification was on the law as to the proper measure of damages and the running of interest). The issue on the main appeal is simply what is or should be the proper measure of damages for the **744 breach of an implied warranty of title (or quiet possession) in the sale of personal property. The cases cited by the Appellate Division do not hold that the measure of damages is the purchase price plus interest. The Staats case (supra) was an action for breach of a real property covenant in which there was dicta to the effect that the rule was the same for personal property. The dicta was compromised one year later by the same jurist (Chief Justice KENT who wrote the opinion in Staats in [Blasdale v. Babcock](#), 1 Johns. 517 (1806), where it was held that the buyer was entitled to recover in damages the amount which he had been compelled to pay to the true owner, the actual value of the chattel. In [Armstrong v. Percy](#), 5 Wend. 535, Supra the buyer recovered the purchase price but only because the chattel, a horse, was found to have depreciated in value below the price paid. In [Case v. Hall & Van Elten](#), 24 Wend. 102, Supra, there is contained a statement which is pure dicta to the effect that warranty damages are the purchase price (the action was in contract for goods sold and delivered). The parties have cited no New York case which squarely meets the issue and it is, therefore, concluded that, contrary to the counter assertions of the parties, neither 'purchase plus interest' (Perls) nor 'value at date of dispossession' (List) is presently the law of this State. In fact, there is a marked absence of case law on the issue. One legislative source has described this paucity of case law with the understatement ***982 that '(t)he implied warranty of title under the Uniform Sales Act (N.Y. Personal Property Law, Consol.Laws, c. 41, s 94) has seldom been invoked.' *96 (1955 Report of N.Y. Law Rev.Comm., Vol. 1, p. 387, n. 68, citing [Pinney v. Geraghty](#), 209 App.Div. 630, 205 N.Y.S. 645, a case dealing with the effect of the

vendor's ignoring a vouching-in notice.) Furthermore, the case law in other jurisdictions in this country provides no consistent approach, much less 'rule', on this issue and it is difficult even to add up jurisdictions to pinpoint a 'majority' and a 'minority'. One attempt to collect and organize the law in this country on this issue concludes that there are at least four distinct 'rules' for measuring the damages flowing from the breach of a personal property warranty of title: purchase price plus interest; 'value', without specification as to the time at which value is to be determined; value at the time of dispossession; and value at the time of the sale (Ann., Breach of Warranty of Title—Damages, 13 A.L.R.2d 1369). Interestingly enough, the annotator was able to find New York cases each of which used language which would apparently suggest that a different one of these four 'rules' was The rule. (Ann., Supra, p. 1380.) In the face of such unsettled and unconvincing 'precedent', the issue is one which is open to resolution as a question which is actually one of first impression.

At the time of the sale to List and at the commencement of the Menzel replevin action, there was in effect the New York counterpart to section 13 of the Uniform Sales Act (N.Y. Personal Property Law, s 94 (PPL)) which provided that 'In a contract to sell or a sale, unless contrary intention appears, there is

1. An implied warranty on the part of the seller that * * * he has a right to sell the goods * * *
2. An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale'.

[1] [2] In addition, [section 150 of the PPL](#) provided for remedies for breach of warranty and subdivision 6 provided: 'The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events from the breach of warranty'. Subdivision 7 applies, by its terms, only to a breach of warranty of quality and is, therefore, not controlling on the question of damages for breach of warranty of title and quiet enjoyment. (3 Williston, Sales **745 (rev.ed.), *97 s 615, n. 9.) Thus, the Perls' reliance on this subdivision is misplaced. The Perls contend that the only loss directly and naturally resulting, in the ordinary course of events, from their breach was List's loss of the purchase price. List, however, contends that that loss is the ***983 present market value of the painting, the value which he would have been able to obtain if the Perls had conveyed good title. The Perls support their position by reference to the damages recoverable for breach of the

warranty of quiet possession as to real property. However, this analogy has been severely criticized by a leading authority in these terms: 'This rule (limiting damages to the purchase price plus interest) virtually confines the buyer to rescission and restitution, a remedy to which the injured buyer is undoubtedly entitled if he so elects, but it is a violation of general principles of contracts to deny him in an action on the contract such damages as will put him in as good a position as he would have occupied had the contract been kept.' (11 Williston, Contracts (3d ed.), s 1395A, p. 484 (emphasis added).) Clearly, List can only be put in the position he would have occupied if the contract had been kept by the Perls if he recovers the value of the painting at the time when, by the judgment in the main action, he was required to surrender the painting to Mrs. Menzel or pay her the present value of the painting. Had the warranty been fulfilled, i.e., had title been as warranted by the Perls, List would still have possession of a painting currently worth \$22,500 and he could have realized that price at an auction or private sale. If List recovers only the purchase price plus interest, the effect is to put him in the same position he would have occupied if the sale had never been made. Manifestly, an injured buyer is not compensated when he recovers only so much as placed him in Status quo ante since such a recovery implicitly denies that he had suffered any damage. This rationale has been applied in Massachusetts in a case construing a statute identical in language to [section 150](#) (subd. 6) of the PPL where the buyer was held entitled to the value 'which (he) lost by not receiving a title to it as warranted. * * * His loss cannot be measured by the (price) that he paid for the machine. He is entitled to the benefit of his bargain' ([Spillane v. Corey](#), 323 Mass. 673, 675, 84 N.E.2d 5 (1949)); see, also, *98 [Pillgrene v. James J. Paulman, Inc.](#), 6 Terry 225, 226, 45 Del. 225—226, 71 A.2d 59 (1950) ('The purpose of compensatory damages is to place the buyer in as good condition as he would have occupied had the title been good.'). This measure of damages reflects what the buyer has actually lost and it awards to him only the loss which has directly and naturally resulted, in the ordinary course of events, from the seller's breach of warranty.

An objection raised by the Perls to this measure of damages is that it exposes the innocent seller to potentially ruinous liability where the article sold has substantially appreciated in value. However, this 'potential ruin' is not beyond the control of the seller since he can take steps to ascertain the status of title so as to satisfy himself that he himself is getting good title. (Mr. Perls testified that to question a reputable ***984 dealer as to his title would be an 'insult.' Perhaps, but the sensitivity of the art dealer cannot serve to deprive the injured

buyer of compensation for a breach which could have been avoided had the insult been risked.) Should such an inquiry produce no reasonably reliable information as to the status of title, it is not requiring too much to expect that, as a reasonable businessman, the dealer would himself either refuse to buy or, having bought, inform his vendee of the uncertain status of title. Furthermore, under [section 94 of the PPL](#), the seller could modify or exclude the warranties since they arise only 'unless contrary intention appears'. Had the Perls taken the trouble to inquire as to title, they could have sold to List subject to any existing lawful claims unknown to them at the time of the sale. Accordingly, the 'prospects of ruin' forecast as flowing from the rule are not quite as ominous as the argument would indicate. Accordingly, **746 the order of the Appellate Division should be reversed as to the measure of damages and the judgment awarding List the value of the painting at the time of trial of the Menzel action should be reinstated.

[3] On the cross appeal by the Perls, the issue is as to the time from which interest should run on the judgment in favor of List against the Perls. The Appellate Division indicated that interest should be recovered from the date of purchase in October, 1955, but it did so only in conjunction with its determination that the measure of damages should be the purchase price paid by List on that date. Manifestly, the present-value measure of damages has no necessary connection with the date of purchase *99 and is, in fact, inconsistent with the running of interest from the date of purchase since List's possession was not disturbed until the judgment directing delivery of the painting to Mrs. Menzel, or, in the alternative, paying her the present value of the painting. Accordingly, List was not damaged until that time and there is no basis upon which to predicate the inclusion of interest from the date of purchase. Accordingly, on the cross appeal, the order of the Appellate Division, insofar as it directed that interest should run from the date of purchase, should be reversed and interest directed to be included from the date on which Mrs. Menzel's judgment was entered, May 10, 1966.

SCILEPPI, BERGAN, BREITEL and JASEN, JJ., concur.

FULD, C.J., and KEATING, J., taking no part.

Order reversed, with costs to third-party plaintiff-appellant-respondent, and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein.

Parallel Citations

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22 N.Y.3d 962

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

Court of Appeals of New York.

In the Matter of Riven FLAMENBAUM, Deceased.
Vorderasiatisches Museum, Respondent,
Hannah K. Flamenbaum, Appellant,
Israel Flamenbaum, Respondent.

Nov. 14, 2013.

Synopsis

Background: In probate proceeding, German museum sought to recover from probate estate a 3,000 year-old gold tablet that was part of museum's holdings until it went missing at the end of the Second World War. The Surrogate's Court, Nassau County, 27 Misc.3d 1090, 899 N.Y.S.2d 546, Riordan, S., found that museum was barred by laches from asserting its claim. Appeal was taken. The Supreme Court, Appellate Division, 95 A.D.3d 1318, 945 N.Y.S.2d 183, held that museum's failure to report to missing tablet to law enforcement authorities did not preclude it from making claim against probate estate. Estate appealed.

Holdings: The Court of Appeals of New York held that:

^[1] theory of laches did not preclude museum's claim, and

^[2] court would not adopt "spoils of war" theory of title.

Affirmed.

West Headnotes (2)

^[1] **Executors and Administrators**
🔑 Time to Sue, and Limitations

Theory of laches did not preclude German museum from bringing action to seek return from probate estate of 3,000 year-old gold tablet that went missing from its holdings at the end of

the Second World War; museum did not fail to act reasonably to locate the tablet, since there was no indication that its reporting the item as missing to law enforcement would have increased the chance of its discovery in the estate's possession, and museum's failure to report the item as missing did not prejudice the estate from defending against museum's claim.

^[2] **War and National Emergency**
🔑 Capture of Property on Land

Court would not adopt "spoils of war" transfer of title theory in action by German museum seeking to reclaim from probate estate a 3000 year-old gold tablet taken at the end of the Second World War, where estate supplied only conjecture to support the theory, and doctrine establishing title transfer based upon looting and removal of cultural artifacts during wartime would be fundamentally unjust.

Attorneys and Law Firms

Steven R. Schlesinger, for appellant.

Raymond J. Dowd, for respondent Vorderasiatisches Museum.

Archaeological Institute of America et al., amicus curiae.

Opinion

MEMORANDUM:

The order of the Appellate Division should be affirmed, with costs, and the certified question should be answered in the affirmative.

In this probate proceeding, the Vorderasiatisches Museum in Berlin, Germany (the Museum), seeks to recover a 3,000-year-old gold tablet from the estate of Riven Flamenbaum (the Estate). The tablet was first discovered prior to World War I by a team of German archeologists

excavating at the foundation of the Ishtar temple in Ashur, Iraq. The tablet dates back to the reign of Assyrian King Tukulti-Ninurta I (1243–1207 BCE) and bears an inscription written in Assyro-Babylonian language and Middle-Assyrian cuneiform script. The tablet was shipped to the Berlin Museum (now the Vorderasiatisches Museum) in 1926. The Museum's inventory book catalogs the arrival of the gold tablet and provides a description and a sketch. In 1939, the Museum was closed because of World War II, and objects from Ashur were put in storage. In 1945, at the end of the war, the gold tablet was missing.

The tablet resurfaced in 2003, when it was discovered among the possessions of the decedent, a resident of Nassau County and a Holocaust survivor. When Hannah K. Flamenbaum, the decedent's daughter and executor of the Estate, petitioned to judicially settle the final account, she listed a "coin collection" as an asset of the Estate. Israel Flamenbaum, the decedent's son and Hannah's brother, filed objections to the accounting, wherein he claimed that the value of the coin collection was understated "and includes one item identified as a 'gold wafer' which is believed to be an ancient Assyrian amulet and the property of a museum in Germany." Israel also notified the Museum about the tablet, and the Museum responded that the gold tablet is part of its Assyrian collection and had been missing since the end of World War II.

The Museum thereafter filed a notice of appearance and claim with the Surrogate's Court, Nassau County, to recover the tablet. The Surrogate held a hearing, at which the Museum's director, Dr. Beate Salje, was the sole witness to testify. Dr. Salje testified that the tablet, along with many other objects, disappeared from the Museum sometime near the end of World War II. Russian troops removed some objects at the end of the war, brought them to Russia, and then back to the Museum in 1957. Dr. Salje stated that she did not know if the tablet was taken by Russian troops, German troops, or people who came to the Museum to take refuge.

The Museum also submitted the report of Dr. Eckart Frahm, Assistant Professor of Assyriology at Yale University. As explained by Dr. Frahm, a 1983 article written by A.K. Grayson, entitled "Antiquities from Ashur; A Brief Description of Their Fate with Special Reference to the Royal Inscription," published in the *Annual Review of the Royal Inscriptions of Mesopotamia Project*, stated that "Professor H.G. Guterbock [a professor at the Oriental Institute of the University of Chicago] in a private communication told [Grayson] of having seen a gold tablet ... which was in the Berlin

Museum before the war ... in the hands of a dealer in New York in 1954." There is an entry in the Museum's record that reads "seen by Guterbach 1954 in New York," and underneath it says "Grayson." This entry is undated, and nothing in the record indicates when the Museum first learned that the tablet was reportedly sighted in 1954.

After the hearing, Surrogate's Court determined that, although the Museum met its prima facie burden of proving legal title or superior right of possession to the tablet, its claim was barred by the doctrine of laches because the Museum had failed to either report the tablet's disappearance to the authorities or list the tablet on any international stolen art registries. This inaction, according to the court, prejudiced the Estate's ability to defend against the Museum's claim to the tablet.

^[1] The Appellate Division, among other things and as relevant here, reversed the Surrogate's Court order on the law, granted the Museum's claim for the return of the tablet, and remitted the matter to Surrogate's Court for further proceedings (*see Matter of Flamenbaum*, 95 A.D.3d 1318, 945 N.Y.S.2d 183 [1st Dept 2012]). The Appellate Division concluded that the Estate had not established that the Museum failed to exercise reasonable diligence to locate the tablet, or that the Museum's inaction had prejudiced the Estate. That court granted the Estate's motion for leave to appeal pursuant to CPLR 5602(b)(1) and certified the following question: "Was the decision and order of this Court dated May 30, 2012, properly made?" We now affirm and answer the certified question in the affirmative.

We agree with the Appellate Division that the Estate failed to establish the affirmative defense of laches, which requires a showing "that the museum failed to exercise reasonable diligence to locate the tablet and that such failure prejudiced the [E]state" (95 A.D.3d at 1320, 945 N.Y.S.2d 183, citing *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 321 [1991]; *see also Sotheby's, Inc. v. Shene*, U.S. Dist Ct, SD NY, 04 Civ 10067, Griesa, J., 2009). While the Museum could have taken steps to locate the tablet, such as reporting it to the authorities or listing it on a stolen art registry, the Museum explained that it did not do so for many other missing items, as it would have been difficult to report each individual object that was missing after the war. Furthermore, the Estate provided no proof to support its claim that, had the Museum taken such steps, the Museum would have discovered, prior to the decedent's death, that he was in possession of the tablet (*compare Matter of Peters v. Sotheby's Inc.*, 34 A.D.3d 29, 37–38, 821 N.Y.S.2d 61 [1st Dept 2006], *lv denied* 8 NY3d 209 [2007] [laches barred claim where owner had actual knowledge of the

identity of the party in possession but did not demand return of the property]). As we observed in *Lubell*, in a related discussion of the defense of statute of limitations, “[t]o place a burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would ... encourage illicit trafficking in stolen art” (77 N.Y.2d at 320, 567 N.Y.S.2d 623, 569 N.E.2d 426).

Additionally, the Estate failed to demonstrate “the essential element of laches, namely prejudice” (*Matter of Barabash*, 31 N.Y.2d 76, 82 [1972]). While the Estate argued that it had suffered prejudice due to the Museum’s inaction, there is evidence that at least one family member (decedent’s son) was aware that the tablet belonged to the Museum. And, although the decedent’s testimony may have shed light on how he came into possession of the tablet, we can perceive of no scenario whereby the decedent could have shown that he held title to this antiquity.

[2] The “spoils of war” theory proffered by the Estate—that the Russian government, when it invaded Germany, gained title to the Museum’s property as a spoil of war, and then transferred that title to the decedent—is rejected. The Estate’s theory rests entirely on conjecture, as the record is bereft of any proof that the Russian government ever had possession of the tablet. Even if there were such proof, we decline to adopt any doctrine that would establish good title based upon the looting and removal of cultural objects during wartime by a conquering military force (*see Menzel v. List*, 49 Misc.2d 300, 305–308, 267 N.Y.S.2d 804 [Sup Ct New York County 1966], *modified as to damages*, 28 A.D.2d 516,

279 N.Y.S.2d 608 [1st Dept 1967], *revd as to modification*, 24 N.Y.2d 91 [1969])].¹ Allowing the Estate to retain the tablet based on a spoils of war doctrine would be fundamentally unjust.

Order affirmed, with costs, and certified question answered in the affirmative, in a memorandum.

Chief Judge LIPPMAN and Judges GRAFFEO, READ, SMITH, PIGOTT, RIVERA and ABDUS–SALAAM concur.

¹ Notably, it was the official policy of the United States during World War II to forbid pillaging of cultural artifacts. The Rules of Land Warfare of the United States War Department provided that “[a]ll movable property belonging to the State directly susceptible of military use may be taken possession of as booty and utilized for the benefit of the invader’s government. Other movable property, not directly susceptible of military use, must be respected and cannot be appropriated” (Rules of Land Warfare, War Department of the United States, Basic Field Manual (FM 27–10, 1940), 77, 82, 84, quoted in *Menzel*, 49 Misc.2d at 306 n. 1, 267 N.Y.S.2d 804).

Parallel Citations

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