

THE THIRD TIME IS NOT ALWAYS A CHARM: THE
TROUBLESOME LEGACY OF A DUTCH ART
DEALER

THE LIMITATION AND ACT OF STATE DEFENSES
IN LOOTED ART CASES ♦

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INTRODUCTION

In recent years, federal and state courts in California have become an increasingly common venue for bringing restitution claims concerning Holocaust-related art losses. Since the highly publicized title dispute over some of the world's finest Klimt paintings¹ – brought by California resident Maria Altmann, against the Republic of Austria² – several additional much talked-about cases on Nazi-era looted art have been before California courts.³ In light of this, New York's status as the prominent forum with respect to art litigation has become somewhat less absolute over the past decade. California's ascendance as a forum for Nazi-era art litigation is not surprising, considering its world-class museums, citizens of considerable means, exquisite collections, and dynamic art market.

One of the most fascinating Nazi-era restitution lawsuits currently before the federal courts in California is *von Saher v. Norton Simon Museum of Art*.⁴ The dispute relates to an action taken by an American heir to a famed Dutch art dealer. Von Saher seeks the recovery of a sixteenth-century diptych by Lucas Cranach, one of the prime attractions of the Norton Simon Museum in Pasadena. Stemming from some of the darkest days of mankind, Nazi-era restitution cases are certainly compelling both from an art-history and a human point of view. They are the manifestation of the persistent societal desire to come to terms with the enduring injustices of the Holocaust. As World War II (WWII) was inspired by the urge for cultural domination,

¹ The case was widely covered, both in legal periodicals and in newspapers. See, e.g., Mark J. Chorazak, *Clarity and Confusion: Did Republic of Austria v. Altmann Revive State Department Suggestions of Foreign Sovereign Immunity?*, 55 DUKE L.J. 373 (2005); Lisa Iadevaia, *Altmann v. Republic of Austria*, 13 DEPAUL-LCA J. ART & ENT. L. 481 (2003); David Wissbroecker, *Six Klimts, a Picasso, & a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DEPAUL-LCA J. ART & ENT. L. 39 (2004); Judith H. Dobrzynski, *Austria Refuses to Cede Klimt Paintings*, N.Y. TIMES, July 1, 1999, at E3; Linda Greenhouse, *Justices Allow Suit Against Austria to Regain Art*, N.Y. TIMES, June 8, 2004, at A20.

² *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001), *aff'd*, 317 F.3d 954 (9th Cir. 2002), *amended by* 327 F.3d 1246 (9th Cir. 2003), *cert. granted in part*, 539 U.S. 987 (2003), *mot. granted*, 540 U.S. 1101 (2004), *aff'd*, 541 U.S. 677 (2004).

³ See, e.g., *Adler v. Taylor*, No. CV 04-8472-RGK (FMOx), 2005 U.S. Dist. LEXIS 5862 (C.D. Cal. Feb. 2, 2005), *aff'd sub nom. Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007); *United States v. One Oil Painting Entitled "Femme En Blanc" by Pablo Picasso*, 362 F. Supp. 2d 1175 (C.D. Cal. 2005); *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157 (C.D. Cal. 2006), *aff'd in part and rev'd in part, rem'd*, 580 F.3d 1048 (9th Cir. 2009), *vacated, rehearing, en banc, granted by*, 590 F.3d 981 (9th Cir. 2009).

⁴ No. CV 07-2866-JFW (JTLx), 2007 U.S. Dist. LEXIS 95757 (C.D. Cal. Oct. 18, 2007), *aff'd in part, rev'd in part, rem'd*, 578 F.3d 1016 (9th Cir. 2009), *am'd, on rehearing at, rehearing denied by, rehearing, en banc, denied by* 592 F.3d 954 (9th Cir. 2010).

including control over cultural heritage⁵ each surviving work of art looted during that time remains an eternal witness to humanity's equal potential for wondrous brilliance and utter depravity. In addition, however, Nazi-era art litigation is often very interesting from a legal point of view. Like other restitution lawsuits, *von Saher* confronts the court with challenging legal questions, principally because of both the enduring nature of art objects, and their worldwide circulation.

Unlike consumer goods that get used up and disappear over time, art objects are timeless, passed on from generation to generation. Unfortunately, however, problems affecting the object, such as authenticity issues and title problems, are passed on together with the artwork. For instance, decades-old forgeries continue to deceive the market.⁶ Similarly, looting that happened during WWII, more than sixty years ago, continues to affect the legal status of many works of art.⁷ Art objects thus challenge the law's relation to time, as established with regard to other types of personal property. It is not a coincidence that in most jurisdictions, case law concerning art objects features prominently in jurisprudence regarding the limitation of claims. The *von Saher* case constitutes no exception, as its final outcome will be indicative of the attitude of the California courts, not only towards the problem of limitation of claims regarding Nazi-era looted art, but also with respect to other types of stolen cultural property.

Involving not just a single act of misappropriation by Göring during the occupation of the Netherlands, but arguably a second misappropriation by the Bolsheviks in early 1920s Russia,⁸ *von Saher* is peppered with issues of public and private international law. Again, this is not uncommon for disputes regarding stolen art, given the truly international nature of collectorship and the art trade. International litigation is, however, complicated by its own rules regarding forum and applicable law. One of the most interesting, yet obscure, legal theories impeding international litigation regarding misappropriated personal property is the act of state doctrine. Implicating several decisions of foreign governments, *von Saher* is the perfect opportunity for an analysis of the act of state doctrine in litigation regarding works of art looted during the Nazi era.

⁵ See Paulina McCarter Collins, *Has "The Lost Museum" Been Found? Declassification of Government Documents and Report on Holocaust Assets Offer Real Opportunity to "Do Justice" for Holocaust Victims on the Issue of Nazi-looted Art*, 54 ME. L. REV. 115, 123-125 (2002); Kelly D. Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 549, 553-566 (1999); Julia Parker, Note, *World War II & Heirless Art: Unleashing the Final Prisoners of War*, 13 CARDOZO J. INT'L & COMP. L. 661, 663 (2005).

⁶ See, e.g., *David Tunick, Inc. v. Kornfeld*, 838 F. Supp. 848 (S.D.N.Y. 1993); *Rosen v. Spanierman*, 711 F. Supp. 749 (S.D.N.Y. 1989), *aff'd in part, vacated in part and remanded*, 894 F.2d 28 (2d Cir. 1990).

⁷ See, e.g., *von Saher*, 2007 U.S. Dist. LEXIS 95757; *Cassirer*, 461 F. Supp. 2d 1157.

⁸ See Carla J. Shapreau, *Nazi-era Restitution Lawsuits – New Developments in the California Courts*, 10 IFAR J. No. 2, 2008, at 23.

Considering these two characteristics of art, being both timeless and internationally traded, and the resulting restitution lawsuits, this article has a twofold purpose. Firstly, this article will analyze the effectiveness of the statute of limitations defense in stolen art litigation, by questioning the approach recently taken in California and comparing it to those of other jurisdictions. The comparison will not only focus on other U.S. jurisdictions, but also on Continental European civil property law, specifically the Dutch approach, given the underlying facts of *von Saher*. Secondly, this article will analyze the significance of the act of state doctrine as a hurdle for litigation regarding misappropriated artwork. This article points out how the act of state defense can even be relevant in a restitution dispute between a U.S. citizen and a U.S. museum regarding property situated in the United States.

Part I reviews the law prior to *von Saher* with regard to the statute of limitations defense and contrasts California's complex limitation rule with the legal approaches taken in other U.S. jurisdictions. This part explains that while numerous states have shifted from the doctrines of adverse possession and fraudulent concealment to application of a discovery rule, California has gone further by adopting a special limitation provision for Holocaust-era art claims. California's provision is part of a complex threefold limitation rule, grounded in statute and exclusively concerned with actions regarding stolen artwork. Part II questions the professed unconstitutionality of California's Holocaust-era claims provision, and interprets *von Saher* as an invitation to the courts to clarify the precise accrual standard for actions in replevin regarding Nazi-era takings. Finally, through this connection, it is argued that a thorough understanding of the previous restitution proceedings in the Netherlands is crucial to the assessment of the limitation defense raised by the museum in this case. Explaining the doctrine's potential in *von Saher*, Part III analyzes the act of state doctrine and its significance in international litigation regarding personal property, including artwork, which was misappropriated by foreign governments. On a more fundamental level, Part III will show that the act of state defense can surface in purely domestic litigation. Returning to *von Saher*, this article will demonstrate that the act of state defense does not necessarily foreclose a decision on substantive grounds. The act of state doctrine only applies when a U.S. court must declare an official act of a foreign sovereign government invalid. It is argued that its application should not be expanded to cases that merely touch upon or relate to the acts of a sovereign state, even if such an approach might risk displeasing that foreign nation.

I. THE LAW PRIOR TO *VON SAHER*

At common law, purchasers who buy from a thief, albeit in good

faith, remain at all times exposed to the original owner's claim.⁹ A thief's title is void; he cannot convey good title to any subsequent purchaser. Thus, regardless of whether the subsequent purchaser acquired the property in good faith and for value, he cannot establish valid title.¹⁰ This is contrary to the position in civil law jurisdictions,¹¹ where a good faith purchase is in itself a valid defense against an original owner's action in replevin or conversion.¹² In common law jurisdictions, no matter how many innocent hands the stolen object (artwork or any kind of personal property) passes through, title remains vested in the original owner.¹³ The famous tenet "*nemo plus iuris ad alium transferre potest, quam ipse habet*"¹⁴ epitomizes the common law's owner-friendly position by rendering impossible any protection of the actual possessor at the expense of the original owner.¹⁵ For more than a century the traditional *nemo dat* doctrine has been implicitly entrenched in American and English law,¹⁶ through statutory provisions

⁹ See Robin M. Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17, 21 (1993); John G. Petrovich, Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1124 (1980); Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 633-34 (2000).

¹⁰ See Alexandre A. Montagu, *Recent Cases on the Recovery of Stolen Art – The Tug of War Between Owners and Good Faith Purchasers Continues*, 18 COLUM.-VLA J.L. & ARTS 75, 79 (1993); Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2440 (1994).

¹¹ See Montagu, *supra* note 10, at 79; Steven F. Grover, Note, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431, 1445 (1992).

¹² Actions in replevin or conversion are state common law actions, as U.S. federal law does not provide a cause of action for the recovery of personal property. Such actions aim at recovery or damages, not at the criminal prosecution of the possessor. According to Black's Law Dictionary, an action in replevin is "an action for the repossession of personal property wrongfully taken or detained by the defendant . . ." BLACK'S LAW DICTIONARY 1413 (9th ed. 2009). By bringing an action in conversion, the true owner seeks *monetary damages* for the "wrongful possession or disposition of another's property as if it were one's own." *Id.* at 381.

¹³ See *Basset v. Spofford*, 45 N.Y. 387, 391 (1871) ("By the larcenous taking of chattels the owner is not divested of his property, and a transfer to a purchaser does not impair the right of the true owner. A purchase of stolen goods either directly from the thief or from any other person, although in the ordinary course of trade and in good faith, will not give a title as against the owner. In the case of a felonious taking of goods, the owner may follow and reclaim them wherever he may find them."). See also Phelan, *supra* note 9, at 633-34; Robert Schwartz, *The Limits of the Law: A Call for a New Attitude Towards Artwork Stolen During World War II*, 32 COLUM. J.L. & SOC. PROBS. 1, 4 (1998); Julia A. McCord, Note, *The Strategic Targeting of Diligence: A New Perspective on Stemming the Illicit Trade in Art*, 70 IND. L.J. 985, 989-90 (1995).

¹⁴ DIG. 50.17.54 (Ulpian, Ad Edictum 46) ("No one can transfer to another a right which he himself does not possess.").

¹⁵ However, under certain conditions, it may be possible for a good faith purchaser for value to obtain title from a seller with a voidable title. Similarly, under U.C.C. § 2-403(2), entrustment of possession of personal property to a merchant who deals in such goods gives the merchant the power to transfer the entruster's rights to a good faith purchaser in the ordinary course of business. See Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 398 (1995); Grover, *supra* note 11, at 1446-48.

¹⁶ See 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, 265-78 (5th ed. 2006); Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 99 (1993); David A. Thomas, *Establishing Title to Stolen Artworks in the United States*, 3 INT'L. TRADE & BUS. L. ANN. 253, 254 (1997); Grover, *supra* note 11, at 1445.

in the Uniform Commercial Code (U.C.C.),¹⁷ the Sale of Goods Act 1979,¹⁸ and their predecessors.¹⁹

However, notwithstanding the *nemo dat* rule, which keeps purchasers of stolen goods at all times exposed to a claim for recovery, the original owner must take steps to recover his artwork or otherwise find it difficult to prevail in a replevin suit at a time when “evidence has been lost, memories have faded, and witnesses have disappeared.”²⁰ In all common law jurisdictions, the statutes of limitations constitute an important exception to the *nemo dat* rule by allowing the passage of time to affect the allocation of rights and burdens between original owners and purchasers of stolen goods.²¹ The expiration of the limitation period is a particularly powerful affirmative defense to the original owner’s action in replevin, since it is not uncommon for stolen artwork to resurface several decades after the theft.²²

In most jurisdictions in the United States, the statute of limitations for actions in replevin ranges from two to six years.²³ Similarly, in the United Kingdom, actions to reclaim personal property expire after six years.²⁴ Yet, in spite of the short limitation periods, in most jurisdictions with a vibrant art market, actions in replevin may still be brought more than sixty years after the theft, as is the case with Nazi-era spoiliations. This is because, in addition to the statutory limitation period, timeliness of an action is dependent upon the concept of accrual of the cause of action, which determines when the crucial countdown starts. Hence, determining the length of the applicable limitation period is not nearly as important as knowing when the period begins to run.²⁵

¹⁷ U.C.C. § 2-403(1) (2007).

¹⁸ Sale of Goods Act, 1979, c. 54, § 21 (Eng.).

¹⁹ Uniform Sales Act, § 23 (1906); Sale of Goods Act, 1893, 56 & 57 Vict., c. 71, § 21 (Eng.).

²⁰ Harvard Law Review Ass’n., *Developments in the Law – Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950).

²¹ Montagu, *supra* note 10, at 80; Schwartz, *supra* note 13, at 4.

²² See Ashton Hawkins, Richard A. Rothman & David B. Goldstein, *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49, 50 (1995); Lauren F. Redman, *A Wakeup Call for a Uniform Statute of Limitations in Art Restitution Cases*, 15 UCLA ENT. L. REV. 203, 210 (2008); Walton, *supra* note 5, at 579; McCord, *supra* note 13, at 990.

²³ Nearly all U.S. states have limitation periods for personal property claims that range between two and six years. See, e.g., CAL. CIV. PROC. CODE § 338(c) (West 2007) (California - three years); D.C. CODE § 12-301(2) (2001) (District of Columbia - three years); FLA. STAT. § 95.11(3)(i) (2010) (Florida - four years); 735 ILL. COMP. STAT. 5/13-205 (2003) (Illinois - five years); IND. CODE § 34-11-2-7(3) (1999) (Indiana - six years); MD. CODE ANN. CTS. & JUD. PROC. § 5-101 (LexisNexis 2004) (Maryland - three years); N.J. STAT. ANN. §§ 2A:14-1 (West 2000) (New Jersey - six years); N.Y. C.P.L.R. 214(3) (McKinney 2003) (New York - three years); OHIO REV. CODE ANN. § 2305.09(b) (LexisNexis 2008) (Ohio - four years); 42 PA. CONS. STAT. § 5524(3) (2004) (Pennsylvania - two years); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon 2005) (Texas - two years); VA. CODE ANN. § 8.01-243(B) (2008) (Virginia - five years). *But see* LA. CIV. CODE ANN. art. 3492 (1994) (Louisiana - one year).

²⁴ However, different limitation rules apply to actions against a thief or regarding subsequent conversions that occurred before the person from whom the chattel was stolen recovered possession of it. See Limitation Act, 1980, c. 58, §§ 2-4; LYNDAL V. PROTTE & PATRICK J. O’KEEFE, *LAW AND THE CULTURAL HERITAGE: MOVEMENT* 419 (1989).

²⁵ See Collins, *supra* note 5, at 130; Stephanie Cuba, Note, *Stop the Clock: The Case to Suspend*

The notion of accrual presents a complex problem. The event that marks the accrual of the cause of action of a claim in replevin is not specified by legislation, which merely defines the limitation period and leaves the issue of accrual for the courts to decide.²⁶ Unfortunately, in this field there is little consistency among U.S. courts.²⁷

A. *From Adverse Possession to the Discovery Rule*

1. The Doctrines of Adverse Possession and Fraudulent Concealment

Until 1980, the different states were somewhat uniform in determining the availability of the statute of limitations defense when faced with an owner's replevin action. It was generally held that in most cases the clock began to run upon the commission of the tortious act.²⁸ In applying the rules of adverse possession to stolen goods, the cause of action accrued at the time of the wrongful taking, regardless of the owner's knowledge (or lack of knowledge) of the theft, provided the other elements of adverse possession²⁹ were satisfied.³⁰ Consequently,

the Statute of Limitations on Claims for Nazi-Looted Art, 17 CARDOZO ARTS & ENT. L.J. 447, 455 (1999); Petrovich, *supra* note 9, at 1128.

²⁶ See Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119, 126 (1988); Stephen L. Foutty, Recent Development, Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.: *Entrenchment of the Due Diligence Requirement in Replevin Actions for Stolen Art*, 43 VAND. L. REV. 1839, 1840 (1990); Petrovich, *supra* note 9, at 1129.

²⁷ See Linda F. Pinkerton, *Due Diligence in Fine Art Transactions*, 22 CASE W. RES. J. INT'L L. 1, 2 (1990); Meghan A. Sherlock, Comment, *A Combined Discovery Rule and Demand and Refusal Rule for New York: The Need for Equitable Consistency in International Cases of Recovery of Stolen Art and Cultural Property*, 8 TUL. J. INT'L & COMP. L. 483, 487 (2000).

²⁸ Katherine J. Carver, *The Legal Implications and Mysteries Surrounding the Archimedes Palimpsest*, 47 AM. J. LEGAL HIST. 119, 121 (2005); Thomas, *supra* note 16, at 256; Leah E. Eisen, Commentary, *The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World*, 81 J. CRIM. L. & CRIMINOLOGY 1067, 1074-75 (1991).

²⁹ In order to bar the original owner's action in replevin, adverse possession, as traditionally stated, requires property to be possessed in an adverse, visible, open and notorious way, under a claim of right or title (*i.e.* hostile to the title of the original owner), continuously and exclusively for the length of time required by the jurisdiction's applicable statute of limitations. See generally Henry W. Ballantine, *Claim of Title in Adverse Possession*, 28 YALE L.J. 219, 219-24 (1919); Gerstenblith, *supra* note 26, at 120; Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1123 (1985). For more on adverse possession in the context of art theft, see generally Paula A. Franzese, "Georgia on my mind" – *Reflections on O'Keeffe v. Snyder*, 19 SETON HALL L. REV. 1, 2 (1989); Charles D. Webb, Note, *Whose Art is It Anyway? Title Disputes and Resolutions in Art Theft Cases*, 79 KY. L.J. 883, 885-86 (1991).

³⁰ See, e.g., *O'Keeffe v. Snyder*, 405 A.2d 840, 847 (N.J. Super. Ct. App. Div. 1979) ("[T]he property must be possessed for the required period in the required manner. If one of the essential ingredients to adverse possession is missing, the claim for the property is simply not barred."); *Rabinov v. United States*, 329 F. Supp. 830, 841-42 (S.D.N.Y. 1971) (defendant's possession of a violin had been hostile to the rights of the original owner; consequently, all requirements of the adverse possession doctrine were not met, title did not pass and the owner's action in replevin was not time-barred); *Reynolds v. Bagwell*, 198 P.2d 215, 216 (Okla. 1948) ("The statute of limitations as to personal property, though stolen, when held in good faith for value, openly and notoriously, runs in favor of such adverse possession so as to bar a recovery by the true owner after the expiration [of the statutory period].") (alteration in original). See also Thomas, *supra* note 16, at 253, 256; Eisen, *supra* note 28, at 1075-76; Andrea E. Hayworth, Note, *Stolen Artwork: Deciding Ownership is No Pretty Picture*, 43 DUKE L.J. 337, 347-48 (1993); Petrovich, *supra* note 9, at 1142-43.

the limitation period for adverse possession often expired before the original owner could retrieve his possessions or ascertain the identity of the thief or subsequent purchaser.³¹ Difficulties associated with tracing artwork, regardless of diligence on the part of the original owner, often led to difficulty in pursuing legal action; however, such issues are irrelevant to the application of the doctrine of adverse possession, because it traditionally focuses on the actions of the adverse possessor, rather than those of the original owner.³² Indeed, the running of the limitation period could be tolled only in cases of fraudulent concealment giving rise to equitable estoppel.³³ This doctrine “prevents a wrongdoer, who induces the injured party’s delay by fraud, from relying on the statute of limitations as a defense.”³⁴ The limitation period is suspended for the duration of the fraudulent concealment. Thus, the clock commences to run when thieves or purchasers in bad faith start to possess the property openly or when the art object is transferred to an innocent purchaser.³⁵

However, in the context of personal property, difficulties arise. The doctrines of adverse possession and fraudulent concealment were crafted to fit the theft of land and cattle. These concepts did not work nearly as well when extrapolated to cover smaller, easily movable, and concealable objects, as the ordinary (i.e. open and notorious) use of such chattels is no longer likely to put the original owner on notice.³⁶ Artwork is especially vulnerable to being possessed privately and inconspicuously, so that in many cases fraudulent concealment is virtually indistinguishable from open, bona fide possession, which in itself generally involves some concealment.³⁷ In that respect, it is often

³¹ See Thomas, *supra* note 16, at 256; Walton, *supra* note 5, at 579.

³² See Tarquin Preziosi, Note, *Applying a Strict Discovery Rule to Art Stolen in the Past*, 49 HASTINGS L.J. 225, 234 (1997).

³³ See *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 288 (7th Cir. 1990) (“Under this doctrine, a defendant who has by deceit or fraud prevented a potential plaintiff from learning of a cause of action cannot take advantage of his wrongdoing by raising the statute of limitations as a bar to plaintiff’s action.”); *Strasberg v. Odyssey Group, Inc.*, 51 Cal. App. 4th 906, 916 (Cal. Ct. App. 1996) (“[W]here there has been a fraudulent concealment of the facts the statute of limitations does not commence to run until the aggrieved party discovers or ought to have discovered the existence of the cause of action for conversion.”) (citation omitted); *Naftzger v. American Numismatic Society*, 42 Cal. App. 4th 421, 429 (Cal. Ct. App. 1996); see also John P. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875, 897-901 (1933); Gerstenblith, *supra* note 26, at 127; Emily J. Henson, Comment, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners – Can Moral Obligations Be Translated Into Legal Duties?*, 51 DEPAUL L. REV. 1103, 1139 (2002); Petrovich, *supra* note 9, at 1131.

³⁴ Gerstenblith, *supra* note 26, at 127. For a discussion of what conduct on the part of the adverse possessor might constitute fraudulent concealment, see Gerstenblith, *supra* note 26, at 127-31. See also *Republic of Turkey v. OKS Partners*, 797 F. Supp. 64, 69 (D. Mass. 1992); *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1392 (S.D. Ind. 1989) (explaining that although the Indiana District Court applied a different accrual theory (i.e. the discovery rule), it rendered an alternative finding that the doctrine of fraudulent concealment could also be applicable).

³⁵ Petrovich, *supra* note 9, at 1131 n.36.

³⁶ Franzese, *supra* note 29, at 7; Bibas, *supra* note 10, at 2442; Petrovich, *supra* note 9, at 1144.

³⁷ PROT & O’KEEFE, *supra* note 24, at 422; Eisen, *supra* note 30, at 1077-78. The

said that in order to toll the limitation period, the concealment of both the location and possessor must be active and intentional, requiring some affirmative fraudulent act.³⁸ A mere failure to publicly show one's artwork would not in itself amount to wrongful concealment,³⁹ although some authors question this position.⁴⁰ Whether or not, as a result of these ambiguities, major U.S. jurisdictions such as California and New York have abandoned the traditional adverse possession rule, as it was found to be inappropriate for dealing with possessory rights over movable and easily concealable objects like artwork.⁴¹ In order to mitigate the harsh results associated with the application of the traditional doctrine of adverse possession, wherein the limitation period

considerations set out by the Supreme Court of New Jersey in *O'Keeffe v. Snyder* are striking:

The acquisition of title to real and personal property by adverse possession is based on the expiration of a statute of limitations To establish title by adverse possession to chattels, the rule of law has been that the possession must be hostile, actual, visible, exclusive, and continuous [T]here is an inherent problem with many kinds of personal property that will raise questions whether their possession has been open, visible, and notorious For example, if jewelry is stolen from a municipality in one county in New Jersey, it is unlikely that the owner would learn that someone is openly wearing that jewelry in another county or even in the same municipality. Open and visible possession of personal property, such as jewelry, may not be sufficient to put the original owner on actual or constructive notice of the identity of the possessor. The problem is even more acute with works of art. Like many kinds of personal property, works of art are readily moved and easily concealed.

O'Keeffe v. Snyder, 416 A.2d 862, 870-71 (N.J. 1980) (citations omitted). *See also* Bufano v. City & County of San Francisco, 233 Cal. App. 2d 61, 71 (1965) (similarly criticizing this uneasy extrapolation); Erik Jayme, *Globalization in Art Law: Clash of Interests and International Tendencies*, 38 VAND. J. TRANSNAT'L L. 927, 932 (2005).

³⁸ *See* Hawkins, Rothman & Goldstein, *supra* note 22, at 79; Henson, *supra* note 33, at 1139; Petrovich, *supra* note 9, at 1131 n.36.

³⁹ In *O'Keeffe v. Snyder*, the Supreme Court of New Jersey observed that:

O'Keeffe argues that nothing short of public display should be sufficient to alert the true owner and start the statute running. Although there is merit in that contention from the perspective of the original owner, the effect is to impose a heavy burden on the purchasers of paintings who wish to enjoy the paintings in the privacy of their homes.

O'Keeffe, 416 A.2d at 871. In an earlier federal case, the Second Circuit held:

In this case there seems to have been no attempt to secrete the violin. It was kept on Mr. Havemeyer's library table, at his residence at [sic] New York. It was exhibited to many guests, including well-known violinists, at musicales, and was pointed out as the famous 'Kieserwetter Strad.' Short of making a public exhibition of the violin . . . there was little more that could have been done to publish the presence of the violin. But Mr. Havemeyer was not obliged to publicly exhibit, and . . . he did not conceal by keeping silent.

U.S. v. One Stradivarius Kieserwetter Violin, 197 F. 157, 159 (2d Cir. 1912). *See* Hans Kennon, *Take a Picture, it May Last Longer if Guggenheim Becomes the Law of the Land: The Repatriation of Fine Art*, 8 ST. THOMAS L. REV. 373, 410 (1996); Webb, *supra* note 29, at 887.

⁴⁰ *See* Cuba, *supra* note 25, at 454; Eisen, *supra* note 30, at 1078; *see also* Hayworth, *supra* note 30, at 348 (pointing out that the doctrine of adverse possession "creates an almost impossible burden: either the true owner must locate the stolen property or the subsequent possessor must somehow meet the vague requirement of 'open and notorious' possession"); Petrovich, *supra* note 9, at 1147 (justifiably asserting one cannot gloss over "the undeniable fact that not all works of all artists – even many works of considerable value – merit museum display.").

⁴¹ *See* Bibas, *supra* note 10, at 2444; Cuba, *supra* note 25, at 454-55; Sherlock, *supra* note 27, at 488.

starts to run upon the wrongful taking, courts have devised different ways of applying the statute of limitations and allowing it to be tolled.⁴²

2. The Emergence of the Discovery Rule

In *O'Keeffe v. Snyder*,⁴³ the New Jersey Supreme Court blazed the trail for a new accrual theory for actions in replevin, known as the “discovery rule”—an equitable approach that provided an alternative to the uncomfortable confines of the traditional adverse possession analysis.⁴⁴ In that case, the court had to deal with the limitation issue as applied to an original owner who did not discover the identity of the present possessor of her stolen paintings until decades after the expiration of New Jersey’s six-year limitation period.⁴⁵ When O’Keeffe instituted her action in replevin, the current possessor unsurprisingly argued that as a bona fide purchaser he had obtained good title to the paintings through adverse possession.⁴⁶ The trial court held for the defendant. The court found the action time-barred because it was not commenced within six years of the theft.⁴⁷ The appellate division reversed, holding that a private display of the paintings failed to meet the “open and notorious” test pivotal to the doctrine of adverse possession.⁴⁸ Likening the defense of adverse possession to that of the statute of limitations, the court argued that:

[A]ctions for the recovery of property, real or personal, of the character required by the law of adverse possession, has [sic] persisted throughout the statutory period of limitations. With respect to real property, that period is 20 or 30 years. With respect to personal property, that period is six years. In both cases, however,

⁴² See Franzese, *supra* note 29, at 7; Walton, *supra* note 5, at 579.

⁴³ 416 A.2d 862 (N.J. 1980), *rev'g* 405 A.2d 840 (N.J. Super. Ct. App. Div. 1979).

⁴⁴ See Franzese, *supra* note 29, at 7-8.

⁴⁵ See Elisa B. Pollack, *Toward a New Standard in Art Recovery Cases: New York's Solomon R. Guggenheim Foundation v. Lubell and the Rejection of Due Diligence*, 16 COLUM.-VLA J.L. & ARTS 361, 364 (1992). In *O'Keeffe v. Snyder*, the famous artist Georgia O’Keeffe attempted to recover some of her paintings that had been stolen in 1946 from the storage room of her husband’s New York gallery. At the time of the theft, the crime was not reported to any law enforcement agency or insurance company, nor did the victims pursue the employee of the gallery, whom they suspected of the theft. In fact, the loss was not publicized until 1972, when O’Keeffe finally reported the missing paintings to the registry of stolen objects maintained by the Art Dealers Association of America. She had, however, over the years discussed the loss with colleagues and friends in the art world. The missing paintings were ultimately located in a New Jersey gallery in 1975. When O’Keeffe learned of the whereabouts of the paintings, she demanded their return. However, Barry Snyder, the gallery owner, refused. He claimed to have bought the paintings some months earlier in a New York gallery, where they were on consignment. Moreover, the seller, Ulrich Frank, confirmed the sale to Snyder and asserted continuous possession through his father and himself for over thirty years. In late 1975, O’Keeffe instituted an action in replevin against Snyder. *O'Keeffe*, 416 A.2d at 865-66.

⁴⁶ See *O'Keeffe*, 416 A.2d at 865.

⁴⁷ *Id.* at 843. Unfortunately, the full decision of the trial court is unpublished.

⁴⁸ *Id.* at 846. See *DeWeerth v. Baldinger*, 658 F. Supp. 688, 697 (S.D.N.Y. 1987) (rejecting the defendant’s counterclaim based on adverse possession by asserting that “[c]ourts and commentators have noted that the mere residential display of paintings may not constitute the type of open and notorious possession sufficient to afford notice to the true owner.” (quoting *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1164 n.25 (2d Cir. 1982))).

the property must be possessed for the required period in the required manner. If one of the essential ingredients to adverse possession is missing, the claim for the property is simply not barred.⁴⁹

Accordingly, the majority ruled that since the defendant had not proved adverse possession, the plaintiff could reclaim her stolen paintings.⁵⁰

However, a year later the Supreme Court of New Jersey reversed and remanded the case to resolve some factual issues. In doing so, the court rejected the lower courts' reliance on the doctrine of adverse possession, a theory that, in its view, was not responsive to the needs of the art world.⁵¹ The court instead applied the discovery rule to replevin actions for the recovery of stolen property, an accrual concept developed "to avoid harsh results from the mechanical application of the statute [of limitations]."⁵² The court explained:

[U]nder the discovery rule, if an artist diligently seeks the recovery of a lost or stolen painting, but cannot find it or discover the identity of the possessor, the statute of limitations will not begin to run. The rule permits an artist who uses reasonable efforts to report, investigate, and recover a painting to preserve the rights of title and possession.⁵³

In the years preceding *O'Keeffe*, the New Jersey courts had already experimented with the discovery rule, exporting it from its original use in the context of (California) medical malpractice suits⁵⁴ to a host of other areas, such as professional negligence,⁵⁵ product liability,⁵⁶ property damage,⁵⁷ insurance claims⁵⁸ and misrepresentation.⁵⁹ Given this judicial tendency to appeal to the discovery rule "whenever equity and justice have seemed to call for its application[.]"⁶⁰ replevin cases were bound to follow suit. Frequently, in stolen art cases, the owner presumably could not have known of the facts giving rise to his or her

⁴⁹ *O'Keeffe*, 416 A.2d at 847.

⁵⁰ *Id.* at 848.

⁵¹ Writing for the majority, Justice Pollock argued that "the doctrine of adverse possession no longer provides a fair and reasonable means of resolving this kind of dispute." *O'Keeffe*, 416 A.2d at 872.

⁵² *Id.* at 869.

⁵³ *Id.* at 872.

⁵⁴ In 1936, the California Supreme Court adopted the discovery rule in a case of medical malpractice, fashioning it into a potent theory. *Huysman v. Kirsch*, 57 P.2d 908 (Cal. 1936). In the sixties, New Jersey followed this trend. See *Lopez v. Swyer*, 300 A.2d 563 (N.J. 1973); *Yerzy v. Levine*, 271 A.2d 425 (N.J. 1970); *Fernandi v. Strulli*, 173 A.2d 277 (N.J. 1961).

⁵⁵ See *Diamond v. New Jersey Bell Tel. Co.*, 242 A.2d 622 (N.J. 1968) (negligent construction work); *New Market Poultry Farms, Inc. v. Fellows*, 241 A.2d 633 (N.J. 1968) (professional negligence by land surveyors); *Federal Ins. Co. v. Hausler*, 261 A.2d 671 (N.J. Super. Ct. App. Div. 1970) (malpractice of stockbroker).

⁵⁶ See *Burd v. New Jersey Tel. Co.*, 386 A.2d 1310 (N.J. 1978).

⁵⁷ See *Rosenau v. City of New Brunswick*, 238 A.2d 169 (N.J. 1968); *Rosenberg v. Town of North Bergen*, 293 A.2d 662 (N.J. 1972).

⁵⁸ See *Kielb v. Couch*, 374 A.2d 79 (N.J. Super. Ct. App. Div. 1977).

⁵⁹ See *Gibbins v. Kosuga*, 296 A.2d 557 (N.J. Super. Ct. App. Div. 1972).

⁶⁰ *Lopez v. Swyer*, 300 A.2d 563, 566 (N.J. 1973).

action until years after the wrongful taking.⁶¹ Under a discovery rule, the action would only accrue – and the limitation period would only begin to run – at the moment the plaintiff was found to have possessed the requisite knowledge to enable the filing of a claim.⁶²

Yet with *O’Keeffe*, the New Jersey Supreme Court not only introduced the familiar discovery rule in replevin actions for stolen property, “but added a twist: the plaintiff could not claim the tolling benefit of the discovery rule unless the plaintiff had exercised some diligence in continuing to seek the missing goods.”⁶³ In doing so, the discovery rule shifted the burden of proof onto the original owners, who, in order to suspend the statutory limitation period, must provide sufficient evidence of diligence in seeking to ascertain the required information.⁶⁴ Accordingly, the discovery rule became “a vehicle for transporting equitable considerations into the statute of limitations for replevin[.]”⁶⁵ by asking whether the plaintiff knew or, by the exercise of due diligence, should have known of facts that would have enabled her to effectively file suit against the possessor of the artwork.⁶⁶

3. The Proliferation of the Discovery Rule

Following *O’Keeffe v. Snyder*, the equitable approach of applying the discovery rule to resolve the statute of limitation issue in stolen art cases gained approval in other jurisdictions.⁶⁷ Yet, it was not until 1989 that the discovery rule really made its breakthrough in stolen art cases.

⁶¹ See Franzese, *supra* note 29, at 9.

⁶² See Thomas, *supra* note 16, at 256.

⁶³ *Id.* at 257.

⁶⁴ See Gerstenblith, *supra* note 26, at 143-44; Alexandra Minkovich, *The Successful Use of Laches in World War II-Era Art Theft Disputes: It’s Only a Matter of Time*, 27 COLUM. J.L. & ARTS 349, 356 (2004); Schwartz, *supra* note 13, at 5; Webb, *supra* note 29, at 887; Hayworth, *supra* note 30, at 351.

⁶⁵ *O’Keeffe v. Snyder*, 416 A.2d 862, 872 (N.J. 1980).

⁶⁶ See Symeon C. Symeonides, *A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property*, 38 VAND. J. TRANSNAT’L L. 1177, 1196 (2005).

⁶⁷ In *Mucha v. King*, the District Court for the Northern District of Illinois and the Court of Appeals for the Seventh Circuit, applying Illinois law to an action in replevin, sympathized with the discovery rule set out in *O’Keeffe*, underlining the significance of an owner-friendly accrual policy in keeping the limitations clock from ticking. The case concerned Alphonse Mucha’s consignment of the oil painting “Quo Vadis” to a Chicago dealer in 1920. After the artist’s death, his son, Jiri Mucha, maintained sporadic correspondence with the dealer, inquiring about the paintings. In 1982, Jiri Mucha found out that the dealer had sold or given away one of his father’s paintings. An investigation finally led to the then-current owner King, and Mucha filing suit for recovery in 1983. The district court held that the action was not time-barred, since the limitation period was tolled during the fifty-five years of bailment. The term began to run only when Jiri Mucha received notice of the conversion of the painting and the identity of the converter. The Seventh Circuit found it worth noting that “the Supreme Court of New Jersey, in interpreting a discovery rule apparently much like Illinois’, has held that an artist . . . is entitled to invoke the discovery rule when diligently seeking the recovery of a lost or stolen painting.” *Mucha v. King*, 792 F.2d 602, 612 (7th Cir. 1986). However, *Mucha v. King* being a case regarding bailment, the court decided it on other grounds, leaving it somewhat uncertain whether the Seventh Circuit would apply the discovery rule in stolen art cases. *Id.* at 603. See also Phelan, *supra* note 16, at 102-03; Borodkin, *supra* note 15, at 398; Sydney M. Drum, Comment, *DeWeerth v. Baldinger: Making New York a Haven for Stolen Art?*, 64 N.Y.U. L. REV. 909, 921-22 (1989).

Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.,⁶⁸ a federal case applying Indiana law, concerned an action in replevin brought against a dealer concerning mosaics that were stolen from a Cypriot church sometime in the mid-1970s.⁶⁹

Although the Indiana limitation period for claims in replevin is six years, the district court refused to be restricted by the traditional application of the statute of limitations and adopted the discovery rule.⁷⁰ Indiana courts had already used it in other contexts⁷¹ to postpone the time of accrual “until the plaintiffs, *using due diligence*, knew or were on reasonable notice of the identity of the possessor of the mosaics.”⁷²

⁶⁸ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

⁶⁹ The mosaics from the sixth century were of great historical significance as they were among the few religious icons that survived the wave of iconoclasm in eighth century Cyprus. *Id.* at 1396. However, in the aftermath of the 1974 Turkish occupation of Northern Cyprus, large mosaics were cut out of the apse of the Panagia Kanakaria church in Lythragomi. *Id.* at 1379. In 1979, the Cypriot Department of Antiquities learned that the church had been vandalized. *Id.* at 1380. In order to secure the mosaics' return, the Republic of Cyprus, acting on behalf of the Greek-Orthodox Church, immediately reported the loss to heritage organizations (e.g. UNESCO, ICOM,...), scholars and auctioneers (e.g. Christie's, Sotheby's,...). *Id.* Soon, these actions paid off. Upon their discovery in Munich, Germany, two parts of the mosaic, portraying Luke the Evangelist and Bartholomew the Apostle, were returned. Nevertheless, large parts of the valuable mosaics, depicting the figures of Christ, the Archangel, Matthew and James the Apostle remained missing. In 1988, however, Peg Goldberg, an Indiana art dealer, was given the opportunity to purchase some Byzantine mosaics in what seemed to be a rather shady affair. *Id.* at 1381. The \$1.08 million sale of the mosaics occurred in dubious circumstances in the free port area of Geneva's airport. *Id.* at 1382. In spite of this, Goldberg apparently did not request verification of the mosaics' provenance. *Id.* at 1404. When requested by the court, she could not produce any official document attesting authority to export. *Id.* She was allegedly told that the seller had brought the mosaics from a desanctified Cypriot church, after Turkish officials had granted authority to export them. After securing financing, Goldberg simply purchased the mosaics and returned to Indianapolis. *Id.* at 1383. In the fall of 1988, she attempted to sell the artifacts to the Getty Museum. *Id.* at 1384. However, the curator sensed danger and began inquiries that eventually resulted in informing the Cypriot government of the whereabouts of the Kanakaria mosaics. *Id.* After the demand for restitution was made and refused, the Greek-Orthodox Church of Cyprus instituted an action in replevin in March 1989. *Id.* at 1385. Dan Hofstadter gave an illuminating discussion of the facts of the *Autocephalous* case in a two-part series in *The New Yorker*. See Dan Hofstadter, *Annals of the Antiquities Trade: The Angel on Her Shoulder* (pts 1 & 2), *THE NEW YORKER*, July 13, 1992, at 36, *THE NEW YORKER*, July 20, 1992, at 38. See also Hayworth, *supra* note 30, at 352-56; Meredith Van Pelt, Note, *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.: A Case for the Use of Civil Remedies in Effecting the Return of Stolen Art*, 8 *DICK. J. INT'L L.* 441, 443 (1990).

⁷⁰ See Eisen, *supra* note 30, at 1085-86. The district court held that:

The fact that statutes of limitations exist, however, does not mean that the timeliness of a claim is determined solely by the mechanical application of a period of months to a file-stamp date. Rather, under certain circumstances a court is required to evaluate the timeliness of a claim under rules and doctrines of law designed to ensure fairness and equity in the adjudication of claims. The facts of this case warrant that the Court evaluate the timeliness of the plaintiffs' claims

Autocephalous, 717 F. Supp. at 1386.

⁷¹ See, e.g., *Barnes v. A.H. Robins Co.*, 476 N.E.2d 84 (Ind. 1985) (applying the discovery rule to a tort claim concerning an injury caused to the plaintiff by a disease which may have been contracted as a result of protracted exposure to a contraceptive device); *Burks v. Rushmore*, 534 N.E.2d 1101 (Ind. 1989) (expanding the application of the discovery rule to encompass a claim for defamation).

⁷² *Autocephalous*, 717 F. Supp. at 1388 (emphasis added). The court continued:

According to the district court, there is a requirement of due diligence as a corollary to the discovery rule,⁷³ as the court held “that a plaintiff who seeks protection under the discovery rule has a duty to use reasonable diligence to locate the stolen items.”⁷⁴ Since “[d]etermination of due diligence . . . is [a] fact-sensitive” assessment to “be made on a case-by-case basis,”⁷⁵ the district court chronicled the plaintiffs’ “organized and systematic effort to notify those who might assist them and to seek the return of the mosaics.”⁷⁶ In conclusion, the court considered that the action did not accrue in 1979, when Cyprus first learned that the artifacts had been stolen, but in late 1988, when it learned of the identity of the possessor. Accordingly, the suit was filed within the six-year limitation period.⁷⁷

On appeal, the Seventh Circuit affirmed the district court’s decision, ruling that “a plaintiff cannot be said to have ‘discovered’ his cause of action until he learns enough facts to form its basis, which must include the fact that the works are being held by another and who, or at least where, that ‘other’ is.”⁷⁸ The Seventh Circuit went on to say that in its search for the mosaics, Cyprus’ actions satisfied the due diligence requirement of the discovery rule, as they “were sweeping and consistent with [the] trade practices.”⁷⁹ After all, Cyprus had taken “substantial and meaningful steps, from the time it first learned of the disappearance of the mosaics, to locate and recover them.”⁸⁰

Alongside New Jersey, Illinois, and Indiana, Massachusetts and Pennsylvania also adhere to the discovery rule for claims for the recovery of stolen artifacts. In *Republic of Turkey v. OKS Partners*,⁸¹ Turkey filed an action in replevin against the possessor of ancient

In a replevin action, a plaintiff sues a defendant for the recovery of specific property. An element of the cause of action is the defendant’s wrongful detaining or wrongful possession of the property sought to be recovered. In order to maintain a replevin action, the plaintiff must know who is in possession of the property at issue. If a plaintiff is unable to determine the possessor of stolen items, the plaintiff cannot maintain a cause of action in replevin.

Id. at 1389. The *Autocephalous* Court was clearly influenced by the New Jersey decision in *O’Keeffe*. See *supra* notes 43-66 and accompanying text; see also Foutty, *supra* note 26, at 1855-57.

⁷³ Henson, *supra* note 33, at 1132.

⁷⁴ *Autocephalous*, 717 F. Supp. at 1389.

⁷⁵ Montagu, *supra* note 10, at 82.

⁷⁶ *Autocephalous*, 717 F. Supp. at 1389.

⁷⁷ *Id.* at 1391.

⁷⁸ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 289 (7th Cir. 1990) (citing *O’Keeffe v. Snyder*, 416 A.2d 862, 869-70 (N.J. 1980)).

⁷⁹ *Id.* at 290.

⁸⁰ *Id.*

⁸¹ 797 F. Supp. 64 (D. Mass. 1992) (denying motion to dismiss), *discovery motion granted in part and denied in part*, 146 F.R.D. 24 (D. Mass. 1993), *summary judgment denied*, No. 89-3061-WJS, 1994 U.S. Dist. LEXIS 17032, at *1 (D. Mass. June 8, 1994), *summary judgment on different claims denied*, No. 89-CV-3061-RGS, 1998 U.S. Dist. LEXIS 23526, at *1 (D. Mass. Jan., 23 1998). The parties settled in 1999.

coins.⁸² The district court ruled that the statute of limitations did not bar Turkey's action in replevin, since the facts giving rise to the cause of action were "inherently unknowable" to the plaintiff.⁸³ In *Erisoty v. Rizik*,⁸⁴ a Pennsylvania District Court faced a somewhat unusual action, in that the plaintiff was a bona fide purchaser of a painting who filed suit against the original owner seeking declaratory and injunctive relief, correspondingly awarding him possession of and title to the artwork.⁸⁵ Again, the court chose to apply a discovery rule, thereby shifting the focus to the original owner's diligence.⁸⁶ The court reasoned that "the standard is not whether [the plaintiffs] did everything that might have been done with the benefit of hindsight, but whether their efforts were reasonable given the facts of the case."⁸⁷

⁸² The plaintiff alleged that the coins were Lycian, discovered in Anatolia, on the Southern coast of Turkey, and illicitly sold, in violation of the National Stolen Properties Act. *Republic of Turkey*, 1998 U.S. Dist. LEXIS 23526, at *4. Under Turkish law, all antiquities within Turkey's borders are Turkish national property, even before they are unearthed. *Republic of Turkey*, 797 F. Supp. at 66-67. For more details about this case regarding an action for smuggling under the Racketeer Influenced and Corrupt Organizations (RICO) Act 1970, see Lawrence M. Kaye, *The Recovery of Stolen Cultural Property: A Practitioner's View—War Stories and Morality Tales*, 5 VILL. SPORTS & ENT. L.J. 5, 10-13 (1998); Kennon, *supra* note 39, at 412-14; see generally Marilyn E. Phelan, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects Confirms a Separate Property Status for Cultural Treasures*, 5 VILL. SPORTS & ENT. L.J. 31, 55 n.138 (1998). RICO was passed by the U.S. Congress to enable persons financially injured by a pattern of criminal activity to seek redress through the state or federal courts. See Ichiyasu v. Christie, Manson & Woods Int'l, 637 F. Supp. 187 (N.D. Ill. 1986).

⁸³ *Republic of Turkey*, 797 F. Supp. at 69 ("[A] plaintiff cannot be said to have 'discovered' his cause of action until he learns enough facts to form its basis, which must include the fact that the works are being held by another and who, or at least where, that 'other' is."). At any rate, for the purpose of tolling the statute of limitations, the court explained that it could either apply the discovery rule or the doctrine of fraudulent concealment. *Id.* at 69-70.

⁸⁴ No. 93-6215, 1995 U.S. Dist. LEXIS 2096, at *1 (E.D. Pa. Feb. 23, 1995), *aff'd without opinion*, No. 95-1807, 1996 U.S. App. LEXIS 14999 (3d Cir. May 7, 1996).

⁸⁵ In July 1960, three works by the Italian painter Corrado Giaquinto were stolen from the Washington, D.C. home of the Rizik family. Almost thirty years later, Stephen Erisoty, a Philadelphia art restorer, had acquired one of the paintings at an auction for \$29,050. The consignor was the owner of a cleaning service, who had found the painting, in terrible condition, while removing unwanted furniture from a Philadelphia home some months earlier. The Riziks were not aware of what had happened to their painting until September 1993, when the FBI notified them that one of their paintings had been recovered. Having been alerted by the International Foundation for Art Research (IFAR) and the Philadelphia Museum of Art, the FBI seized the painting from Erisoty's home, without filing an interpleader action. A bewildered Erisoty had handed over the painting, though he alleged that he had lawfully purchased it. When he demanded return of the painting, the Riziks refused and Erisoty filed suit. See *id.*; see generally Jonathan Bloom, *Stolen Art*, in ART LAW HANDBOOK 281, 304 (Roy S. Kaufman ed., 2000).

⁸⁶ *Erisoty*, 1995 U.S. Dist. LEXIS 2096, at *28 ("We note that any 'laziness' this rule might at first blush invite on the part of plaintiffs is heavily tempered by the requirement that, all the while, the plaintiff must exercise due diligence to investigate the theft and recover the works" (quoting *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 289 (7th Cir. 1990))).

⁸⁷ *Id.* at *41 (alteration in original). Like the parties, the court focused its attention largely on whether the Riziks' efforts to trace the artwork were sufficiently diligent to overcome the statute of limitations. In deciding the due diligence issue, the court took into account the abilities of the parties, reasoning:

The discovery rule is fact-sensitive so as to adjust the level of scrutiny as is appropriate in light of the identity of the parties; what efforts are reasonable for an individual who is relatively unfamiliar with the art world may not be reasonable for a savvy collector, a gallery, or a museum.

In addition to the aforementioned states where courts have applied a discovery rule to actions in replevin regarding stolen artwork, the Ohio legislature has adopted a general discovery rule for replevin actions regarding any kind of stolen chattel.⁸⁸ One writer has gone so far as to state that the “discovery rule has now become the majority rule in replevin actions for the recovery of stolen art, followed in almost every jurisdiction.”⁸⁹ However, as a leading property lawyer has justifiably observed, such a characterization seems a bit premature, given the almost complete absence of art theft related litigation in the

Id. At *40. Until *Erisoty*, no court had ever established a clearly defined standard of diligence, nor explained what due diligence entails. The *Erisoty* Court explained:

In determining whether to apply the [discovery] rule, all relevant factors should be considered including, but not limited to, the following: (1) the nature of the injury; (2) the availability and quality of witnesses and physical evidence; (3) the lapse of time since the initial wrongful act; (4) whether the circumstances permit the inference that the delay has been intentional or deliberate; and (5) whether the delay has unusually prejudiced the defendant.

Id. at * 35 (quoting John G. Petrovich, Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1152 (1980)); see also Minkovich, *supra* note 64, at 358-60; Patricia Y. Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-faith Purchasers of Stolen Art*, 50 DUKE L.J. 955, 993 (2001); Schwartz, *supra* note 13, at 5.

⁸⁸ In 1988, nearly two decades after the death of German-born American artist Eva Hesse, her sister, and administratrix of her estate, Helen Charash, discovered that the Ohio Oberlin College had a large collection of Hesse's drawings. Believing that the donor lacked good title to the drawings, Charash filed suit against Oberlin College for conversion of the Hesse drawings. The district court found for the defendant, holding that the Ohio statute of limitations barred Charash's claim in conversion. On appeal, the Sixth Circuit looked to the Ohio Revised Code which states that the statute of limitations starts tolling when the plaintiff has actual or constructive notice. Consequently, the court decided, under Ohio law, the limitation period ran from the time Charash had constructive notice of the donation to the college. See *Charash v. Oberlin College*, No. 91-00578 (N.D. Ohio July 7, 1994), *vacated*, 14 F.3d 291 (6th Cir. 1994). Another Ohio case involves a title dispute over a Gauguin painting between the Toledo Museum of Art and the heirs of Martha Nathan, a German Jew who fled to Switzerland to escape Nazi persecution. In December 1938, Nathan sold the Gauguin painting for roughly \$7,000 to Wildenstein & Co., a group of Jewish art dealers. In 1939, the Toledo Museum of Art purchased it from Wildenstein for \$25,000. Ever since, it has been on display in Ohio and internationally, with reference to Nathan as previous owner. In May 2004, Nathan's heirs contacted the Toledo Museum to reclaim the painting. In early 2006, the museum filed an action to quiet title, seeking declaratory relief. The museum argued that the heirs' action in conversion was barred since, under Ohio law, these actions must be brought within four years after the injured party discovered or should reasonably have discovered the injury and the wrongdoer. The District Court for the Northern District of Ohio found for the museum, holding that the heirs should have discovered the work in the possession of the museum well before 2006. Furthermore, the court concluded that Nathan did not sell the painting under duress. After all, it was striking that none of the claims for wartime losses that Nathan and her estate pursued after WWII regarded the Gauguin painting. In addition, the court noticed that Nathan had dealt with Jewish dealers and that neither she nor the paintings were in occupied territory at the time of the sale. See *Toledo Museum of A.D. Ohio Dec. 28, 2006*; Robin Pogrebin, *Arts, Briefly; Museums Battle Heirs for Art*, N.Y. TIMES, Jan. 27, 2006, at E4. Notwithstanding the Ohio courts' application of a constructive discovery rule, it is striking that the Ohio State Legislature complemented the limitation rules with a discovery provision, without incorporating a corollary due diligence rule. See OHIO REV. CODE ANN. § 2305.09 (LexisNexis 2005) (“If the action is for . . . the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered.”). For similar problems regarding the standard of discovery in California courts, see *infra* notes 103-121 and accompanying text.

⁸⁹ Hayworth, *supra* note 30, at 356.

majority of the states.⁹⁰ Moreover, New York notably applies an accrual doctrine clearly distinct from the widespread discovery rule. It is hard to overestimate the importance of New York's "demand and refusal" rule for the law of replevin, especially given the city's role as a center of the international art trade.⁹¹

B. California's Complex Limitation Rules

Nonetheless, aside from New York's exceptional accrual theory of "demand and refusal," the equitable discovery rule has undeniable appeal. For obvious reasons, California adheres to this equitable discovery rule for accrual too. However, in the Golden State, the rule that the cause of action to recover stolen artwork does not accrue until the time the owner discovers the location of the property is explicitly grounded in statute.⁹² California added a discovery provision to its three-year statute of limitations for actions in replevin in 1983, and the amendment has substantially complicated California's position on the limitation issue.

Before 1983, section 338 of the California Code of Civil Procedure (Cal. Code Civ. Proc.) did not specify when the clock started to run on the limitation period, nor did it consider actions in replevin for stolen artwork differently from those regarding other types of chattels. Instead, section 338(3) merely set out a straightforward three-year limitation period for "actions for the specific recovery of personal property[.]" and remained silent about the time of accrual, leaving this issue for the courts to decide.⁹³ Under the 1983 amended rule,

[t]he cause of action in the case of theft, as defined in section 484 of the Penal Code, of any art or artifact is not deemed to have accrued

⁹⁰ Thomas, *supra* note 16, at 259. See, e.g., *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 U.S. Dist. LEXIS 28364 (E.D. Mich. Mar. 31, 2007). This recent Michigan case revolves around an allegedly looted van Gogh painting, entitled "*Les Becheurs*" (The Diggers). The work once belonged to the previously mentioned Martha Nathan (see *supra* note 84), who, in 1938, shortly before fleeing to Switzerland, sold it for approximately \$9,360 to the Jewish art dealers Wildenstein & Co., who subsequently sold the painting to Detroit collector Robert Tannahill. Upon Tannahill's death in 1969, he donated "*Les Becheurs*" to the Detroit Institute of Arts. In May 2004, Martha Nathan's heirs approached the Detroit Institute of Arts and asserted an ownership claim over the painting, which they alleged to have been sold under coercion. In 2006, the Detroit Institute of Arts lodged a claim to quiet title in the Michigan Eastern District Court. The court concluded that the heirs' actions for recovery were barred by the Michigan three-year statute of limitations. The court held that under Michigan law, the cause of action for a claim in conversion or replevin accrues upon the wrongful taking, and that the discovery rule does not apply.

⁹¹ The New York accrual doctrine of "demand and refusal" is beyond the scope of this article. See generally Hawkins, Rothman & Goldstein, *supra* note 22, at 49-77; Kennon, *supra* note 39, at 393-407; Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes over Title*, 31 N.Y.U. J. INT'L L. & POL. 15, 20-28 (1998); Pollack, *supra* note 45, at 361-79; Reyhan, *supra* note 87, at 994-1002; Walton, *supra* note 5, at 585-92; Drum, *supra* note 67, at 909-42; Hayworth, *supra* note 30, at 360-83; Sherlock, *supra* note 27, at 489-97.

⁹² Walton, *supra* note 5, at 595.

⁹³ Shapreau, *supra* note 8, at 21. Before 1983, it was traditionally held that under California law the limitation period for actions in replevin or conversion commenced at the time of the theft. See, e.g., *San Francisco Credit Clearing House v. Wells*, 239 P. 319 (Cal. 1925).

until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft.⁹⁴

The 1983 amendment's purport was significant, as it not only established an important distinction between art and other personal property, but it also distinguished between pre- and post-1983 theft cases.⁹⁵ Thus, despite the fact that the limitation rules have been amended, the pre-1983 text is not devoid of meaning for illicit takings that occurred before 1983.⁹⁶

Moreover, in 2002, California subsequently adopted a special limitation rule, section 354.3 Cal. Code Civ. Proc. (Holocaust-Era Claims Provision), for claims regarding Holocaust-era thefts of artwork⁹⁷ brought against museums or galleries that display, exhibit or sell any article of historical, interpretive, scientific, or artistic significance.⁹⁸ Any action regarding Holocaust-era lootings brought under this section shall not be dismissed for failure to comply with the applicable statute of limitations, provided that the action is commenced on or before December 31, 2010.⁹⁹ The Holocaust-Era Claims Provision, which became effective on January 1, 2003, added to the fragmentation, by introducing several additional distinctions both between Holocaust-related and other cases of art theft, and between actions in replevin brought against individuals on the one hand and against galleries or museums on the other.¹⁰⁰ The Holocaust-Era Claims Provision, additionally, is far from being uncontroversial. In *von Saher v. Norton Simon Museum of Art*, its constitutionality was challenged.¹⁰¹ In addition, the *von Saher* case subsequently led the California legislature to approve Assembly Bill No. 2765, which once again amended the limitation rules on stolen art claims.¹⁰²

The 1983 amendment is not without controversy either, largely

⁹⁴ Stats. 1982, ch. 340, § 1. The text has undergone some further minor changes since 1983. In 1988, section 338(3) was redesignated as 338(c). Stats. 1988, ch. 1186, § 1. In 1989 the California Legislature replaced the words "art or artifact" by the phrase "article of historical, interpretive, scientific, or artistic significance." Stats. 1989, ch. 467, § 1. See also Carla J. Shapreau, *California's Discovery Rule is Applied to Delay Accrual of Replevin Claims in Cases Involving Stolen Art*, 1 ART ANTIQUITY & LAW 407, 408 (1996) (U.K.).

⁹⁵ Redman, *supra* note 22, at 213; Shapreau, *supra* note 94, at 408.

⁹⁶ Redman, *supra* note 22, at 215; Shapreau, *supra* note 94, at 408.

⁹⁷ "'Holocaust-era artwork' means any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945, inclusive." CAL. CIV. PROC. CODE § 354.3(a)(2) (West 2006).

⁹⁸ "Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any entity described in paragraph (1) of subdivision (a)." CAL. CIV. PROC. CODE § 354.3(b) (West 2006).

⁹⁹ CAL. CIV. PROC. CODE § 354.3(c) (West 2006).

¹⁰⁰ Redman, *supra* note 22, at 213.

¹⁰¹ *Von Saher v. Norton Simon Museum of Art*, 2007 U.S. Dist. LEXIS 95757, at *3, *5 (C.D. Cal. Oct. 18, 2007). For a thorough analysis of this case, see *infra* notes 122-381 and accompanying text. For specific details on the provision's unconstitutional nature, see 208-241.

¹⁰² Stats. 2010, ch. 691. For an analysis of this act to amend Section 338 Cal. Code Civ. Proc., see 278-290.

because it is silent on the issue of retroactivity. In addition, decisions from the state intermediate appellate courts have reached differing conclusions in defining the exact time of accrual of the cause of action for pre-1983 takings. In *Naftzger v. American Numismatic Society*,¹⁰³ the California Court of Appeals held that a cause of action for the return of personal property stolen before the 1983 amendment accrues “when the owner discovered the identity of the person in possession of the stolen property, and not when the theft occurred.”¹⁰⁴ At issue on appeal was whether the discovery rule of section 338(c) applied retroactively to actions arising from a pre-1983 theft. The court apparently thought not, yet concluded that “there was a discovery rule of accrual implicit in the prior version of section 338,”¹⁰⁵ so that the cause of action accrued upon actual discovery of the identity of the purchaser.¹⁰⁶ It is noteworthy that in *Naftzger* the Court focused on the *actual* rather than the more traditional *constructive* discovery to delay accrual, as it ruled that the diligence of the theft victim in tracing his property was not part of the pre-1983 discovery rule.¹⁰⁷ However, several authors have pointed out that the court would most likely consider the victim’s diligence in assessing a laches defense.¹⁰⁸

In *Society of California Pioneers v. Baker*,¹⁰⁹ California’s First

¹⁰³ 49 Cal. Rptr. 2d 784. (Cal. Ct. App. 1994), *rev’g* No. BC075918 (Cal. Sup. Ct. 1994), *modified and reh’g denied*, 42 Cal. App. 4th 1806B (Cal. Ct. App. 1996), *appeal denied*, 1996 Cal. LEXIS 2393 (Cal. 1996). This case concerned an action to quiet title brought by a bona fide purchaser against a New York museum from which 129 coins had been stolen. Although the theft occurred sometime around 1970, the criminal act remained undiscovered until 1990. The museum demanded restitution as soon as it found out that some of the missing coins were in the possession of Roy Naftzger. The latter refused, instead bringing an action seeking declaratory relief. The trial court found for Naftzger, applying an adverse possession theory. The three-year limitation period had expired, thus barring the action in replevin, which had started to run from the time of the theft. *Id.* at 792. *See generally* Lerner, *supra* note 91, at 32-33; John H. Merryman & Carla Shapreau, *Reversals in Two California Cases Prompt Debate on Time Limits*, IFAR REP. No. 5, 1996, at 4; Redman, *supra* note 22, at 213-15; Carla Shapreau, *California Adopts an “Actual” Discover Accrual Rule for Claims to Recover Stolen Art*, 7 INT’L J. CULTURAL. PROP. 177 (1998) (U.K.); Carla Shapreau, *California Court of Appeals Adopts Discovery Rule in Cases to Recover Stolen Art*, IFAR REP. No. 5, 1996, at 2; Walton, *supra* note 5, at 595-96; Preziosi, *supra* note 32, at 238-39.

¹⁰⁴ *Naftzger*, 49 Cal. Rptr. 2d at 786.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*; *see also id.* at 788 (pointing out, in *dicta*, that a thief of personal property cannot transfer title by adverse possession).

¹⁰⁷ *Id.* at 786. A *constructive* discovery rule delays accrual until the plaintiff actually discovers, or through the use of due diligence *should have discovered*, the theft.

¹⁰⁸ *See* Lerner, *supra* note 91, at 33; Shapreau, *supra* note 94, at 408. For general background information about the doctrine of laches as applied by U.S. courts, *see Developments in the Law – Statutes of Limitations*, 63 HARV. L. REV. 1177, 1183-85 (1950); Uisdean R. Vass & Xia Chen, *The Admiralty Doctrine of Laches*, 53 LA. L. REV. 495, 497-523 (1992); Ashraf R. Ibrahim, Note, *The Doctrine of Laches in International Law*, 83 VA. L. REV. 647 (1997); Thomas G. Robinson, Note, *Laches in Federal Substantive Law: Relation to Statutes of Limitation*, 56 B.U. L. REV. 970 (1976). For more on the use of the equitable defense of laches against claims in replevin regarding stolen artworks, *see* Jeremy G. Epstein, *The Laches Defense in Art Theft Litigation*, IFAR J. No. 1, 2001, at 44; Minkovich, *supra* note 64, at 361-74.

¹⁰⁹ Soc’y of Cal. Pioneers v. Baker, No. 92-945939 (Cal. App. Dep’t Super. Ct. May 2, 1997) (granting summary judgment for defendant), *rev’d*, 50 Cal. Rptr. 2d 865 (Cal. Ct. App. 1996) (ordering trial court to enter judgment for plaintiff).

District, Appellate Court noted its disagreement with the decision of the Second District, Appellate Court in *Naftzger* “as to the state of the law prior to the 1983 amendment.”¹¹⁰ In the *Baker* case, the appellate court reversed the decision of the trial court, which had ruled in favor of the defendant, finding that the three-year limitation period had started to run at the time of the theft. The appellate court held that prior to the 1983 amendment, “the statute of limitations in an action concerning stolen property began to run anew against a subsequent purchaser,”¹¹¹ thus reinstating the term each time the relevant object, a cane handle, changed hands. Since Baker bought the collectible in 1980, the limitation period was still running when the 1983 amendment entered into force. Accordingly, the court argued that the plaintiff’s action in replevin fell within the 1983 statute of limitations, clearing the way for the discovery rule to apply. The court found the action for recovery timely, given that it only accrued in 1992 when the society came across the stolen cane handle in Baker’s possession.¹¹² Notwithstanding that the decision was grounded on the 1983 discovery rule, the appellate court criticized the actual discovery standard of the *Naftzger* decision in *dicta*, implying that under California law the owner’s diligence is a factor to be considered when applying a discovery rule.¹¹³

Thus far, the California Supreme Court has not addressed the issue of whether the 1983 amendment is retroactive, nor whether the pre-1983 version of the statute of limitations actually implies a discovery rule. However in *Orkin v. Taylor*,¹¹⁴ the Ninth Circuit undertook an

¹¹⁰ *Id.* at 870 n.10. The case revolved around the 1978 theft of a valuable cane handle. In 1991, Baker bought the handle from Kah, who had received the object as a gift from his mother in 1980. *Id.* at 866-67. See generally Lerner, *supra* note 91, at 33-34; Merryman & Shapreau, *supra* note 103, at 4; Redman, *supra* note 22, at 214; Shapreau, *supra* note 94, at 410-11; Walton, *supra* note 5, at 596; Preziosi, *supra* note 32, at 238-40.

¹¹¹ *Soc’y of Cal. Pioneers*, 50 Cal. Rptr. 2d at 870.

¹¹² See *id.* at 871.

¹¹³ *Id.* at 870 n.10; see also Lerner, *supra* note 91, at 33-34; Shapreau, *supra* note 94, at 411.

¹¹⁴ 487 F.3d 734 (9th Cir. 2007). This case revolved around a painting by Van Gogh, which was once the property of a German Jew, Margarete Mauthner, an early collector of his work. Mauthner’s heirs claimed that she had been wrongfully dispossessed of the painting during Hitler’s Nazi regime, entitling them to its ownership. In April 1963, the famous actress Elizabeth Taylor bought the painting at a Sotheby’s London auction for £92,000. Taylor’s acquisition was much publicized at the time. In the following decades, Taylor was identified as the owner on numerous occasions: her name figured in the catalogue raisonné; she openly lent the work to several prestigious exhibitions; in 1990, amidst much public comment, she consigned it for sale to Christie’s, London, yet her efforts to sell the work were unsuccessful. In spite of the foregoing, the Mauthner heirs claimed that they first learned of Taylor possessing the painting in 2002, through a rumor on the Internet that she was interested in selling it. In December 2003, they wrote a letter, demanding the surrender of the painting. After unsuccessful settlement discussions, Taylor filed a complaint seeking declaratory relief to establish her title. The dispute focused on the circumstances under which Mauthner had parted with the painting. Mauthner had fled Germany to South Africa in 1939, leaving her possessions behind. She remained there until her death in 1947. What happened to the painting during the 1930s is clouded in uncertainty. It was common case that Mauthner once owned the painting, and that it was later possessed by Alfred Wolf, a Jewish businessman who left Germany for Switzerland in 1934. Taylor bought the painting in 1963 from Wolf’s estate. Mauthner’s heirs admitted that the Van Gogh had not been confiscated by the Nazis, but alleged economic coercion, contending that she sold the work “under duress” before fleeing Germany. Accordingly, they relied on the presumption established

assessment of California law,¹¹⁵ and concluded that the California Supreme Court would most likely endorse the standard set out in *Jolly v. Eli Lilly & Co.*,¹¹⁶ prescribing that “the discovery rule, whenever it applies, incorporates the principle of constructive notice.”¹¹⁷ In *Jolly*, the California Supreme Court held that, under California’s discovery rule, “[a] plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her.”¹¹⁸ Thus, in *Orkin*, the Ninth Circuit reiterated that “under the discovery rule, a cause of action accrues when the plaintiff discovered *or reasonably could have discovered* her claim to and the whereabouts of her property.”¹¹⁹ Consequently, the Ninth Circuit found that the heirs’ claims for recovery were time-barred under Cal. Code Civ. Proc. section 338(c), because even under the most plaintiff-friendly accrual rule, the claims expired in, or before 1993, three years after the last public announcement of Taylor’s ownership.¹²⁰ Previously, the district court had rejected the heirs’ argument that the Holocaust-Era Claims Provision of section 354.3 applied to claims brought against private individuals like Elizabeth Taylor. The court noted that the limitation rule only concerns actions against museums and galleries.¹²¹ Shortly thereafter, this issue resurfaced in *von Saher v. Norton Simon Museum of Art*.

II. THE LIMITATION DEFENSE IN *VON SAHER*

Prior to the recent decision in *von Saher v. Norton Simon Museum*

by the Military Government Law No. 59 that any transfer or relinquishment of property by a persecuted person within the period of January 30, 1933 to May 8, 1945 was an act of confiscation. Taylor, on the other hand, argued that elements in the record showed that the painting was sold to another Jewish collector, with no evidence of any Nazi coercion in the transaction. The court held for Taylor. *Id.* at 735-38. See generally Matthew Batters & Sharon Flescher, *Liz Taylor Seeks Court's Aid in Holocaust Claim*, IFAR J. No. 1, 2004, at 6-7; Lauren F. Redman, *Orkin v. Taylor: A Satisfying Solution to a Dispute Over a Van Gogh or a Blow for Holocaust Art Restitution Claims in United States Federal Court?*, 12 ART ANTIQUITY & L., 2007, at 389 (U.K.); Steven A. Reiss & Jonathan Bloom, *The Good Faith Owner and the Tardy Heir*, IFAR J. No. 2, 2008, at 13-18; Shapreau, *supra* note 8, at 28-29; Linda Greenhouse, *Elizabeth Taylor to Keep Van Gogh*, N.Y. TIMES, Oct. 30, 2007, at E2, available at http://www.nytimes.com/2007/10/30/arts/30arts-ELIZABETH_TAY_BRF.html.

¹¹⁵ “The task of a federal court in a diversity action is to approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum.” If the state’s highest court has not decided the question presented, then it must predict “how the highest court would resolve it.” *Ticknor v. Choice Hotels Int’l Inc.*, 265 F.3d 931, 939 (9th Cir. 2001) (quoting *Gee v. Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir. 1980), and *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986)).

¹¹⁶ 751 P.2d 923 (Cal. 1988).

¹¹⁷ *Orkin*, 487 F.3d at 741.

¹¹⁸ *Jolly*, 751 P.2d at 927 (citing *Sanchez v. South Hoover Hosp.*, 553 P.2d 1129, 1136 (Cal. 1976)).

¹¹⁹ *Orkin*, 487 F.3d at 741.

¹²⁰ See *id.* at 742. It is significant that the Ninth Circuit neither decided the issue of whether the 1983 amendment is retroactive, nor whether the pre-1983 version of the statute of limitations actually implies a discovery rule. The court merely concluded that the heirs’ claims were barred even under the most plaintiff-friendly possible rule for accrual.

¹²¹ *Adler v. Taylor*, No. CV 04-8472-RGK (FMOx), 2005 U.S. Dist. LEXIS 5862, at *10-11 (C.D. Cal. Feb. 2, 2005).

of Art, it was well established, as discussed *supra*, that California had a statute of limitations rule distinguishing between thefts that occurred before 1983 and those occurring after. Within the former group, section 354.3 prolongs the limitation period for otherwise expired actions regarding Holocaust-related thefts, when those actions are brought against galleries or museums. In addition to the *Orkin* court's review of the *Naftzger* standard for discovery, the *von Saher* court reshuffled the cards once more, readjusting again the trichotomy of the California statute of limitation rules.

A. Factual Background

1. Wartime Looting and Early Restitution in the Netherlands

Jacques Goudstikker, a Dutch Jew, was one of the major art dealers in prewar Europe. He specialized in paintings by the Dutch, Flemish and Italian masters.¹²² In 1919, at the age of 21, he joined the Amsterdam-based family business that would make him extremely wealthy by the time the war broke out.¹²³ On May 14, 1940, only days before the German troops marched into the city, Goudstikker fled Amsterdam, together with his wife Désirée von Halban-Kurz, a fashionable Viennese opera singer, and Edouard, their infant son.¹²⁴ The Goudstikkers were unable to take any of their prized paintings with them. They left their assets behind in the canal-side art gallery in Amsterdam. The Goudstikker collection totaled more than 1,100 paintings, including masterworks by Rembrandt, Rubens, van Dyck and Lorrain.¹²⁵ On May 16, 1940, while crossing to Britain on one of the last blacked-out freighters to leave before the Germans occupied the Dutch coast, tragedy struck once more as Goudstikker, walking the deck, accidentally fell into the hold and died, at the age of 42.¹²⁶ He was buried in England.¹²⁷ Désirée and Edouard were refused asylum in the United Kingdom, so they continued their journey to Canada and finally settled in the United States.¹²⁸ By good fortune, among the few

¹²² Alan Riding, *Göring, Rembrandt and the Little Black Book*, N.Y. TIMES, Mar. 26, 2006, at E1, available at <http://www.nytimes.com/2006/03/26/arts/design/26ridi.html>.

¹²³ For a short overview of Goudstikker's professional career, see *Origins Unknown - Interim Report II*, at 12, see <http://www.herkomstgezocht.nl/eng/rapportage/content.html> (last visited Sept. 22, 2010).

¹²⁴ ELTJO J.H. SCHRAGE, *DIE REGELN DER KUNST [THE RULES OF THE ART]* 51 (NOMOS-VERL.-GES 2009) (F.R.G.); Riding, *supra* note 122.

¹²⁵ See *supra* note 123, *Deelrapportage II [Interim Report II]* at 12, 22, 51, 102, 133; Riding, *supra* note 122. See also *von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016, 1021 (9th Cir. 2009).

¹²⁶ See KATJA LUBINA, *CONTESTED CULTURAL PROPERTY: THE RETURN OF NAZI SPOILIATED ART AND HUMAN REMAINS FROM PUBLIC COLLECTIONS* 319 (2009); Riding, *supra* note 122.

¹²⁷ For a detailed account of Goudstikker's life, business and death, see PIETER DEN HOLLANDER, *DE ZAAK GOUDSTIKKER [THE GOUDSTIKKER CASE]* (Meulenhoff 1998) (Neth.); PETER C. SUTTON, *RECLAIMED: PAINTINGS FROM THE COLLECTION OF JACQUES GOUDSTIKKER* (Bruce Museum 2008).

¹²⁸ SCHRAGE, *supra* note 124, at 51.

possessions she had been able to save, Désirée carried with her a small black notebook she had found on Goudstikker's body. The leather notebook listed in alphabetical order by painter, the entire business stock of 1,113 paintings the family had left behind, recounting each work's title, size, date of purchase, and purchase price.¹²⁹

In the meantime, within weeks of Goudstikker's departure, high-ranked Nazi officials had begun making frenetic attempts to seize his gallery holdings under color of law.¹³⁰ Mr. Sternheim, the agent Goudstikker had appointed to take care of the gallery during his absence, unexpectedly died of a heart attack on May 10, 1940, whereupon, two employees of Goudstikker, Arie Ten Broek and Jan Dik Sr., undertook the administration of the business.¹³¹ On June 3, 1940, during an extraordinary shareholders' meeting attended by Emily Sellisberger, Goudstikker's mother, Ten Broek was appointed president of the Goudstikker Company.¹³² Around that time, he was approached by Alois Miedl, a German banker and businessman, who had been living in the Netherlands since the early 1930s.¹³³ Miedl was keen on taking over the Goudstikker business and he succeeded in doing so in July 1940. A mere month after Ten Broek's appointment, by contract dated July 1, 1940, Miedl acquired all of the company's assets (both movables and real estate), as well as the trading name.¹³⁴ However, this original contract was amended only two weeks later;¹³⁵ Nazi-Commander Hermann Göring coveted the Goudstikker collection for Carinhall, his private residence near Berlin.¹³⁶ Thus, on July 13, 1940, Göring paid 2,000,000 guilders for an exquisite selection of 779 paintings, while Miedl paid 550,000 guilders for the remaining paintings, collectibles, the art historical library, all shares in the company, and the trading name, not to mention Goudstikker's canal-side mansion, his twelfth-century castle Nijenrode, and another eighteenth-century country house, near Amsterdam.¹³⁷

It is often somewhat short-sightedly argued that the 1940 sales to Göring and Miedl were voluntary, because they were approved by the company's president Ten Broek and Goudstikker's mother.¹³⁸

¹²⁹ See Riding, *supra* note 122.

¹³⁰ See LUBINA, *supra* note 126, at 319-20; SCHRAGE, *supra* note 124, at 52.

¹³¹ SCHRAGE, *supra* note 124, at 51-52.

¹³² See LUBINA, *supra* note 126, at 319; SCHRAGE, *supra* note 124, at 52.

¹³³ See LUBINA, *supra* note 126, at 319; SCHRAGE, *supra* note 124, at 52.

¹³⁴ LUBINA, *supra* note 126, at 319; SCHRAGE, *supra* note 124, at 52.

¹³⁵ LUBINA, *supra* note 126, at 319-20; SCHRAGE, *supra* note 124, at 52.

¹³⁶ Michael Janofsky, *Norton Simon Museum Faces Dispute Over Cranach's 'Adam,' 'Eve,'* <http://www.bloomberg.com/apps/news?pid=newsarchive&refer=home&sid=aRzY5IH1XBBg> (last visited Sept. 22, 2010).

¹³⁷ SCHRAGE, *supra* note 124, at 52; Alan Riding, *Heirs Claim Art Lost To Nazis in Amsterdam; Another Collection Joins the Disputes Over Who Owns War's Cultural Booty*, N.Y. TIMES, Jan. 12, 1998, at E1, available at <http://www.nytimes.com/1998/01/12/arts/heirs-claim-art-lost-nazis-amsterdam-another-collection-joins-disputes-over-who.html>.

¹³⁸ Alan Riding, *Dutch To Return Art Seized By Nazis*, N.Y. TIMES, Feb. 7, 2006, at E7, available at <http://www.nytimes.com/2006/02/07/arts/design/07rest.html?>

However, Goudstikker's mother owned only 15 percent of the company, so she had no authority to sell.¹³⁹ Furthermore, there are clear indications that Emily Goudstikker ensured protection from anti-Jewish reprisals by giving her consent to the liquidation of the gallery's assets.¹⁴⁰ In addition, Miedl paid Jan Dik Sr. and Arie Ten Broek, rewards of 180,000 guilders each, for facilitating the liquidation of the Goudstikker business.¹⁴¹ In any case, from her refuge on the other side of the Atlantic, Désirée Goudstikker, who represented 334 of the 600 shares, partly on behalf of her minor son, vehemently objected to what was nothing short of a sale under coercion.¹⁴² By the fall of 1940, the original Goudstikker gallery was liquidated and Miedl's firm, "Gallery formerly known as J. Goudstikker N.V.," started doing great business selling art for the benefit of the Nazi-regime.¹⁴³

When Göring's influence was declining towards the end of the war, Miedl fled with his family to Spain, taking with him a small selection of fine paintings.¹⁴⁴ The rest of the company's trading stock remained in Amsterdam, where numerous paintings were discovered after the liberation. Yet the better part of the collection was found in Germany, where the allied forces recovered significant caches of looted artwork at the end of the war. The recovered pieces were sent to the Munich Central Collection Point. Once the works from the Goudstikker collection were identified, the allied forces returned them to the Netherlands.¹⁴⁵ At the 1945 Potsdam Conference, a policy of "external restitution" was formally adopted, under which the looted art was returned to the countries of origin, not to the individual owners.¹⁴⁶ Consequently, like all other recovered artwork, about 300 paintings of the Goudstikker collection came under the administration of the Dutch Art Property Foundation (*Stichting Nederlands Kunstbezit*), whose primary task was to recover artwork from abroad and facilitate restitution to the (heirs of) victims of Nazi spoliations.¹⁴⁷

After the war, Désirée Goudstikker sought to recover the family's

¹³⁹ LUBINA, *supra* note 126, at 320.

¹⁴⁰ When her son fled the city, Emily Goudstikker-Sellisberger chose to stay behind in Amsterdam. She managed to survive the war in the Netherlands and died in 1954. Throughout the German occupation, she lived in her house and her personal assets were not confiscated. It is conjectured that Miedl, whose wife was Jewish, pledged himself to protect Emily. *See id.*; Riding, *supra* note 137.

¹⁴¹ SCHRAGE, *supra* note 124, at 52; Riding, *supra* note 137.

¹⁴² LUBINA, *supra* note 126, at 320.

¹⁴³ From 1943, when the Nazi defeat looked plausible, there was a booming art market in Germany as paintings were considered secure long-term investments. *See* Riding, *supra* note 122. *See also* LUBINA, *supra* note 126, at 320.

¹⁴⁴ Miedl died in Spain, a few years after the war. *See* PETER HARCLERODE & BRENDAN PITTAWAY, *THE LOST MASTERS: WORLD WAR II AND THE LOOTING OF EUROPE'S TREASUREHOUSES*, 148-53 (Gollancz 1999); SCHRAGE, *supra* note 124, at 52.

¹⁴⁵ LUBINA, *supra* note 126, at 320; SCHRAGE, *supra* note 124, at 52; Riding, *supra* note 122.

¹⁴⁶ *Von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016, 1019 (9th Cir. 2009).

¹⁴⁷ *See* LUBINA, *supra* note 126, at 321. For more on the Dutch Art Property Foundation and its controversial restitution policy, *see* EELKE MÜLLER, *BETWIST BEZIT* (Waanders 2002).

lost possessions.¹⁴⁸ Because the Dutch government contended that the paintings had been legally sold, she could only regain her property after returning the purchase price paid by Göring and Miedl. Unable to raise the funds, Goudstikker reluctantly entered into a settlement agreement with the Dutch government on August 1, 1952.¹⁴⁹ Notwithstanding the agreement, in an attached statement of protest she recorded her express refusal to acknowledge any of the other party's statements and expressed how bitter and deeply deprived she felt. It was apparent that the uncertain political situation and the prospect of time-consuming and expensive litigation made the Goudstikker family decide to close this book.¹⁵⁰ Désirée Goudstikker remarried and her minor son, Eduard, took her second husband's name, von Saher. Later Eduard married Marei Langenbein and had two daughters, Charlène and Charlotte.¹⁵¹ In the meantime, the Dutch administration incorporated the paintings into its own national museum collections, where for decades millions of people admired them without having the slightest idea about the objects' provenance.¹⁵²

2. The Cranach Paintings in the Norton Simon Museum at Pasadena

It was only after Désirée and Eduard died in 1996 that a Dutch journalist informed Marei von Saher-Langenbein of the long-forgotten family saga.¹⁵³ Thereafter, she and her children started a quest to recover the pieces of the unclaimed Goudstikker legacy by tracking down the paintings that were listed in the small black notebook.¹⁵⁴ Over a number of years, the family managed to trace numerous paintings with the help of private detectives.¹⁵⁵ Most of the pieces that had not been returned to the Dutch government after the war were discovered in Germany, leading to numerous voluntary restitutions from private collectors or German museums.¹⁵⁶ Others were surrendered by

¹⁴⁸ On February 26, 1947 the liquidation of the Goudstikker Company was retroactively reversed. From the proceeds of the sales to Göring and Miedl (together f 2,550,000), f 1,363,752.33 remained as assets of the business, as such available to the heirs. See LUBINA, *supra* note 126, at 320-21.

¹⁴⁹ LUBINA, *supra* note 126, at 321. For an analysis of the 1952 settlement, see *id.* at 321-30. See also von Saher/State, Gerechtshof [Hof] [Ordinary Court of Appeal], The Hague, 16 Dec. 1999, LJN:AV1399, <http://zoeken.rechtspraak.nl> (Neth.); Restitutions Committee, *Recommendation Regarding the Application by Amsterdamse Negotiatie Compagnie NV in Liquidation for the Restitution of 267 Works of Art from the Dutch National Art Collection (advice concerning Goudstikker)*, available at http://www.restitutiecommissie.nl/en/rc_1.15/advies_rc_1.15.html.

¹⁵⁰ LUBINA, *supra* note 126, at 321.

¹⁵¹ Riding, *supra* note 122.

¹⁵² LUBINA, *supra* note 126, at 321; Riding, *supra* note 122; Raphael Rubinstein, *Victory for Dutch Dealer's Heirs*, ART IN AMERICA, Apr. 2007, at 31.

¹⁵³ Suzanne Muchnic, *The Norton Simon Museum is Battling to Keep 'Adam' and 'Eve,'* L.A. TIMES, Aug. 22, 2009, available at <http://articles.latimes.com/2009/aug/22/entertainment/et-cranach22>; Riding, *supra* note 122.

¹⁵⁴ Rubinstein, *supra* note 152, at 31.

¹⁵⁵ Riding, *supra* note 122.

¹⁵⁶ October 2002: a private collector returned "Maria Magdalena" by Anthony van Dyck. February 2005: a private collector returned "Christ Blessing the Children" by Aert de Gelder. December 2005: Staatliche Kunstsammlungen in Dresden returned "Still Life of Flowers" by

collectors or dealers in Austria,¹⁵⁷ the Netherlands,¹⁵⁸ the United Kingdom,¹⁵⁹ the United States,¹⁶⁰ and Israel.¹⁶¹

Numbers 2721 and 2722 in the Goudstikker notebook listed a pair of oil-on-wood paintings by the German master, Lucas Cranach the Elder.¹⁶² The first part of the ca. 1530 diptych¹⁶³ shows a life-size Adam, standing under the biblical Tree of Knowledge, apparently wondering how to proceed, scratching his head with one hand and holding the forbidden fruit in the other. The second part represents a life-size Eve on the brink of original sin, with an earful of bad advice from a sly serpent. Around 1971, L.A. businessman, Norton Simon, acquired the adorable, all but nude couple from George Stroganoff-Scherbatoff, heir of a Russian noble family, for \$800,000.¹⁶⁴ Ever since, “Adam” and “Eve” have been on display in the galleries of the Norton Simon Museum in Pasadena.¹⁶⁵ In 2006, when the paintings were appraised for insurance purposes, the diptych was valued at \$24,000,000.¹⁶⁶

In 2001, having discovered that the Cranach paintings were at the Pasadena museum, von Saher came forward with her restitution claim.¹⁶⁷ On May 1, 2007, following years of unsuccessful mediation,

Rachel Ruysch. April 2006: the City of Cologne returned “Cattle Market” by David Teniers and “Cows” by Constant Troyon. October 2006: Hamburg Kunsthalle returned a self-portrait by Cornelius Bega. December 2006: Herzog Anton Ulrich Museum returned “Portrait of a Bearded Man” by Lorenzo Tiepolo. April 2007: Wiesbaden Museum returned “Family Portrait” by Cornelius Troost. See Herrick, Feinstein LLP, *Resolved Stolen Art Claims*, <http://www.herrick.com/siteFiles/Publications/546411D050AA20C661AF5F974318FFF2.pdf> (last visited Sept. 22, 2010).

¹⁵⁷ October 2008: Austria returned a portrait by Philips Koninck. See *id.*

¹⁵⁸ May 2006: Christie’s Amsterdam returned “Still Life with Tablecloth” by Edgar Fernhout in return for monetary compensation. August 2006: Salomon Lilian Gallery returned “A Wooded Landscape with the Concubine” by Salomon van Ruysdael. See *id.*

¹⁵⁹ October 2003: a private collector returned “Portrait of a Gentleman, Jacob Gerritsz” by Aelbert Cuyp. June 2006: Rafael Valls Gallery returned “Resurrection of Christ” by Thomas de Keyser. March 2006: Christie’s, London returned “Hunter Courting a Milkmaid” by Gerrit Lundens in return for monetary compensation. See *id.*

¹⁶⁰ May 2006: Daphne Alazraki Gallery returned “Interior Musical Scene” by Anthony Palamedes. February 2008: Sotheby’s returned “Adoration of the Shepherds” by Joachim Beuckelaer, in return for monetary compensation. See *id.*

¹⁶¹ March 2005: Israel Museum returned “*Quatre Danseuses Nues en Repos*” by Edgar Degas. See Marilyn Henry, *Reclaiming a Legacy*, ARTNEWS, May 2005, at 78.

¹⁶² Von Saher v. Norton Simon Museum of Art, 578 F.3d 1016, 1021 (9th Cir. 2009). For an overview of the paintings listed in Goudstikker’s black notebook and claimed by von Saher, see http://www.restitutiecommissie.nl/images/stories/rc_1.15/bijlage%20lijsten.pdf (last visited Oct. 5, 2010).

¹⁶³ A diptych is a “picture consisting of two separate panels facing each other and usually joined at the centre by a hinge.” THE CONCISE OXFORD DICTIONARY OF ART TERMS (2007).

¹⁶⁴ See Muchnic, *supra* note 153.

¹⁶⁵ Von Saher v. Norton Simon Museum of Art, No. CV 07-2866-JFW (JTLx), 2007 U.S. Dist. LEXIS 95757, at *2-3 (C.D. Cal. Oct. 18, 2007).

¹⁶⁶ See von Saher v. Norton Simon Museum of Art, 578 F.3d 1016, 1020-21 (9th Cir. 2009); see also Mike Boehm, *Appeals Court Overturns Holocaust Looted-Art Law, but Norton Simon Suit Continues*, L.A. TIMES, Aug. 19, 2009, available at <http://latimesblogs.latimes.com/culturemonster/2009/08/federal-judges-overturn-californias-holocaust-lootedart-law-as-unconstitutional-.html>; Janofsky, *supra* note 136; Muchnic, *supra* note 153.

¹⁶⁷ Boehm, *supra* note 166.

she ultimately filed suit, asserting her rights to the Cranach paintings.¹⁶⁸

B. *Statute of Limitations*

1. The District Court for the Central District of California

As the Cranach paintings were looted during WWII, von Saher brought her action in replevin under the Holocaust-Era Claims Provision. She did so for obvious reasons, specifically, her action was timely since she filed suit before 2011. The Norton Simon Museum moved to dismiss von Saher's claim, arguing that it was time-barred. The museum contended that California's three-year limitation period in section 338 Cal. Code Civ. Proc. could not be revived by section 354.3, arguing that the latter provision was unconstitutional. On October 18, 2007, the district court found for the museum, dismissing von Saher's claims as time-barred.¹⁶⁹

With regard to von Saher's action under section 354.3, the district court found that California's Holocaust-Era Claims Provision was facially unconstitutional.¹⁷⁰ Relying on the Ninth Circuit decision in *Deutsch v. Turner Corp.*,¹⁷¹ the district court, somewhat reluctantly, held that section 354.3 inadmissibly "intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims."¹⁷² In *Deutsch*, the Ninth Circuit had addressed the constitutionality of a similar provision that purported to extend the limitation period for claims relating to WWII slave labor,¹⁷³ ultimately holding that it violated the foreign affairs doctrine. The Constitution allocates this power to the federal government exclusively, depriving the states of the authority to make and resolve war, including the resolution of war claims, which the Ninth Circuit considered a central aspect thereof.¹⁷⁴ The Ninth Circuit continued, "[b]ecause California lacks the power to create a right of action – or, alternatively, to resurrect time-barred claims – in order to provide its own remedy for war-related injuries inflicted by our former enemies and those who operated in their territories, we hold that section 354.6 is unconstitutional."¹⁷⁵

Although at this stage of the litigation von Saher was only relying upon section 354.3, the district court also addressed the timeliness of her action under section 338(c), California's regular statute of

¹⁶⁸ *Von Saher*, 2007 U.S. Dist. LEXIS 95757, at *3.

¹⁶⁹ *Id.* at 10.

¹⁷⁰ *See id.* at *9.

¹⁷¹ 324 F.3d 692 (9th Cir. 2003).

¹⁷² *Id.* at *3 (quoting *Deutsch v. Turner Corp.*, 324 F.3d 692, 712 (9th Cir. 2003)).

¹⁷³ Like section 354.3, section 354.6 prevented certain WWII slave labor claims from being time-barred, provided the action was commenced before 2011. *See id.* at *2.

¹⁷⁴ *See Deutsch*, 324 F.3d at 714-15.

¹⁷⁵ *Id.* at 716.

limitations for the recovery of personal property, in response to the defendant's arguments relating thereto.¹⁷⁶ Expounding upon California's limitation rule regarding art stolen before 1983, the district court contended that under the version of section 338(c) in effect in 1971 (i.e., at the time the museum acquired the Cranachs), the Goudstikker family had three years to bring an action in replevin.¹⁷⁷ By the time von Saher inherited the alleged claim to the Cranachs, the applicable statute of limitations on that claim was long expired. As a result, being unable to rely upon section 354.3, the court found von Saher's claim time-barred, in spite of her alleged ignorance of the cause of action or the paintings' whereabouts within the statute of limitations prescribed time period.¹⁷⁸ Thereby, the district court disregarded the Ninth Circuit decision in *Orkin v. Taylor* and the California Appellate Court in *Naftzger*, which had both seemingly implied a discovery-based accrual standard.¹⁷⁹

2. The Court of Appeals for the Ninth Circuit

On August 19, 2009, the Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of the case based on its finding that section 354.3 was unconstitutional. The Ninth Circuit observed that the Supreme Court had repeatedly¹⁸⁰ characterized the power to deal with foreign affairs as primarily, if not exclusively, a federal power.¹⁸¹ The Supreme Court had declared state laws unconstitutional under the foreign affairs doctrine where such laws conflicted with a federal action, such as a treaty, a statute, or some express Executive Branch policy.¹⁸² However, the Ninth Circuit decided that section 354.3 did not conflict with the 1945 U.S. policy of external restitution following WWII,¹⁸³ as the latter ended in 1948.¹⁸⁴ The Circuit Court justifiably asserted that "[s]ection 354.3 cannot conflict with or stand as an obstacle to a policy

¹⁷⁶ See *von Saher v. Norton Simon Museum of Art*, Case No. CV 07-2866-JFW (JTLx), 2007 U.S. Dist. LEXIS 95757, at *3, *10 (C.D. Cal. 2007).

¹⁷⁷ See *id.* at *10. See also Shapreau, *supra* note 8, at 26.

¹⁷⁸ *Von Saher*, Case No. CV 07-2866-JFW (JTLx), 2007 U.S. Dist. LEXIS 95757, at *10.

¹⁷⁹ See generally *Orkin v. Taylor*, 487 F.3d 734, 734 (9th Cir. 2007); *Naftzger v. American Numismatic Society*, 49 Cal. Rptr. 2d 784, 784 (Cal. Ct. App. 1996). See also *supra* notes 103-116 and accompanying text.

¹⁸⁰ See, e.g., *American Insurance Association v. Garamendi*, 539 U.S. 396, 413-14 (2003); *Zschernig v. Miller*, 389 U.S. 429, 432 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941).

¹⁸¹ See *von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016, 1022 (9th Cir. 2009).

¹⁸² See, e.g., *Garamendi*, 539 U.S. at 421-22 (invalidating a California statute, which conflicted with presidential foreign policy); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373-74 (2000) (invalidating a Massachusetts statute, which stood as an obstacle to a congressional action imposing sanctions on Burma); *United States v. Belmont*, 301 U.S. 324, 327 (1937) (holding that the Litvinov Assignment, an executive agreement, preempted New York public policy).

¹⁸³ This policy was expressed in two main sources: firstly, the Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control (the so-called London Declaration of Jan. 5, 1943), and secondly, the U.S. policy statement "Art Objects in US Zone," as approved by President Truman during the Potsdam Conference in August 1945. *Von Saher*, 578 F.3d at 1023-24.

¹⁸⁴ See *id.* at 1024-25.

that is no longer in effect.”¹⁸⁵

Notwithstanding the absence of any conflict with a specific federal action or law, a 2-1 majority held that section 354.3 interfered with the federal government’s exclusive foreign affairs powers, specifically the authority to redress injuries arising from war.¹⁸⁶ The Ninth Circuit declared that, even in the absence of any such conflict, the Supreme Court had on several occasions held the field to be preempted.¹⁸⁷ Thus, the Ninth Circuit inquired whether in enacting section 354.3, California had addressed a traditional state responsibility or had treaded upon a foreign affairs power reserved exclusively to the federal government by the Constitution.¹⁸⁸

Although von Saher contended that section 354.3 merely purported to regulate property, an area traditionally left to the states, the court found its real purpose to be to grant relief to Holocaust victims and their heirs.¹⁸⁹ In addition, the Ninth Circuit held that section 354.3 did more than regulate the museums and galleries operating within California’s borders in preventing them from trading and displaying Nazi-looted art; though, the court noted that this might have been an area of state responsibility. The court observed that section 354.3 could be interpreted to apply equally to out-of-state museums displaying looted art.¹⁹⁰ Therefore, the Ninth Circuit concluded that:

[T]he scope of § 354.3 belies any purported state interest in regulating stolen property or museums or galleries within the State. By enacting § 354.3, California has created a world-wide forum for the resolution of Holocaust restitution claims. While this may be a laudable goal, it is not an area of “traditional state responsibility”¹⁹¹

In addition, the court found section 354.3 to intrude on the federal government’s exclusive power to make and resolve war.¹⁹² The Ninth Circuit concluded that the power to wage and resolve war, including the

¹⁸⁵ *Id.* at 1025.

¹⁸⁶ *Id.* at 1025-29.

¹⁸⁷ *See, e.g.,* *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (striking down an Oregon probate law, in the absence of any federal action, because it was an “intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress”); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (invalidating a Pennsylvania immigration law because of preemption); *see also* *Deutsch v. Turner Corp.*, 324 F.3d 692, 712 (9th Cir. 2003) (concluding that § 354.6 infringed on the federal government’s exclusive power to wage and resolve war).

¹⁸⁸ *Von Saher*, 578 F.3d at 1025-29.

¹⁸⁹ *See id.* at 1026.

¹⁹⁰ *Id.* at 1026-27.

¹⁹¹ *Id.* at 1027. The Ninth Circuit also reasoned that:

By opening its doors as a forum to all Holocaust victims and their heirs to bring Holocaust claims in California against “any museum or gallery” whether located in the state or not, California has expressed its dissatisfaction with the federal government’s resolution (or lack thereof) of restitution claims arising out of World War II. In so doing, California can make “no serious claim to be addressing a traditional state responsibility.”

Id. at 1027 (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003)).

¹⁹² *See id.* at 1027-29.

power to legislate restitution and reparation claims, is one that has been exclusively reserved to the federal government by the Constitution.¹⁹³ Relying on *Deutsch* as the district court had done, the Ninth Circuit found that by enacting section 354.3, California essentially sought “to redress wrongs committed in the course of the Second World War,”¹⁹⁴ a foreign affairs power for which it lacked authority as a state.¹⁹⁵

Although it foreclosed von Saher from bringing her claim under section 354.3, the Ninth Circuit allowed her to state a cause of action within California’s regular three-year statute of limitations for the recovery of personal property. The court reversed the district court’s dismissal with prejudice, granting von Saher leave to amend her complaint to establish the timeliness of her action under section 338(c).¹⁹⁶ In accordance with *Naftzger*, von Saher contended “that the statute of limitations on her claim did not begin to run until she [actually] discovered that the Cranachs were in the possession of the museum.”¹⁹⁷ Relying upon its prior decision in *Orkin v. Taylor*, the Ninth Circuit “concluded that ‘under the discovery rule, a [pre-1983] cause of action accrues when the plaintiff discovered *or reasonably could have discovered* her claim to and the whereabouts of her property.’”¹⁹⁸ Consequently, von Saher’s cause of action accrued when she received constructive notice that the museum possessed the diptych.¹⁹⁹ The Ninth Circuit disagreed with the district court’s finding that von Saher’s complaint could not be saved by amendment because the statute of limitations had undeniably expired, and so it overturned its decision to dismiss with prejudice and without leave to amend.²⁰⁰

Before proceeding with an amended complaint, von Saher, together with amici, the State of California and Earthrights International, sought a rehearing en banc, to have her section 354.3 claim reheard before all of the court’s judges.²⁰¹ However, on January 14, 2010, the Ninth Circuit refused to revisit its August 2009 decision, which had been rendered by a three-judge panel.²⁰² On April 14, 2010 von Saher filed a petition for certiorari.²⁰³ Unless her appeal to the U.S.

¹⁹³ *See id.* at 1028.

¹⁹⁴ *Id.* at 1027 (quoting *Deutsch v. Turner Corp.*, 324 F.3d 692, 712 (9th Cir. 2003)).

¹⁹⁵ *See id.* (“In *Deutsch*, we held that ‘[i]n the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government’s resolution of war-related disputes.’” (quoting *Deutsch*, 324 F.3d at 714)).

¹⁹⁶ *See id.* at 1030-31.

¹⁹⁷ *Id.* at 1030 (alteration in original).

¹⁹⁸ *Id.* (emphasis added) (alteration in original) (quoting *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007)).

¹⁹⁹ *Id.* at 1031.

²⁰⁰ *Id.*

²⁰¹ Petition for Panel Rehearing and Rehearing en Banc, *von Saher*, 578 F.3d 1016 (No. 07-56691), available at <http://www.commartrecovery.org/docs/SFX6C21.pdf>.

²⁰² *Von Saher*, 578 F.3d 1016, *reh’g denied*, 592 F.3d 954 (9th Cir. 2010).

²⁰³ Petition for a Writ of Certiorari, *von Saher v. Norton Simon Museum of Art*, (U.S. Apr. 14, 2010) (No. 09-1254), available at <http://www.commartrecovery.org/docs/228877-pet.pdf>.

Supreme Court succeeds, section 354.3, California's Holocaust-Era Claims Provision, is dead.²⁰⁴

3. The Constitutionality of California's Holocaust-Era Claims Provision

The decision of the Ninth Circuit, that by enacting section 354.3, California took a position on a matter of foreign policy lacking any serious claim of traditional state responsibility is disputable for various reasons.

First, the court erred in its holding that section 354.3 was outside the traditional area of state responsibility. The court's findings turned upon its conclusion that California had extended the statute of limitations for actions in replevin regarding artwork stolen during WWII without limiting the scope of the provision to institutions located in California.²⁰⁵ However, it is beyond doubt that both the regulation of property and the enactment of statutes of limitations are quintessential areas of state responsibility.²⁰⁶ The Ninth Circuit acknowledged this when it stated that California had a legitimate interest in regulating museums and galleries active in its territory, including keeping them from trading and displaying Holocaust-era looted property.²⁰⁷ The court even admitted that the legislative intent underlying section 354.3 was precisely aimed at addressing that problem.²⁰⁸ The majority made it clear that, had the scope of section 354.3 been restricted to institutions located in California, it would most likely have been constitutional.²⁰⁹ However, the court unreasonably construed section 354.3, a statute extending the limitation period, as an attempt to create "a world-wide forum for the resolution of Holocaust restitution claims."²¹⁰ Such a reading is too broad and unfair, as section 354.3 did not modify the standard requirements for personal jurisdiction under California law.²¹¹

²⁰⁴ Carla Shapreau, *California's Holocaust Era Statute of Limitations Struck Down But Goudstikker Heir Allowed to Pursue Claim for Cranachs*, IFAR J. No. 2, 2009 at 10, 11. On October 4, 2010, the U.S. Supreme Court neither declined nor accepted to hear the case, but invited the U.S. Solicitor General to file briefs in the case expressing the views of the U.S. government. Consequently, the case is still pending before the U.S. Supreme Court. *See von Saher*, 2010 U.S. LEXIS 6643 (U.S. Oct. 4, 2010). *See also* Mike Boehm, *Norton Simon's disputed 'Adam and Eve' getting closer look from Supreme Court*, L.A. TIMES Oct. 4, 2010, available at <http://latimesblogs.latimes.com/culturemonster/2010/10/art-adam-eve-holocaust-norton-simon-.html>.

²⁰⁵ *See generally von Saher*, 578 F.3d at 1022-29.

²⁰⁶ *Von Saher*, 578 F.3d at 1026.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1027.

²¹¹ However, in his dissenting opinion, Judge Pregerson stated:

It is undisputed that property is traditionally regulated by the State. The majority acknowledges that California has a legitimate interest in regulating museums and galleries, and that California Code of Civil Procedure § 354.3 "addresses the problem of Nazi-looted art currently hanging on the walls of the state's museums and galleries." However, the majority goes on to hold that because Section 354.3 applies to any

As the following reasoning makes clear, section 354.3 only applies to out-of-state museums or galleries to the extent they come into California to contract business: subjecting them to the jurisdiction of the state and its legitimate interest in preventing the trade in and display of Nazi-looted art.²¹² Providing a forum to out-of-state plaintiffs is a longstanding feature of civil courts of general jurisdiction and therefore falls within traditional state competence. Accordingly, section 354.3 cannot be said to be more wide-ranging than state laws have historically been, whether under the common law or statute-based. After all, the Supreme Court has systematically held that, where personal jurisdiction is present, state courts are open to out-of-state or domestic plaintiffs for the resolution of claims that arise against out-of-state defendants.²¹³ Since there is nothing unusual about opening the California courts to claims against out-of-state defendants over whom they may constitutionally exercise personal jurisdiction, there can be little argument against the proposition that section 354.3 is squarely within the realm of traditional state responsibility.²¹⁴

Second, and to a certain extent in continuation of the foregoing, because the Ninth Circuit suggested that section 354.3 would have been constitutional had its scope been restricted to institutions located in California, it is obvious that the application of section 354.3 in *von Saher* would by no means have resulted in an unconstitutional outcome. As the dispute is between a U.S. citizen and a California museum, the case has no bearing on the foreign affairs power. The facts at bar presenting no constitutional problem makes any constitutional implications purely prospective. In spite of recognizing that the statute as applied to the *von Saher* facts would be constitutional, the Ninth Circuit struck down the law facially. However, according to the Supreme Court, statutes cannot be fully invalidated unless they are unconstitutional *in all applications*,²¹⁵ or where no appropriate limiting

museum or gallery, “California has created a world-wide forum for the resolution of Holocaust restitution claims,” and that the State is therefore acting outside the scope of its traditional interests. The majority reads the statute far too broadly. A reasonable reading of “any museum or gallery” would limit Section 354.3 to entities subject to the jurisdiction of the State of California.

Von Saher, 578 F.3d at 1031-32 (Pregerson, J., dissenting) (internal citations omitted).

²¹² *Id.*

²¹³ See *Rasul v. Bush*, 542 U.S. 466, 484-85 (2004); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-80 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446-48 (1952); see also *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 787 (7th Cir. 2003).

²¹⁴ For a more in-depth development of this argument, see Brief of Amicus Curiae Earthrights International in support of Plaintiff-Appellant and Rehearing at 9-11, *von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016 (9th Cir. 2009) (No. 07-56691), available at <http://www.earthrights.org/sites/default/files/publications/amicus-brief-saher-v-norton-simon.pdf>; see also *Petition for Panel Rehearing and Rehearing en Banc*, *supra* note 201, at 6-9.

²¹⁵ See *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008); *United States v. Salerno*, 481 U.S. 739, 745 (1987); see also *Hotel & Motel Ass’n of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003).

construction²¹⁶ is available. The Ninth Circuit consequently erred in failing to consider this well-established rule against facial invalidation. Thus, in *von Saher*, the application of the statute would have been constitutional or, in any case, a suitable limiting construction was available to the court. Even assuming that the application of section 354.3 could be unconstitutional in certain circumstances – although this is doubtful – the court should have avoided invalidating it *in toto*. On *von Saher*'s facts, the court could have construed the provision as applying to institutions operating within the state's borders that are trading in and displaying Nazi-looted art.²¹⁷

Third, while it is undoubtedly correct that the power to make and resolve war is exclusively reserved to the federal government, the extension of the statute of limitations on Holocaust-related art restitution claims does not infringe on these war-making prerogatives reserved to the Executive Branch. The authority to adjudicate actions in replevin against private parties is not constitutionally entrusted to the federal Executive Branch. The Ninth Circuit misapplied the preemption doctrine to an issue that is not constitutionally committed to the federal political branch; although the matter may incidentally touch on foreign relations, it does not infringe on the federal government's authority in this area. Illustrative of this distinction, in *Alperin v. Vatican Bank*, the Ninth Circuit held that causes of action of the sort at issue in *von Saher* – actions in replevin and conversion for the recovery of Nazi loot brought against bona fide purchasers – are “garden variety legal and equitable claims,” in spite of their nexus to WWII.²¹⁸ As such, they are different from the war crimes claims (e.g., slave labor claims), which were constitutionally committed to the President pursuant to his power as Commander-in-Chief to discipline wartime enemies.²¹⁹ As stated in *Alperin*, “[r]eparation for stealing, even during wartime, is not a claim that finds textual commitment in the Constitution.”²²⁰ Moreover, unlike section 354.6, the provision struck down in *Deutsch v. Turner Corp.*,²²¹ section 354.3 does not target former enemies of the United States. In addition, *Deutsch* addressed claims that had already been resolved through a resolution process established pursuant to a federal treaty or agreement.²²² Judge Pregerson, in his dissenting opinion, argued that, unlike section 354.6, section 354.3 did not subject wartime enemies to suit, nor was it aimed at punishing defendants for war crimes. He found

²¹⁶ See *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006); see also *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985); *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984).

²¹⁷ For a more in-depth development of this argument, see Brief of Amicus Curiae Earthrights International in support of Plaintiff-Appellant and Rehearing, *supra* note 214, at 4–9.

²¹⁸ *Alperin v. Vatican Bank*, 410 F.3d 532, 548, 551–52 (9th Cir. 2005).

²¹⁹ See *id.* at 559.

²²⁰ *Id.* at 551.

²²¹ *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003).

²²² *Id.*

that section 354.3 also addresses conduct committed after WWII, as the facts of the *von Saher* case, regarding an alleged conversion in 1971, make clear.²²³ Finally, in *Zschernig v. Miller*, the Supreme Court held that in spite of the constitutional supremacy of the federal government in foreign affairs, not all issues that touch on these areas are off-limits to state action.²²⁴ Consequently, the aforementioned case law suggests that despite the fact that actions in replevin regarding stolen artwork arise in the context of the Holocaust, such actions taken in state court impinge no more than incidentally on federal foreign affairs powers.²²⁵ In view of the above, it is difficult to understand the Ninth Circuit's conclusion that the connection to the Holocaust necessarily meant that federal war powers were infringed.²²⁶

Finally, in *von Saher*, the majority wrongly contended that when it comes to the restitution of Nazi-looted art there exists a "history of federal action . . . so comprehensive and pervasive as to leave no room for state legislation."²²⁷ Recent statements made by federal officials point out that the federal government plays only a very limited role in resolving restitution claims regarding Nazi-looted art. In his speech given in Potsdam on April 23, 2007, the State Department's Special Envoy for Holocaust Issues, Ambassador J. Christian Kennedy, elucidated:

[A]rt restitution in the United States has generally involved a private citizen who discovers that an artwork once held by his or her family

²²³ In his dissenting opinion, Judge Pregerson stated:

The majority's reliance on *Deutsch v. Turner* is misplaced. The statute in *Deutsch*, California Code of Civil Procedure § 354.6, allowed recovery for slave labor performed "between 1929 and 1945, [for] the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." This court held that California impermissibly intruded upon the power of the federal government to resolve war by enacting the *Deutsch* statute "with the aim of rectifying wartime wrongs committed by our enemies . . ." The majority concludes that Section 354.3 suffers from a "fatal similarity" to the *Deutsch* statute because Section 354.6 applies to looted artwork. I do not agree. The majority overlooks significant differences between the *Deutsch* statute and Section 354.3. First, as discussed above, here California has acted within the scope of its traditional competence to regulate property over which it has jurisdiction. Furthermore, unlike the statute in *Deutsch*, Section 354.3 does not target enemies of the United States for wartime actions. Nor, contrary to the majority's characterization, does Section 354.3 provide for war reparations. Here, Appellee, a museum located in California, acquired stolen property in 1971. Appellant now seeks to recover that property. I fail to see how a California statute allowing such recovery intrudes on the federal government's power to make and resolve war.

von Saher v. Norton Simon Museum of Art, 578 F.3d 1016, 1032 (9th Cir. 2009) (Pregerson, J., dissenting) (quoting *Deutsch*, 324 F.3d at 708, 711) (citations omitted). See also Shapreau, *supra* note 8, at 28.

²²⁴ *Zschernig v. Miller*, 389 U.S. 429, 433 (1968). See also *Baker v. Carr*, 369 U.S. 186, 211-14 (1962).

²²⁵ *Id.*; *Alperin*, 410 F.3d 532 (9th Cir. 2005).

²²⁶ For a more in-depth development of this argument, see Brief of Amicus Curiae Earthrights International in support of Plaintiff-Appellant and Rehearing, *supra* note 4, at 11-14; see also Petition for Panel Rehearing and Rehearing en Banc, *supra* note 201, at 9-15.

²²⁷ *Von Saher*, 578 F.3d at 1029.

is now hanging in a museum or private collection. . . . Usually working through their respective attorneys, the two parties attempt to establish and agree on the facts of the case, and then work out a settlement. . . . If the talks break down, or fail to get underway at all, the claimant has the option of turning to the courts. . . . While the government can urge institutions to participate voluntarily in programs . . . the government does not have any leverage to force compliance, for one simple reason: With the exception of a few federally owned and operated institutions, museums in the United States tend to be owned and operated privately, or by state or municipal authorities. This leaves no specific role for the federal government in the art restitution process. . . . The point that I want to leave with you today is the following. The role of the United States Government in art restitution matters is significantly different from the role of many European governments. Our government has not been involved in cases such as those adjudicated by the Dutch Art Restitution Commission, nor has it been involved in direct negotiations with other states as have some European countries.²²⁸

Consequently, there is no real federal policy that preempts the field of restitution of Nazi-looted artwork at the state level.²²⁹ For example, while the U.S. Holocaust Assets Commission Act²³⁰ established the Presidential Advisory Commission on Holocaust Assets in the United States, its mission was solely to study the issue and make recommendations for possible action, and Congress failed to adopt any of its recommendations.²³¹ Further, the 1998 Washington Conference Principles on Nazi-Confiscated Art²³² are not binding, nor do they

²²⁸ For the entire speech of Ambassador Kennedy, see J. Christian Kennedy, Ambassador, Special Envoy for Holocaust Issues at the State Dep't, Address at the University of Potsdam's Moses-Mendelssohn Center for European-Jewish Studies: The Role of the United States Government in Art Restitution (April 23, 2007), http://germany.usembassy.gov/kennedy_speech.html (last visited Sept. 3, 2010).

²²⁹ See Petition for Panel Rehearing and Rehearing en Banc, *supra* note 201, at 15-17.

²³⁰ U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611-617 (1998).

²³¹ Benjamin E. Pollock, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 206 (2006); Jessica Grimes, Note, *Forgotten Prisoners of War: Returning Nazi-Looted Art by Relaxing the National Stolen Property Act*, 15 ROGER WILLIAMS U. L. REV. 521, 544 (2010).

²³² On December 3, 1998, forty-four governments participating in the Washington Conference on Holocaust-Era Assets endorsed a set of principles for dealing with Nazi-looted art. The Washington Conference Principles aim at simplifying the process of identifying Nazi-looted art objects, tracking down pre-war owners and settling conflicting claims to property. See generally Michael J. Bazzyler & Amber L. Fitzgerald, *Trading with the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOK. J. INT'L L. 683, 710 (2003); Jennifer A. Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes*, 73 BROOK. L. REV. 155, 169-70 (2007); McCarter Collins, *supra* note 5, at 141; Owen Pell, *The potential for a mediation/arbitration commission to resolve disputes relating to artworks stolen or looted during World War II*, 10 DEPAUL-LCA J. ART & ENT. L. 27, 47 (1999); Walton, *supra* note 5, at 607; Cuba, *supra* note 25, at 463-64; Kelly A. Falconer, Comment, *When Honor Will Not Suffice: The Need For A Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U. PA. J. INT'L ECON. L. 383, 390 (2000); Stephan J. Schlegelmilch, Note, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 CASE W. RES. L. REV. 87, 101

provide any direct remedy for the victims of Holocaust-era spoliations, referring them instead to the courts to resolve their claims. Similarly, the Holocaust Victims Redress Act²³³ merely authorized the President to financially support archival/translation services and organizations assisting Holocaust survivors in bringing claims, but did not provide specific remedies. It should be recalled that it was the Ninth Circuit in *Orkin v. Taylor* that held that “[t]he plain text of the Holocaust Victims Redress Act leaves little doubt that Congress did not intend to create a private right of action.”²³⁴ The 1998 Nazi War Crimes Disclosure Act²³⁵ only made WWII criminal records public. Thus, if the little federal legislation that exists on the matter is all aimed at encouraging victims of Nazi-spoliation to come forward with their claims to confiscated art, would it not be ironic if a state provision that endorses that same federal policy would be found to undermine the authority of the Executive Branch? As the *Alperin* court aptly stated “a private lawsuit is the only game in town”²³⁶ for victims of Nazi-era lootings to seek the return of their lost possessions. The issue of restitution has always been left to the states to regulate under their traditional competence for actions in replevin and conversion regarding stolen property. Consequently, there have always been differences between the states when it comes to limitation of actions in replevin and conversion, transforming certain states into a preferred forum for the resolution of Holocaust restitution claims. Illustratively, New York’s “demand and refusal” rule has turned the Empire State into a haven for the litigation of ancient claims,²³⁷ more so than section 354.3 ever did with respect to California. After all, an analysis of the publicly available case law points out that prior to *von Saher*, the outcome of none of the California restitution claims concerning Holocaust-related art losses was grounded in that provision.²³⁸ Thus, while differences in state laws may render certain jurisdictions the forum of choice, in no way does this trespass on federal executive prerogatives.

4. Analysis of the Limitation Defense

Questionable though it may be, the fact that section 354.3 was found unconstitutional is unfortunate but not insurmountable for von

(1999). See also Thomas Lippman, *44 Nations Pledge to Act on Art Looted by the Nazis*, WASH. POST, Dec. 4, 1998, at A2.

²³³ Pub. L. No. 105-158, 112 Stat. 15 (1998).

²³⁴ 487 F.3d at 734, 739 (9th Cir. 2007). See also Redman, *supra* note 22, at 207-09.

²³⁵ Pub. L. No. 105-246, 112 Stat 1859 (1998).

²³⁶ *Alperin v. Vatican Bank*, 410 F.3d 532, 548, 558 (9th Cir. 2005).

²³⁷ *Hawkins, Rothman & Goldstein, supra* note 22, at 51.

²³⁸ See *Adler v. Taylor*, No. CV 04-8472-RGK (FMOx), 2005 U.S. Dist. LEXIS 5862 (C.D. Cal. Feb. 2, 2005), *aff'd sub nom. Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007); *United States v. One Oil Painting Entitled "Femme En Blanc" by Pablo Picasso*, 362 F. Supp. 2d 1175 (C.D. Cal. 2005); *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157 (C.D. Cal. 2006), *aff'd in part and rev'd in part, rem'd*, 580 F.3d 1048 (9th Cir. 2009), *vacated, rehearing, en banc, granted by*, 590 F.3d 981(9th Cir. 2009).

Saher, even if her appeal to the U.S. Supreme Court proves unsuccessful. Unlike the district court, the Ninth Circuit, with good reason, permitted her to amend her complaint to establish the timeliness of her action under California's general three-year statute of limitations regarding stolen personal property.²³⁹ After all, as several Jewish organizations observed in their amicus brief, it would have been "extremely ironic if a claimant could sue the Austrian government for the recovery of her artwork in federal court in the United States (*Republic of Austria v. Altmann*, 541 U.S. 677 (2004)), but could not sue an American art gallery or museum for such recovery."²⁴⁰

The case being remanded for further proceedings, it is clear that, barring a successful appeal to the U.S. Supreme Court that would ultimately allow von Saher to circumvent the usual statute of limitations, the federal courts will have to decide the timeliness of her action under section 338(c) Cal. Code Civ. Proc.²⁴¹ Accordingly, the potential significance of *von Saher* lies in its invitation to the courts to clarify the precise accrual standard for pre-1983 takings. The 1983 amendment was silent on the issue of retroactivity, and decisions from California's intermediate appellate court in *Naftzger*²⁴² and *California Pioneers*²⁴³ have reached differing conclusions. Moreover, to date, the California Supreme Court has not addressed the issue either.²⁴⁴ Therefore, in *Orkin v. Taylor*, the Ninth Circuit could only assess California law by trying to predict how the state's highest court would decide the matter.²⁴⁵ Relying upon the highest court's decision in *Jolly*,²⁴⁶ the Ninth Circuit held that, if a discovery rule were to apply to determine the time of accrual for pre-1983 takings, the accrual standard would be one of constructive rather than of actual notice.²⁴⁷ Consequently, in *von Saher*, the Ninth Circuit repeated that "under the discovery rule, a [pre-1983] cause of action accrues when the plaintiff discovered or reasonably could have discovered her claim to and the whereabouts of her property."²⁴⁸

When was it reasonable for von Saher to find out that the diptych that once belonged to her father-in-law was at the Norton Simon Museum? To answer this question, it is necessary to take into account

²³⁹ *Von Saher v. Norton Simon Museum of Art*, 2010 U.S. App. LEXIS 1019, at *37-38 (9th Cir. 2010).

²⁴⁰ The Jewish Federation Council of Greater Los Angeles, et al., Brief of Amici Curiae Bet Tzedek Legal Services in Support of Plaintiff-Appellant Seeking Reversal of Order Dismissing Complaint, at 13, <http://www.commartrecovery.org/docs/usvonsaheramicibrief.pdf> (last visited Sept. 22, 2010) (footnote omitted). See Shapreau, *supra* note 8, at 28.

²⁴¹ See *von Saher*, 2010 U.S. App. LEXIS 1019, at *38.

²⁴² *Naftzger v. American Numismatic Society*, 49 Cal. Rptr. 2d 784 (Cal. Ct. App. 1996).

²⁴³ *Soc'y of Cal. Pioneers v. Baker*, 50 Cal. Rptr. 2d 865 (Cal. Ct. App. 1996).

²⁴⁴ See *supra* notes 103-120 and accompanying text.

²⁴⁵ *Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007).

²⁴⁶ *Jolly v. Eli Lilly & Co.*, 751 P.2d at 923 (Cal. 1988).

²⁴⁷ *Orkin*, 487 F.3d at 741.

²⁴⁸ *Von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016, 1030 (9th Cir. 2009).

what happened in the Netherlands in the late 1990's. It was not until then that most heirs of victims of Nazi-spoliation found out that the wartime losses had ever occurred and were able to document their cases because governments, at that time, started to open their art archives, revealing much Nazi-era art.²⁴⁹ The same applies to Marei von Saher: a Dutch journalist informed her about the unclaimed Goudstikker legacy only after the deaths of Désirée and her husband Eduard in 1996.²⁵⁰ On January 9, 1998, she contacted the Dutch government to request the restitution of all artwork listed in Goudstikker's black notebook that was then held in the state's custody in the NK-collection.²⁵¹ On March 25, 1998, the Dutch Minister of Culture turned down von Saher's request, arguing that the matter had been carefully settled after the war, by way of Désirée's decision not to seek further restitution after the 1952 settlement.²⁵² While the heirs did appeal the Minister's decision, the court in The Hague refused to overrule the government; by judgment dated December 16, 1999, it held itself incompetent to review the decision of the Minister.²⁵³ In addition, the court found von Saher's claim regarding the artwork "sold" to Göring inadmissible, because it had not been submitted before July 1, 1951, when the limitation period ran out.²⁵⁴ Finally, the court stated that it saw no compelling reason to officially grant redress to von Saher.²⁵⁵ The court characterized the sale to Göring as voluntary and Désirée's 1952 decision against seeking further redress as intentional and deliberate.²⁵⁶

Shortly after the court's decision, however, the Dutch government adopted a more liberal restitution policy.²⁵⁷ Numerous local and foreign commentators had criticized how the Dutch post-war restitution policy regarding looted artwork had been shaped and implemented.²⁵⁸ As a result of this criticism, the government had ordered a pilot study into the provenance of objects in the NK-collection, which led to the establishment of the agency "Herkomst Gezocht / Origins Unknown" in September 1998.²⁵⁹ The agency's assignment was to investigate the

²⁴⁹ See generally Collins, *supra* note 5, at 119, 141; Minkovich, *supra* note 64, at 354.

²⁵⁰ Muchnic, *supra* note 153; Riding, *supra* note 122.

²⁵¹ The NK-collection, or "*Nederlands Kunstbezit-collectie*," consists of the remaining works of art retrieved after the war, particularly from Germany. This collection is in the State's custody and is part of the *Instituut Collectie Nederland* (ICN), run by the Dutch Ministry of Education, Culture and Sciences. See also LUBINA, *supra* note 126, at 321-22; SCHRAGE, *supra* note 124, at 54-55.

²⁵² LUBINA, *supra* note 126, at 321-22.

²⁵³ Von Saher/State, *Gerechtshof [Hof] [Ordinary Court of Appeal]*, The Hague, 16 Dec. 1999, LJN:AV1399, <http://zoeken.rechtspraak.nl> (Neth.).

²⁵⁴ *Id.* § 16-17.

²⁵⁵ *Id.* § 18-20.

²⁵⁶ *Id.* § 20. See generally LUBINA, *supra* note 126, at 322-23; SCHRAGE, *supra* note 124, at 55.

²⁵⁷ See LUBINA, *supra* note 126, at 294-342.

²⁵⁸ See MÜLLER, *supra* note 147, at 6; NORMAN PALMER, *MUSEUMS AND THE HOLOCAUST* 130 (Institute of Art and Law 2000). See also GUNNAR SCHNABEL & MONIKA TATZKOW, *NAZI LOOTED ART – HANDBUCH KUNSTRESTITUTION WELTWEIT* [The Story of Street Scene: Restitution of Nazi Looted Art Case and Controversy] 144 (Proprietas-Verlag 2007) (F.R.G.).

²⁵⁹ For more on the agency "Herkomst Gezocht / Origins Unknown," see *Herkomst gezocht*

pre-war provenance of all works in the NK-collection.²⁶⁰ The Ekkart Committee, which monitored the methods and quality of the provenance research, also made recommendations for a more liberal restitution policy.²⁶¹ In response to the first set of recommendations made by the Ekkart Committee,²⁶² the Dutch government established the Advisory Committee on the Assessment of Restitution Applications (Restitution Committee) which began its work on January 1, 2002.²⁶³ As an independent assessor of claims on looted artworks, the Restitution Committee investigated the claim submitted by the Goudstikker heirs on April 26, 2004, seeking the recovery of 276 works of art.²⁶⁴ Unlike the 1999 court of appeal, the Restitution Committee determined that the sales to Göring and Miedl were “involuntary” and that, while Désirée had waived her rights to the paintings that were part of the Miedl-transaction by entering into the 1952 settlement, she had not waived her rights to the paintings taken by Göring.²⁶⁵ On December 19, 2005, the Restitution Committee recommended that the government return 202 of the paintings held at that time in the NK-collection.²⁶⁶ On February 6, 2006, the Dutch government announced its decision to honor the recommendations of the Restitution Committee, albeit on moral rather than on solid legal grounds.²⁶⁷ The minister stressed that the decisive factor in granting von Saher’s request was the deficient nature of the post-war era redress.²⁶⁸ Soon several Dutch museums started preparing the return of the Goudstikker paintings they had on loan from the NK-collection.²⁶⁹

Home Page, <http://www.herkomstgezocht.nl> (last visited July 20, 2010).

²⁶⁰ The results of the provenance research regarding the NK-collection were published annually in interim reports. Interim Report 1 was published in October 1999, Interim Report 2 in October 2000 and Interim Report 3 in February 2002. For Interim Reports, see Herkomst Gezocht Reports <http://www.herkomstgezocht.nl/eng/rapportage/content.html> (last visited Sept. 22, 2010).

²⁶¹ LUBINA, *supra* note 126, at 299-312; SCHRAGE, *supra* note 124, at 48-51.

²⁶² For reports and recommendations of the Ekkart Committee, see Herkomst gezocht Reports, *supra* note 259.

²⁶³ LUBINA, *supra* note 126, at 312.

²⁶⁴ *Id.* at 323.

²⁶⁵ *Id.* at 322-23.

²⁶⁶ *Id.* at 327.

²⁶⁷ *Id.* at 329; Muchnic, *supra* note 153. See also Medy C. van der Laan (Dutch Minister of Culture), Letter addressed at the president of the House of Representatives, announcing and defending the decision of the government to reconstitute 202 paintings to von Saher, available at <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2006/02/06/informatie-over-het-verzoek-tot-teruggave-goudstikker-collectie.html>.

²⁶⁸ For more on the recommendations of the Restitution Commission and the decision of the Dutch government, see LUBINA, *supra* note 126, at 324-30; SCHRAGE, *supra* note 124, at 50-51, 55-58; Hermanus C.F. Schoordijk, *De Goudstikker-Zaak: Regels van privaatrecht zijn door het beheersinstituut nooit toegepast, zo eenvoudig is het* [*The Goudstikker Case: The Beheersinstituut Just Never Applied Rules of Private Law*], 81 NEDERLANDS JURISTENBLAD [NJB] 743-48 (2006) (Neth.); Aart A. van Velten, *Juridische Verwikkelingen rond de voormalige collectie Goudstikker* [*Legal Issues Regarding the Former Goudstikker Collection*], 137 WEEKBLAD VOOR PRIVAATRECHT, NOTARIAAT EN REGISTRATIE [WPNR], 233-43, 257-65 (2006) (Neth.).

²⁶⁹ In February 2007, the possession of the 202 Goudstikker paintings was actually transferred to von Saher. See van der Laan, *supra* note 270. On February 22, 2007, the New York Times announced von Saher’s decision to put up for auction an important part of the Goudstikker collection in order to raise funds for the payment of legal fees. See Carol Vogel, *An art trove*,

Why is this Dutch prequel relevant to the *von Saher* case? In October 2000, the agency published its second interim report containing the provenance information about 460 paintings, organized according to their inventory number in the NK-collection. The Cranach diptych figured as numbers 1693 (Adam) and 1694 (Eve) in the second interim report and the NK-inventory.²⁷⁰ However, although they were restituted to the Netherlands after the war in accordance with the policy of “external restitution,” the 2000 report made it clear that in 1966 the Cranach paintings were sold, so that they were no longer part of the NK-collection.²⁷¹ Thus, it was not until this time that von Saher could reasonably find out that she had to look elsewhere for the Cranachs. Her search did not take long. In early 2001, she contacted the Norton Simon Museum to reclaim the paintings and shortly thereafter started mediation proceedings.²⁷² However, the museum, to support its contention that von Saher had not been sufficiently diligent, has observed that various newspapers, magazines, and books had been published containing information about the Cranachs.²⁷³ Yet, as Shapreau points out, “between 1510 and 1540 Cranach painted the subject of *Adam* and *Eve* over thirty times.”²⁷⁴ Is it reasonable to contend that von Saher should have known on the basis of some references in newspapers, magazines, and books that she might have a claim to the Cranach paintings in the Norton Simon Museum, particularly given the fact that until the journalist informed her in 1996, she did not know about the unclaimed legacy? Furthermore, it is unlikely that she had any reason to suspect that the Cranachs were no longer in the Netherlands. After all, both works were among the paintings that were returned to the Netherlands after the war, as evidenced by their appearance in the NK-collection inventory. However, it was not until the 2000 interim report pointed out that the Dutch government sold them in 1966, that von Saher discovered that the paintings had left the NK-collection.

Unless von Saher’s appeal to the U.S. Supreme Court succeeds so as to render her action timely under section 354.3 Cal. Code Civ. Proc., an assessment of her diligence in retrieving the Cranach paintings would seem necessary to prove the timeliness of her action under section 338(c). A recent stroke of Governor Schwarzenegger’s pen, however, appears to have changed this. On September 30, Assembly Bill No.

looted by the Nazis and recovered, is going on sale, N.Y. TIMES, Feb. 22, 2007, available at http://www.nytimes.com/2007/02/21/arts/21iht-heir.4677497.html?pagewanted=1&_r=1.

²⁷⁰ See *supra* note 123, *Deelrapportage II* [Interim Report II] at 79.

²⁷¹ *Id.*

²⁷² See Mike Boehm, *Norton Simon Sues to Retain Ownership of German Painting*, L.A. TIMES, May 2, 2007, available at <http://articles.latimes.com/2007/may/02/local/me-norton2>; Suzanne Muchnic, *Norton Simon to Keep Pair of Paintings*, L.A. TIMES, Oct. 19, 2007, available at <http://articles.latimes.com/2007/oct/19/entertainment/et-simon19/2>.

²⁷³ *Von Saher v. Norton Simon Museum of Art*, 578 F.3d at 1022 (9th Cir. 2009).

²⁷⁴ Shapreau, *supra* note 8, at 27.

2765 was signed into law, which once again amended the limitation rules for actions in replevin regarding misappropriated works of art.²⁷⁵ The act extends the limitation term from three to six years for actions in replevin against professional actors, such as museums, galleries, auctioneers and dealers.²⁷⁶ In addition, the California legislature affirmed the “actual discovery” rule as the applicable standard for measuring accrual of the cause of action against these professional actors.²⁷⁷ This is contrary to *Jolly*’s rule of “constructive discovery”,²⁷⁸ which the *Orkin* court chose to endorse,²⁷⁹ but reinforces the position taken by the California Court of Appeals in *Naftzger*,²⁸⁰ as “actual discovery does not include any constructive knowledge imputed by law.”²⁸¹ Moreover, the legislature explicitly affirmed the availability of the laches defense, similar to what several commentators contended with regard to the *Naftzger* standard of accrual.²⁸²

Assembly Bill No. 2765 undeniably rose from the Ninth Circuit ruling in *von Saher*²⁸³ and appears to be aimed at giving von Saher her day in court.²⁸⁴ After all, the legislature hastened to specify that the revised limitation rules

shall apply to all pending and future actions commenced on or before December 31, 2017, including any actions dismissed based on the expiration of statutes of limitation in effect prior to the date of enactment of this statute if the judgment in that action is not yet final or if the time for filing an appeal from a decision on that action has not expired, provided that the action concerns a work of fine art that was taken within 100 years prior to the date of enactment of this statute.²⁸⁵

Whether or not the timeliness of von Saher’s action in replevin is assessed according to the actual discovery rule, there is sufficient evidence of her diligence such that the case should be heard on the merits, even if under section 338(c) a “constructive discovery” rule were to apply. Again, the Dutch prequel is of utmost importance, as a trial on the merits involves telling the diptych’s convoluted twentieth-

²⁷⁵ See also Mike Boehm, *Schwarzenegger Decision Could Have an Impact on Looted-Art Claim Against Norton Simon Museum*, L.A. TIMES, Sept. 30, 2010, available at <http://latimesblogs.latimes.com/culturemonster/2010/09/schwarzenegger-norton-simon-museum-holocaust-art.html>; Kate Taylor, *California Lawmakers Approve Bill on Stolen Art Claims*, N.Y. TIMES, Sept. 1, 2010, available at <http://artsbeat.blogs.nytimes.com/2010/09/01/california-lawmakers-approve-bill-on-stolen-art-claims>.

²⁷⁶ Stats. 2010, ch. 691, § 2.

²⁷⁷ *Id.*

²⁷⁸ *Jolly v. Eli Lilly & Co.*, 751 P.2d 923 (Cal. 1988).

²⁷⁹ *Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007).

²⁸⁰ *Naftzger v. American Numismatic Society*, 49 Cal. Rptr. 2d 784, 786 (Cal. Ct. App. 1994). See also Stats. 2010, ch. 691, § 1(b).

²⁸¹ Stats. 2010, ch. 691, § 2.

²⁸² *Id.* See *supra* note 108 and accompanying text.

²⁸³ See Boehm, *supra* note 275.

²⁸⁴ See Taylor, *supra* note 275.

²⁸⁵ Stats. 2010, ch. 691, § 2.

century history.²⁸⁶

III. THE ACT OF STATE DEFENSE IN *VON SAHER*

If the Cranachs were restituted to the Netherlands after the war, why were these prestigious paintings no longer part of the NK-collection? Why were they not displayed in the nation's leading museums, like so many other objects that had returned from Germany? In short, what happened in 1966, when the Dutch government decided to dispose of the diptych? After all, being among the paintings taken by Göring, the Cranachs would have been returned to von Saher in 2006, if they had still been in the custody of the NK-collection. To answer this question, it is crucial to be aware of the paintings' earlier provenance; in other words, how they ended up in Goudstikker's trading stock. *Von Saher* involves not one but two alleged misappropriations: one by Göring, looting the galleries of the Goudstikker business, and another alleged previous misappropriation in Bolshevik, Russia.²⁸⁷

A. *The Plot Thickens: The Russian Connection*

Although there is much controversy about their pre-WWII provenance, both parties accept that Goudstikker acquired the Cranach paintings on May 12-13, 1931 for \$11,186 at Rudolph Lepke, a Berlin auction house.²⁸⁸ The auction catalogue contained 256 objects that all allegedly stemmed from the Stroganoff Collection, Leningrad (*Sammlung Stroganoff, Leningrad*).²⁸⁹ As argued by the museum, the Cranach saga started with the Stroganoffs, a noble family in Tsarist Russia. Favored by the court of Catherine the Great, Count Alexander Stroganoff amassed a great art collection, which he accommodated in a 1754 palace in St. Petersburg.²⁹⁰ The family lost its property when the last Count Stroganoff fled to escape the Bolshevik Revolution. In the course of the revolution, the possessions of the country's nobility were expropriated under Lenin's order; their artworks were transferred to the Soviet state and dispersed to its museums.²⁹¹ In the late 1920s and early

²⁸⁶ See Boehm, *supra* note 275.

²⁸⁷ Shapreau, *supra* note 8, at 23.

²⁸⁸ Muchnic, *supra* note 153. Goudstikker also bought two portraits by Pietro Antoni Rotari, which remained in the NK-collection, as numbers 3261 and 3268, until 2006, when they were restituted to von Saher. See *supra* note 259, *Deelrapportage II* at 218, 221.

²⁸⁹ KATALOG 2043 - SAMMLUNG STROGANOFF, LENINGRAD, IM AUFTRAG DER HANDELSVERTRETUNG DER UNION DER SOZIALISTISCHEN SOWJET-REPUBLIKEN (Buchdruck J.S. Preuss, Rudolph Lepke's Kunst-Auctions-Haus ed., 1931) (F.R.G.).

²⁹⁰ See generally <http://www.nevsky-prospekt.com/palaces/thepalaces.html> (last visited, Oct. 4, 2010); Judith H. Dobrzynski, *Arts in America - The Last of the Stroganoffs Finally Sees What She Lost*, N.Y. TIMES, Feb. 22, 2000, available at <http://www.nytimes.com/2000/02/22/arts/arts-in-america-the-last-of-the-stroganoffs-finally-sees-what-she-lost.html?pagewanted=2>; Muchnic, *supra* note 153.

²⁹¹ Decree No. 111 of the Council of People's Commissars nationalized all movable property of citizens who had fled the Soviet Union. Decree 245, promulgated by the All Russian Central Executive Committee and the Council of People's Commissars nationalized property housed in state museums. See *Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18 (S.D.N.Y. 1976);

1930s, Stalin's government was in desperate need of hard currency. It tried to raise funds by auctioning off state-owned artworks in Western Europe, as it did with the 1931 Berlin auction of the Stroganoff collection.²⁹² Despite protests from the Stroganoff family, the sale proceeded. Around the time of the Lepke auction in Berlin, Princess Stroganoff-Scherbatoff wrote a public letter of protest to the New York Herald Tribune stating that "[t]his collection remains entirely my property. The Soviet republic has taken possession of this collection in a way that sets at defiance every principle of international law."²⁹³

The crux of the *von Saher* case lies in the pre-WWII provenance of the paintings. Where the museum argues that the diptych was illegally expropriated from the Stroganoffs in the aftermath of the Russian revolution, relying on the 1931 auction catalogue as proof of provenance,²⁹⁴ von Saher contends that Goudstikker acquired good title over the Cranachs from the Soviet regime, since they were never part of the Stroganoff collection.²⁹⁵ It is common ground that the Stalin administration systematically added works of art to prestigious sales of collections such as the Stroganoff's. In doing so, the regime tried to drive up prices through association with the renowned collections of glamorous nobility and with a view to disguising the fact that the objects were actually being sold by the Soviet government.²⁹⁶ Aside from the contested auction catalogue, there is no evidence that the diptych once belonged to the Stroganoffs. Recently unearthed documents even indicate that the paintings were reported in a Kiev Church, rather than in the Stroganoff collection.²⁹⁷

The question of whether the Cranachs were actually part of the nationalized Stroganoff collection remains significant. In 1966, the Dutch government transferred the paintings to George Stroganoff-Scherbatoff, the nephew and sole heir to the last Count Stroganoff.²⁹⁸

Princess Paley v. Weisz (1929) 1 KB 718 (EWCA). See also Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Seine, Jan. 12, 1966, REV. CRIT. DR. INT. PR. 1967, 120 (Fr.); Tribunal civil [Trib.civ.] [ordinary court of original jurisdiction], Seine, July 12, 1954, JOURNAL DU DROIT INT'L. [J.D.I.] 1955, 118, J.B. Sialelli (Fr.); Landgericht [LG] [trial court] Dec. 11, 1928, 3 Zeitschrift für Ostrecht [Z.Ost.R.] 1366 (1929) (F.R.G.). For a recent case in the United States, see *Delocque-Fourcaud v. L.A. County Museum of Art*, No. CV 03-5027-R(CTx) (C.D. Cal. 2003). See generally GUIDO CARDUCCI, LA RESTITUTION INTERNATIONALE DES BIENS CULTURELS ET DES OBJETS D'ART VOLÉS OU ILLICITEMENT EXPORTÉS, 154 (L.G.D.J. 1997) (Fr.); Sharon Flescher, *Who Owns the Works Nationalized by Lenin?*, 6 IFAR J. No. 1 & 2, 2003 at 5; Stephen E. Weil, *Museum Litigation Update: 2004*, 7 IFAR J. No. 1, 2004 at 28, 34-36.

²⁹² See Boehm, *supra* note 166; Muchnic, *supra* note 153; Shapreau, *supra* note 8, at 23.

²⁹³ *Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18 (S.D.N.Y. 1976).

²⁹⁴ See Brief in Opposition, *von Saher v. Norton Simon Museum of Art*, (U.S. Apr. 14, 2010) (No. 09-1254), available at <http://www.commartrecovery.org/docs/FILINGDraftofNortonSimonBriefinOpposition.pdf>.

²⁹⁵ See *Petition for a Writ of Certiorari*, *supra* note 206, at 4. See also Janofsky, *supra* note 136; Muchnic, *supra* note 153.

²⁹⁶ See ROBERT C. WILLIAMS, RUSSIAN ART AND AMERICAN MONEY: 1900-1940 179, 182 (Harvard Univ. Press 1980); Muchnic, *supra* note 153.

²⁹⁷ See Muchnic, *supra* note 153.

²⁹⁸ *Id.*; see also *von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016, 1021 (9th Cir. 2009).

George Stroganoff-Scherbatoff renounced his hereditary title, immigrated to the United States, and served in the U.S. Navy during WWII, rising to the rank of commander.²⁹⁹ After the war, he petitioned in various countries, including the Netherlands, to recover works of art of his family's collection.³⁰⁰ After lengthy negotiations, he recovered possession of the diptych in 1966.³⁰¹ Five years later, Stroganoff-Scherbatoff sold the paintings to Norton Simon for \$800,000.³⁰² Thus, the Cranachs ended up in Pasadena.

B. *Analysis of the Act of State Defense*

The Norton Simon Museum claims to have acquired rightful ownership over the paintings in 1971, when it bought the diptych from the sole heir to the Stroganoff family, whose collection was misappropriated. On the other hand, von Saher argues that, being among the paintings taken by Göring, the Cranachs would have been returned to her in 2006, if they had still been in the custody of the NK-collection. In sum, the Dutch government had no actual authority to transfer the paintings to Stroganoff-Scherbatoff. Bearing in mind the *nemo dat* rule, von Saher claims that the 2005 ruling of the Dutch Restitution Committee and the 2006 decision of the Dutch government both established that she is entitled to the Goudstikker paintings that Göring had taken and that the Netherlands had recovered.³⁰³

Who is the rightful owner of the Cranach paintings? If von Saher's action in replevin brought under section 338(c) would be found to be timely in view of the previous developments in the Netherlands and the new-approved Assembly Bill No. 2765, the crux of the dispute will lie in this very question. Determining the pre-war ownership of the paintings seems inescapable, unless the court can find a way to avoid this controversial issue. The act of state defense might be a way out of this conundrum.

The act of state doctrine, established as an independent source of immunity in American law by the 1897 Supreme Court case *Underhill v. Hernandez*,³⁰⁴ provides that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own

²⁹⁹ *Id.*

³⁰⁰ *Stroganoff-Scherbatoff*, 420 F. Supp. at 18. In this case, Stroganoff-Scherbatoff sought the recovery of two works from his family's nationalized collection. The first was a portrait by Anthony van Dyck, and the second was Houdon's bust of Diderot. Both works were sold at the 1931 Lepke auction. In 1974, a New York collector donated the Diderot bust to the Metropolitan Museum of Art. In 1931, the portrait was sold to a London dealer, who in turn sold it on to Weldon, a New York collector. The New York District Court found that the action in conversion was barred by the act of state doctrine. See *infra* notes 342-344 and accompanying text. See also Tribunal de grande instance [TGI] [ordinary court of original jurisdiction], Seine, Jan. 12, 1966, REV. CRIT. DR. INT. PR. 1967, 120 (Fr.).

³⁰¹ See *von Saher*, 578 F.3d at 1021; Muchnic, *supra* note 153.

³⁰² See Boehm, *supra* note 166; Muchnic, *supra* note 153; Shapreau, *supra* note 8, at 25-26.

³⁰³ See *supra* notes 260-272 and accompanying text.

³⁰⁴ 168 U.S. 250 (1897).

territory[.]" since "[e]very state is bound to respect the independence of every other sovereign state" ³⁰⁵ In international litigation, especially in cases regarding the misappropriation of art objects, the act of state doctrine is a commonly raised defense. ³⁰⁶ The principle forecloses a nation from judging the legality of a foreign country's sovereign acts within its territory. However, the act of state doctrine does not preclude the court's jurisdiction. It is important to understand that it can still hear the case. The application of the doctrine merely precludes the court from judging the *validity* of the act in question. Consequently, the court must decide under the assumption that the act in question is valid, which will be dispositive for most cases regarding alleged misappropriations. ³⁰⁷

The common law beginnings of the act of state doctrine are said to go back to *Blad v. Bamfield*, ³⁰⁸ an English case from the late seventeenth-century. In the United States, case law on the theory began to emerge in the late-eighteenth and early-nineteenth centuries. ³⁰⁹ However, despite its old age, there is a great deal of controversy surrounding the act of state doctrine. ³¹⁰ Some major points of

³⁰⁵ *Id.* at 252. In 1812 the Supreme Court recognized the act of state doctrine in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). See Michael J. Bazylar, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 330 (1986); Andrew D. Patterson, *The Act of State Doctrine is Alive and Well: Why Critics of the Doctrine are Wrong*, 15 U.C. DAVIS J. INT'L L. & POL'Y 111, 115 (2008); Antonia Dolar, Comment, *Act Of State And Sovereign Immunities Doctrines: The Need To Establish Congruity*, 17 U.S.F. L. REV. 91, 94 (1982). The doctrine had been foreshadowed in a previous case regarding the seizure of vessels within the territorial jurisdiction of Santo Domingo, where the U.S. Supreme Court had held:

When a seizure is thus made for the violation of a municipal law, the mode of proceeding must be exclusively regulated by the sovereign power of the country, and no foreign court is at liberty to question the correctness of what is done, unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice.

Hudson v. Guestier, 8 U.S. (4 Cranch) 293, 294 (1808). See also Richard L. Scheff, *The Status of the Act of State Doctrine – Application to Litigation Arising from Confiscations of American Owned Property in Iran*, 4 SUFFOLK TRANSNAT'L L.J. 89, 96-97 (1980).

³⁰⁶ See *Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18 (S.D.N.Y. 1976); see, e.g., *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982); *Menzel v. List*, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966); *Princess Paley v. Weisz* [1929] 1 KB 718 (Eng.); see also, JOHN H. MERRYMAN, ALBERT ELSÉN & STEPHEN URICE, LAW, ETHICS AND THE VISUAL ARTS, 51-57 (2007); Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 235-36 (2001); Lucy D. Schwallie, *Acts of Theft and Concealment: Arguments Against the Application of the Act of State Doctrine in Cases of Nazi-Looted Art*, 11 UCLA J. INT'L L. & FOREIGN AFF. 281 (2006); Kurt Siehr, *International Art Trade and the Law*, 243 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW [COURSE SERIES: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW] 9, 135 (1993); Andrew J. Extract, Note, *Establishing Jurisdiction over Foreign Sovereign Powers: The Foreign Sovereign Immunity Act, The 'Act of State' Doctrine and the Impact of Republic of Austria v. Altmann*, 4 J. INT'L BUS. & L. 103 (2005).

³⁰⁷ See Schwallie, *supra* note 306, at 288.

³⁰⁸ *Blad v. Bamfield*, 36 Eng. Rep. 992 (Ch. 1674). See Extract, *supra* note 306, at 115. For more early cases in the United Kingdom, see Michael Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826, 827-28 (1959).

³⁰⁹ See Extract, *supra* note 306, at 115.

³¹⁰ See generally Bazylar, *supra* note 305, at 365-75 (1986).

contention regard the foundation of, and the underlying rationale behind the doctrine. Although nowadays it is commonly accepted that the doctrine is not compelled by international law,³¹¹ it is still a principle adhered to by the U.S. Supreme Court as federal common law, given the doctrine's "constitutional underpinnings."³¹² In the 1964 landmark decision, *Banco Nacional de Cuba v. Sabbatino*,³¹³ the Supreme Court grounded the theory in "the basic relationships between branches of government in a system of separation of powers."³¹⁴ The rationale behind the theory is probably to safeguard U.S. government officials from suit by offering foreign officials the same protection. Nevertheless, it is traditionally argued³¹⁵ that the act of state doctrine aims at protecting the separation of powers by granting the power to determine foreign policy to the Executive, in addition to safeguarding the interest of foreign states in keeping their acts from judicial review in U.S. courts. In *Oetjen v. Central Leather Co.*,³¹⁶ Justice Clark explained that "[t]o permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations."³¹⁷ For "[r]edress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."³¹⁸ Consequently, the doctrine aims at protecting the Executive Branch's prerogatives in foreign affairs from being thwarted by a decision of the U.S. courts.

There is an interesting parallel between the idea that it is the privilege of the Executive Branch to resolve legal problems caused by acts of state, and the museum's argument that the extension of the limitation period on Holocaust-related claims infringes the Executive's war making prerogatives. Both arguments ultimately aim at rendering the judiciary powerless. With good reason, von Saher points out that

³¹¹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964) ("We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority, as some of the earlier decisions seem to imply, or by some principle of international law.") (internal citations omitted). See also Zander, *supra* note 308, at 837. For more on the doctrine's early theoretical basis, see Comment, *The Act of State Doctrine – Its Relation to Private and Public International Law*, 62 COLUM. L. REV. 1278, 1282-87 (1962). For some of the early cases, implying a foundation in international law, see *United States v. Pink*, 315 U.S. 203 (1942); *Shapleigh v. Mier*, 299 U.S. 468 (1937); *United States v. Belmont*, 301 U.S. 324 (1937); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Ricaud v. American Metal Co. Ltd.*, 246 U.S. 304 (1918); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

³¹² Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1935 (1992); Louis Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 811-13 (1964).

³¹³ 376 U.S. 398 (1964).

³¹⁴ *Sabbatino*, 376 U.S. at 423.

³¹⁵ Schwallie, *supra* note 306, at 286; Russ Schlossbach, Note, *Arguably Commercial, Ergo Adjudicable?: The Validity of a Commercial Activity Exception to the Act of State Doctrine*, 18 B.U. INT'L L.J. 139, 141 (2000).

³¹⁶ 246 U.S. 297 (1918).

³¹⁷ *Oetjen*, 246 U.S. at 304 (internal quotation omitted).

³¹⁸ *Underhill*, 168 U.S. at 252.

both the court and the museum blur these distinct lines of reasoning in their arguments. Von Saher aptly contends:

The question of whether this case will require the [Ninth Circuit] to consider the validity of the Dutch government's actions with respect to the Cranachs will be determined under Defendants' act of state defense. It is not an issue that relates to preemption, however, where, as here, the statute at issue is entirely neutral as to foreign governments.³¹⁹

Because the 1966 and 2006 decisions of the Dutch government are thought to affect the museum's entitlement to the paintings, the act of state doctrine is an obvious defense in the *von Saher* case. The Ninth Circuit has already observed that "[i]n order to determine whether the Museum has good title to the Cranachs, a California court would necessarily have to review the restitution decisions made by the Dutch government and courts."³²⁰ In addition, however, the validity of the alleged Soviet expropriations in the early 1920s may also prove to be of relevance. The following analysis will assess the potential application of the act of state defense in *von Saher*.

Some of the difficulties associated with the application of the act of state doctrine lie in the absence of a generally accepted definition. One of the few authors who attempts to define the concept contends, somewhat vaguely, that an act of state is a formal or informal act or refusal to act, done by or for a recognized sovereign state by one vested with sovereign or governmental authority, within its own territory over which it has de facto or de jure control, and done to give effect to a public interest.³²¹ Expropriations by foreign sovereign governments were always regarded as among the acts of state par excellence,³²² and it is these acts that gave rise to the considerable part of the case law on the subject.³²³ Indeed, *Sabbatino*, the landmark case that modernized the doctrine, actually concerned takings of property by a foreign sovereign government.³²⁴ Therefore, the potential of the act of state defense in *von Saher* will be based on the Supreme Court's modern formulation³²⁵

³¹⁹ Petition for Panel Rehearing and Rehearing en Banc, at 14 n.6, *von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016 (9th Cir. 2009), <http://www.commartrecovery.org/docs/SFX6C21.pdf>.

³²⁰ *Von Saher*, 578 F.3d at 1028.

³²¹ John S. Williams, *The Act of State Doctrine*: *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 9 VAND. J. TRANSNAT'L L. 735, 746-47 (1976).

³²² See Scheff, *supra* note 305, at 100.

³²³ See, e.g., *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918); *Ricaud v. Am. Metal Co. Ltd.*, 246 U.S. 304 (1918); *Bernstein v. N.V. Nederlandsche Amerikaansche Stoomvaart Maatschappij*, 173 F.2d 71 (2d Cir. 1949).

³²⁴ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964). See also Richard A. Falk, *The Complexity of Sabbatino*, 58 AM. J. INT'L L. 935 (1964); Henkin, *supra* note 312, at 805-32; Victor Rabinowitz, *Viva Sabbatino*, 17 VA. J. INT'L L. 697 (1977); see also Bazylar, *supra* note 305, at 335; Burley, *supra* note 312, at 1934.

³²⁵ *Sabbatino* adapted the act of state doctrine to a modern idea of foreign policy in an increasingly globalized world. Nevertheless, numerous controversies remain. See Schwallie,

of the doctrine in *Sabbatino*, and more recently in *W. S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*³²⁶

According to *Sabbatino*, the success of the act of state defense rests upon the concurrence of several factors. Indeed, the Supreme Court held:

The Judicial Branch 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 of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.³²⁷

In sum, the act of state defense requires the defendant establish four factors: (1) there was an appropriation by a foreign sovereign government; (2) such government was extant and recognized by the United States at the time of suit; (3) such taking occurred within the territory of that government; and (4) such taking was not violative of a treaty obligation.³²⁸ If these requirements are met, according to *Sabbatino*, a foreign country's expropriation rights are held inviolable, regardless of their illegality in the international realm. Thus, even if the paintings' 1966 restitution to Stroganoff-Scherbatoff was illegal under international standards, amounting with regard to von Saher to a misappropriation because the Dutch government disposed of property it was not entitled to, she would probably have no redress in a U.S. court under *Sabbatino*.³²⁹

In the case at bar, both the museum and von Saher found their respective claims on allegations that foreign sovereign governments wrongfully disposed of their alleged property. In the past, the U.S. Supreme Court has applied the act of state doctrine to claims stemming from Soviet expropriations.³³⁰ With regard to confiscated art objects, *Princess Paley v. Weisz*³³¹ and especially *Stroganoff-Scherbatoff v. Weldon*³³² support the contention that the misappropriation of the art collections of the Russian aristocracy in the aftermath of the Bolshevik

supra note 306, at 287. It is beyond the scope of this article to thoroughly discuss all points of contention related to the act of state doctrine. This article will focus instead on the doctrine as it could be applied in the *von Saher* case.

³²⁶ *W. S. Kirkpatrick & Co. v. Evtl. Tectonics Corp., Int'l*, 493 U.S. 400 (1990). See generally JAMES B. WHISKER, *THE SUPREMACY OF THE STATE IN INTERNATIONAL LAW: THE ACT OF STATE DOCTRINE* 57-86 (2003); Joseph W. Dellapenna, *Deciphering the Act of State Doctrine*, 35 *VILL. L. REV.* 1, 3, 22-30 (1990).

³²⁷ *Sabbatino*, 376 U.S. at 428.

³²⁸ See JOHN H. MERRYMAN ET AL., *supra* note 306, at 51; Gerstenblith, *supra* note 306, at 237 n.173. See also *Menzel v. List*, 267 N.Y.S.2d 804, 813 (N.Y. App. Div. 1966).

³²⁹ See Jane Graham, Note, "*From Russia*" Without Love: Can the Shchukin Heirs Recover their Ancestor's Art Collection?, 6 *U. DENVER SPORTS & ENT. L.J.* 65, 98 (2009).

³³⁰ See *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). See also *Day-Gormley Leather Co. v. National City Bank of N.Y.*, 8 F. Supp. 503 (S.D.N.Y. 1934).

³³¹ *Princess Paley v. Weisz*, [1929] 1 K.B. 718 (U.K.).

³³² *Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18 (S.D.N.Y. 1976).

Revolution constitutes an act of state. *Princess Paley v. Weisz* was a case before the British Court of Appeal, regarding an action instituted by a Russian refugee noble³³³ to recover certain furniture and art objects that had been in the Paley Palace near St. Petersburg, and which were sold by the Soviet government to Weisz in 1928.³³⁴ Weisz contended that the articles in question had ceased to be the property of Princess Paley and were in the possession of the Soviet government as public property. Because that government had been officially recognized as such by the British government in 1924, Weisz relied on the act of state doctrine to argue that Princess Paley could not dispute the validity of the appropriation of her property by the Soviet government in the British Courts. In affirming the lower court's decision dismissing Princess Paley's action, Judge Scrutton of the Court of Appeal held as follows:

Our Government has recognized the present Russian Government as the de jure Government of Russia, and our Courts are bound to give effect to the laws and acts of that Government so far as they relate to property within that jurisdiction when it was affected by those laws and acts.³³⁵

The *Princess Paley* case was extensively referred to in *Stroganoff-Scherbatoff v. Weldon*, a 1970s case brought by George Stroganoff-Scherbatoff, the same gentleman who recovered the Cranach paintings from the Dutch government and sold them to the Norton Simon Museum. Inspired by the British Court of Appeal, the New York District Court applied the act of state doctrine to dismiss the action in conversion regarding a bust of Diderot by Houdon and a van Dyck painting.³³⁶ Both art objects were nationalized in the early 1920s and, like the Cranachs, sold at the 1931 Berlin auction of the Stroganoff collection. The New York District Court held that Stroganoff-Scherbatoff was precluded from recovery by reason of the act of state doctrine.³³⁷

In order to successfully invoke the act of state defense before the U.S. courts, the foreign government must be recognized by the United States and still exist at the time of the suit.³³⁸ The act of state doctrine aims at avoiding diplomatic tension caused by intrusions by the judiciary into Executive Branch prerogatives in foreign affairs. If these countries are not recognized by the United States or no longer exist at

³³³ Princess Olga Paley was the second wife and widow of Grand Duke Paul Alexandrovich of Russia, the uncle of Tsar Nicholas II.

³³⁴ *Stroganoff-Scherbatoff*, 420 F. Supp. at 21-22. See also Siehr, *supra* note 306, at 135; Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels*, 45 HARV. INT'L L.J. 239, 273 n.263 (2004).

³³⁵ *Princess Paley*, [1929] 1 K.B. at 725.

³³⁶ See Gerstenblith, *supra* note 306, at 235-36; Graham, *supra* note 329, at 98.

³³⁷ *Stroganoff-Scherbatoff*, 420 F. Supp. at 22.

³³⁸ See JOHN H. MERRYMAN ET AL., *supra* note 311, at 51; Gerstenblith, *supra* note 306, at 237 n.173. See also *Menzel v. List*, 267 N.Y.S.2d 804, 812 (N.Y. App. Div. 1966).

the time of the suit, there is no need to be concerned about vexed diplomatic relations. With regard to the *von Saher* case, the expropriations of the early 1920s by the Soviet Union do not seem to satisfy this second requirement. Whereas the United States recognized the Soviet Union in 1933, the country ceased to exist in 1991. One might argue, however, that the Russian Federation succeeded the Soviet Union, as the former was founded following the dissolution of the latter and is recognized as the continuing legal personality of the Soviet state.³³⁹ The Soviet Union differs from the Nazi regime, however, as the New York District Court pointed out in *Menzel v. List*.³⁴⁰ The dispute in *Menzel* involved a gouache by Chagall that the plaintiff had left behind in her Brussels apartment when she and her husband fled to escape imminent Nazi persecution.³⁴¹ The Menzel family managed to escape to the United States, but the Nazis confiscated the gouache.³⁴² Once the war was over, they tried to trace their stolen Chagall, yet its whereabouts remained unknown until 1955.³⁴³ At that time, the work resurfaced on the Parisian market, where a New York dealer bought it and subsequently sold it on to an admittedly good faith purchaser, Albert List.³⁴⁴ It was not until November 1962 that Mrs. Menzel located the gouache in the defendant's possession, whereupon she demanded its return and filed an action in replevin.³⁴⁵ The court refused to apply the act of state doctrine, as the Third Reich had permanently collapsed with the surrender in 1945 and the assumption of supreme authority by the Allied Powers.³⁴⁶

In order to rely on the act of state defense as defined in *Sabbatino*, the appropriation had to take place within the territory of the foreign government. With regard to the alleged expropriation of the Cranachs as part of the Stroganoff collection, it is interesting to revert once more to the decision of the district court in *Stroganoff-Scherbatoff v. Weldon*,³⁴⁷ emphasizing the importance of this third requirement and explaining how Soviet expropriations differ from the Nazi looting in *Menzel*.³⁴⁸ The *Stroganoff* Court argued:

³³⁹ For more on state succession and the act of state doctrine, see Gerstenblith, *supra* note 306, at 237 n.173.

³⁴⁰ 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966).

³⁴¹ *See id.* at 806.

³⁴² *See id.*

³⁴³ *See id.* at 808.

³⁴⁴ *See id.* at 807-08.

³⁴⁵ *See id.* 807.

³⁴⁶ *See id.* at 816. For the importance of being recognized as a sovereign state, see also *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982). *See generally* Kent L. Killelea, *Property Law: International Stolen Art*, 23 HARV. INT'L L.J. 466, 469 (1983).

³⁴⁷ *Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18 (S.D.N.Y. 1976).

³⁴⁸ *Menzel*, 267 N.Y.S.2d at 815 ("Assuming . . . 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.").

Unlike the situation in *Menzel v. List* where the taking was by an organ of the Nazi Party, not a sovereign state, and the Act of State Doctrine was held inapplicable, here, the Soviet government, by official decrees of its political organs, had acquired the works of art in Russia prior to their public sale in Berlin in 1931. Moreover, in *Menzel v. List*, the appropriation of the painting was in Belgium and the Government of the Kingdom of Belgium, although in exile at the time, was still the recognized government of Belgium. Here the appropriation was by the Soviet Union and occurred within the territorial boundaries of the Soviet Union. Thus, it seems clear that, on this record, plaintiff is precluded from recovery by the reason of the Act of State Doctrine.³⁴⁹

Both the 1966 and 2006 decisions of the Dutch government are undoubtedly related to property within the territory of the Netherlands, a sovereign country recognized by the United States. As such the U.S. courts cannot question their validity under the act of state doctrine.

Finally, the appropriation of the Cranach paintings, both by the Soviets in the 1920s and by the Netherlands in 1966, may qualify as an act of state, unless the taking is in violation of specific treaty obligations to the United States. The fourth requirement is commonly referred to as the “treaty exception,” which was developed in *Sabbatino*.³⁵⁰ In his opinion, Justice Harlan pointed out that the Supreme Court would decline to inquire into the validity of appropriations by foreign governments, “in the absence of a treaty or other unambiguous agreement regarding controlling legal principles.”³⁵¹ There is no need to abstain on act of state grounds if there is a clear international/bilateral consensus on the matter. After all, under these circumstances there are no potential repercussions to U.S. foreign policy interests.³⁵² However, there is a great deal of controversy about the precise purport of the treaty exception. For the exception being formulated in the negative, it does not imply, according to the Fifth Circuit, that the U.S. courts are automatically precluded from abstaining on act of state grounds if there is a treaty covering the substance of what is being litigated.³⁵³ In *Callejo v. Bancomer*, the Fifth Circuit observed that “treaties are not all of a piece; they come in different sizes and shapes.”³⁵⁴ Some of them set forth unambiguous rules; others are broad and vague pronouncements. Because of this variation, the court suggested that a close examination of the treaty at hand is always required.³⁵⁵ However, in *Kalamazoo Spice Extraction Co. v. Provisional Military Government*

³⁴⁹ *Stroganoff*, 420 F. Supp. at 22 (internal citations omitted).

³⁵⁰ *Sabbatino*, 376 U.S. at 428.

³⁵¹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

³⁵² Bazyley, *supra* note 305, at 371.

³⁵³ *Id.* at 371-72; Schwallie, *supra* note 306, at 291, 297.

³⁵⁴ *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1118 (5th Cir. 1985).

³⁵⁵ *See id.* at 1118; *see also* Schwallie, *supra* note 306, at 297.

of *Socialist Ethiopia*, the Sixth Circuit seemed to rely on a more straightforward “treaty exception,” barring the act of state defense whenever “a controlling legal standard” exists.³⁵⁶ Even when adopting the interpretation most favorable to the plaintiff, it remains questionable whether the 1998 Washington Conference Principles on Nazi-Confiscated Art³⁵⁷ can be considered a controlling legal standard, since they are not binding. Moreover, if the Washington Principles are found to establish restitution as the controlling legal standard for misappropriated art objects, is it then reasonable to maintain that this standard only applies to restitutions to victims of Nazi spoliations, and not to takings in the course of the Bolshevik Revolution, given the potential repercussions to U.S. relations with the Russian Federation? After all, the Nazi government and the Soviet government were equally totalitarian regimes, yet the Russian national museums in Moscow and St. Petersburg are still packed with revolutionary takings.³⁵⁸ Will the Norton Simon Museum find a U.S. court willing to justify the 1966 restitution to Stroganoff-Scherbatoff, thereby unavoidably questioning Russia’s title to numerous art objects in its national museums? On the other hand, if restitution is considered the controlling legal standard for Nazi lootings only and not other misappropriations, the court might be able to review the 2006 decision of the Dutch government, yet should abstain from questioning the validity of the 1966 restitution to Stroganoff-Scherbatoff.

This analysis makes it clear that either way, the *von Saher* case is a political minefield that a U.S. court might seek to avoid by relying on the act of state doctrine. Consequently, the case elucidates how the act of state defense can even obstruct the course of justice in purely national litigation, as *von saher v. Norton Simon Museum* is a dispute between a U.S. citizen and a U.S. museum regarding property situated in the United States.

However, as some Jewish organizations observed in their amici briefs, would it not be extremely ironic if “a [U.S.] claimant could sue the Austrian government for the recovery of her artwork in federal court in the United States,³⁵⁹ but could not sue an American art gallery or museum for such recovery.”³⁶⁰ Is there no other way for the court to overcome this dilemma? The solution might lie in Dutch property law and the limited scope the U.S. Supreme Court gave to the act of state

³⁵⁶ *Kalamazoo Spice Extraction Co. v. Provisional Military Gov’t of Socialist Ethiopia*, 729 F.2d 422, 425 (6th Cir. 1984).

³⁵⁷ See *supra*, note 235 and accompanying text.

³⁵⁸ See Flescher, *supra* note 291, at 6.

³⁵⁹ *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

³⁶⁰ Brief of Amici Curiae Bet Tzedek Legal Services, The Jewish Federation Council of Greater Los Angeles, et al. in Support of Plaintiff-appellant Seeking Reversal of Order Dismissing Complaint at 13, available at <http://www.commart-recovery.org/docs/usvonsaheramicibrief.pdf> (internal citations omitted); Shapreau, *supra* note 8, at 28.

doctrine in *Kirkpatrick*.³⁶¹

C. *Transfer of Ownership under Dutch Property Law*

The lawfulness of the restitutions made by the Dutch government to Stroganoff-Scherbatoff and von Saher, as well as the diptych's pre-war provenance being both difficult and politically delicate for a U.S. court to assess, makes a judgment based entirely upon an analysis of the legal implications of the post-war transactions more feasible and far less controversial, even though the decision might potentially prove unpleasant or embarrassing for the Dutch government. However, this should not be a reason to obstruct the course of justice, as long as the case can be decided without squarely determining the legality of a sovereign state's official acts under that sovereign's own laws.³⁶² Unlike previous case law that suggested that the act of state defense applied more broadly, the U.S. Supreme Court in *Kirkpatrick* strictly limited its application to cases in which a court, in order to decide the case, is *required* to declare an official act of a foreign sovereign "invalid, and thus ineffective as 'a rule of decision for the courts of this country.'"³⁶³ However, at the same time, the Supreme Court recalled that in all other cases "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them."³⁶⁴ Thus, U.S. courts should not refrain from deciding cases that may merely touch on or relate to the acts of a sovereign state or that may have an unpleasant or embarrassing outcome for a foreign nation. Consequently, in *von Saher*, the act of state doctrine should not operate to prevent a U.S. court from properly deciding the case based upon an analysis of the legal implications of the post-war transactions without questioning the validity of the 1966 and 2006 governmental decisions. Moreover, such a decision would have the advantage that, as of May 1931, the diptych's provenance is undisputed. The paintings were bought by Goudstikker, illicitly sold to Göring, recovered by allied forces, restituted to the Netherlands under the Potsdam restitution policy, claimed as heirlooms by George Stroganoff-Scherbatoff in the early 1960s, sold to the latter in 1966 and eventually purchased by Norton Simon in the early 1970s. The 1966 sale to Stroganoff-Scherbatoff was part of a larger settlement agreed upon between the Dutch government and Stroganoff-Scherbatoff, who had actually claimed title to several additional paintings which remained in the NK-collection. It is interesting to note that two female portraits by Pietro Antonì Rotari, which Goudstikker acquired at the same 1931 Berlin auction sale of the Stroganoff collection, were among the 202

³⁶¹ W.S. *Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400 (1990).

³⁶² *See id.* at 405.

³⁶³ *Id.* at 405 (quoting *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310 (1918)).

³⁶⁴ *Id.* at 409.

paintings restituted to von Saher in 2006.³⁶⁵ Not wanting to establish a precedent, the Dutch government refused to retribute any of the paintings Stroganoff-Scherbatoff claimed. Instead, after lengthy negotiations, the Dutch government agreed to *sell* the Cranach diptych to Stroganoff-Scherbatoff.³⁶⁶

The diptych being in the Netherlands at the time of the transaction, the sale occurred under Dutch law. It is a well-established rule of private international law that the validity of a transfer of personal property and the effect of such transfer on the rights of any person claiming title therein will be governed by the law of the country where the property is situated at the time of the transfer.³⁶⁷ In 1966, at the time of the transaction, the relevant governing law in the Netherlands was the 1838 Civil Code, which was modeled on the French Civil Code of 1804 (*Code Napoléon*). Although this is no longer the law in the Netherlands,³⁶⁸ it is relevant as the law that applied at the time the paintings were purchased by Stroganoff-Scherbatoff.

As with many other civil law countries, Dutch property law differs considerably from U.S. property law. By securing transfers in the market, civil property law aims at bringing about a straightforward *favor commercii*, unlike its common law counterpart, which aims at protecting ownership through the all-but-absolute *nemo dat* rule.³⁶⁹ Consequently, with regard to personal property, the preferential treatment of the bona fide purchaser *a non domino* over the former owner is well-established in nearly all civil law jurisdictions.³⁷⁰

Consistent with this purchaser-friendly approach of civil property law, article 2014 of the 1838 Dutch Civil Code, which is essentially very similar to the rule which applies in the Netherlands today, allows a bona fide purchaser to obtain good title over personal property, even in circumstances where the transferor did not have the right to dispose of the property.³⁷¹ Despite the transferor's lack of title, the transfer of personal property is valid, provided the transfer was for value and the acquirer acted in good faith. Under these circumstances, the possessor

³⁶⁵ Both portraits remained in the NK-collection, as numbers 3261 and 3268, until they were restituted to von Saher. See *supra* note 212, *Deelrapportage II*, at 218, 221.

³⁶⁶ Interim Report II clearly states that "Adam" and "Eve" by Cranach were sold in 1966. See *id.* at 79; Maarten Huygen, *Strijd om een Cranach [Battle over a Cranach]*, NRC HANDELSBLAD, Apr. 13, 2007, at 7.

³⁶⁷ Collin, *supra* note 9, at 22.

³⁶⁸ The 1838 Civil Code was substantively reviewed in 1992, when the Netherlands adopted a new Civil Code. However, it is worth noting that the former rules regarding the protection of the bona fide purchaser remain essentially unchanged.

³⁶⁹ See CARDUCCI, *supra* note 291, at 403-04.

³⁷⁰ See FREDERICK H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW, 176-77 (1955); G.H.A. SCHUT & P. RODENBURG, BESCHERMING VAN DE VERKRIJGER VAN ROERENDE ZAKEN VOLGENS BW EN NBW [PROTECTION OF THE BONA FIDE PURCHASER OF PERSONAL PROPERTY ACCORDING TO THE CIVIL CODE AND THE NEW CIVIL CODE] 9 (1986) (Neth.); Georges Sauveplanne, *The Protection of the Bona Fide Purchaser of Corporeal Movables in Comparative Law*, 29 RABELSZ 651, 652, 660 (1965).

³⁷¹ See Burgerlijk Wetboek [BW] art. 3, §86 (Neth.).

of personal property acquires ownership as a result of, and from the moment of possession, even if the seller did not have the right to dispose of the property. This is the meaning of the legal proverb articulated in article 2014(1): “With regard to personal property, possession is equivalent to title.”³⁷²

Thus, by virtue of the 1838 Dutch Civil Code, the transfer of title to a bona fide purchaser is largely impervious to legal challenge. For example, when the original owner deliberately entrusts his property to another person, who sells the property in circumstances constituting an abuse of trust, the original owner cannot recover possession from the bona fide purchaser.³⁷³ In such circumstances, the original owner’s only recourse is to pursue the seller of the property. The sole exception to this rule arises when chattel is accidentally lost or stolen. In such circumstances, the original owner can seek to recover his belongings from whoever has them, provided that recovery is sought *within three years of the date of the loss or theft*, irrespective of whether, or indeed when, he discovers either the loss or theft of the property or the identity of the purchaser.³⁷⁴

All things considered, it seems correct to conclude that under Dutch property law as applied in 1966,³⁷⁵ Stroganoff-Scherbatoff acquired good title over the Cranach diptych, even though the Dutch government was not the owner and thus lacked the authority to sell it. After all, his possession was derived directly from the Dutch state, who delivered the paintings to him (or his agent). Moreover, Stroganoff-Scherbatoff acted in good faith, as a purchaser for value paid under a contract of sale. Although it could be argued that the Goudstikker family had lost the paintings in 1940 or at the time of the 1952 settlement, even the most favorable construction of the facts from von Saher’s point of view would have to conclude that the latest date on which they could have been deemed lost by the family was on or about the time of the 1966 sale. Consequently, the very latest that the three-year term for bringing an action in replevin would be deemed to have started to run would be 1966. Thus, though recovery may have been possible at one point under such a construction, Stroganoff-

³⁷² This rule was originally construed in the same way as its equivalent in the French Civil Code. In the 1950s, however, the Dutch Supreme Court (Hoge Raad), at the urging of some leading Dutch authors, had adopted a somewhat different construction, inspired by German law. *See, e.g.*, Damhof/State, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 5 May 1950, NJ 1951, No. 1 (ann. D.J.V.) (Neth.); Helmer/Schoolderman, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 25 September 1953, NJ 1954, No. 190 (ann. J.D.) (Neth.). *See also* P. CRONHEIM, VERKRIJGING VAN EEN BESCHIKKINGSONBEVOEGDE IN HET NIEUWE BW [ACQUISITION A *NON DOMINO* IN THE NEW CIVIL CODE] 4 (1986) (Neth.); SCHUT & RODENBURG, *supra* note 370, at 4-6, 13-15, 23-24, 36; Sauveplanne, *supra* note 370, at 656, 658-59, 673-77.

³⁷³ SCHUT & RODENBURG, *supra* note 370, at 10-11, 36; Sauveplanne, *supra* note 370, at 680.

³⁷⁴ BW art. 2014(2) (1838) (Neth.). *See also* SCHUT & RODENBURG, *supra* note 370, at 10-11, 36; Sauveplanne, *supra* note 370, at 680-82.

³⁷⁵ It is interesting to note that the current Dutch Civil Code of 1992 also supports this conclusion.

Scherbatoff's title to the paintings became unquestionable in or about 1969, *before* he sold them to Norton Simon. In subsequently disposing of the property, according to the applicable Dutch law, Stroganoff-Scherbatoff conveyed a valid title to Norton Simon, even if it could somehow be shown that the latter had knowledge of the potential claim of the Goudstikker heirs. To hold otherwise would, for all practical purposes, deprive a purchaser of the benefit of his bona fide possession. The original owner could, for example, widely publicize the loss, and thus render it impossible for the purchaser to dispose of the property. This would be contrary to the interests of commerce (*favor commercii*), which constitute the main justification for the purchaser's protection in civil property law. Therefore, it is generally the position in civil law jurisdictions that as a result of a bona fide acquisition *a non domino*, the original owner irretrievably loses his right to the chattel concerned.³⁷⁶ Thus, at least from a legal perspective, the museum acquired title to the Cranach paintings from Stroganoff-Scherbatoff, the undisputed owner at the time of the sale in 1971.

CONCLUSION

As the Cranach diptych was allegedly misappropriated during WWII and the Russian Revolution the questions surrounding its provenance embody much of the turmoil of twentieth-century Europe. However, in addition to offering a compelling story, *von Saher v. Norton Simon Museum of Art* is also compelling from a legal point of view. Through it, the federal courts in California are confronted with several legal questions that, though they are typical for litigation regarding stolen and misappropriated artwork, are nonetheless difficult to resolve.

As with the majority of title disputes regarding cultural property, the statute of limitations has proven pivotal to *von Saher*. Unlike other states, California's law regarding the limitation of actions in replevin and conversion is complex, multi-layered, and somewhat ambiguous. The *von Saher* case is truly significant, as it presents an invitation to the courts to clarify and potentially reshape the California limitation rules for property claims concerning (Nazi-era) stolen artwork.

For the moment at least, *von Saher* is decisive on the question of the constitutionality of California's Holocaust-Era Claims Provision. Both the district court and the Ninth Circuit found the provision to be an impermissible interference with the federal government's exclusive foreign affairs powers, specifically the authority to redress injuries arising from war, and therefore unconstitutional. However, this conclusion is highly questionable, as are the arguments the court adopted to support its decision. Firstly, there is no risk of transforming

³⁷⁶ See Sauveplanne, *supra* note 370, at 678.

California into a worldwide forum for the resolution of Holocaust restitution claims, since the provision merely establishes a limitation period for a distinct class of claims in property law, a quintessential area of state responsibility, without modifying the standard requirements for personal jurisdiction under California law. Secondly, even if the application of the provision could be unconstitutional when applied to certain particular circumstances, the court should have avoided invalidating it fully; the facts at bar did not present a constitutional problem, and so an appropriate limiting construction was available and should have been applied. Thirdly, although the matter may incidentally touch upon foreign affairs, the authority to decide actions in replevin is not constitutionally entrusted to the federal political branches. Likewise, a provision's connection to the Holocaust does not necessarily mean that federal war powers are infringed. Finally, there is no real federal policy that preempts the field of restitution of Nazi-looted artwork and it is thus hard to maintain that California's Holocaust-Era Claims Provision is undermining the federal Executive Branch.

Not only is *von Saher* decisive of the controversy surrounding the constitutionality of California's Holocaust-Era Claims Provision, the case may also resolve the current ambiguity regarding California's statute of limitations for actions in replevin concerning stolen artwork generally. Upon remand, the court may take the opportunity to clarify the accrual standard for pre-1983 cases of theft, taking into consideration the new-approved Assembly Bill No. 2765, which amends the limitation rules once more. This article argues that it is crucial consider the prior restitution proceedings in the Netherlands when assessing the timeliness of von Saher's action.

Aside from the issues related to the limitation of actions, *von Saher* highlights certain issues of private and public international law that are typical in international litigation regarding disputed property. This article shows that, although the case is brought by a U.S. citizen, against a U.S. museum, concerning property that is located in the United States, the act of state defense might at first sight be an important hurdle for litigation. After all, some of the parties' arguments require the U.S. courts to determine the validity of appropriations made by the Dutch and Soviet governments.

However, this article argues that the act of state doctrine should not necessarily foreclose a decision on substantive grounds. After all, in view of the limited scope the U.S. Supreme Court conferred on the act of state doctrine in *Kirkpatrick*, in the appropriate case, which can be decided without determining the legality of a sovereign state's official acts under that sovereign's own laws, there should be no reason to obstruct the course of justice on act of state grounds. *Von Saher* could prove to be such a case, as long as the decision can be based upon an

analysis of the legal implications of the post-war transactions. This article shows that not only is this possible, but that such an approach may in fact lead to a very solid decision from a legal point of view. Under Dutch property law, Stroganoff-Scherbatoff had good title at the time he sold the diptych to the Norton Simon Museum, even if the Dutch government lacked the authority to dispose of the paintings.

However, von Saher should not be entirely disheartened. She can perhaps turn to the Dutch government and, if necessary, the Dutch courts to claim compensation for the 1966 sale. Given the Dutch government's 2006 restitution decision, it is open for her to argue that the 1966 sale was a misappropriation. Of course, it is unlikely that the Dutch government would be eager to comply with another claim for compensation from von Saher. After all, on February 6, 2006, when the Dutch government announced its decision to honor the recommendations of the Restitution Committee and returned 202 of the Goudstikker paintings to von Saher, it emphasized it did so on moral rather than on legal grounds. Indeed in view of this prior, and undoubtedly significant act of restitution, it is perhaps doubtful that there would be sufficient political and public support to address the consequences of the Goudstikker legacy for a third time. After all, the third time is not always a charm. . .