

BUFFALO LAW REVIEW

VOLUME 59

MAY 2011

NUMBER 3

Has the Time (of Laches) Come? Recent Nazi-Era Art Litigation in the New York Forum

BERT DEMARSIN†

Considering Manhattan's status as the leading center of international art trade, courts in New York are an unsurprisingly prominent venue for resolving disputes regarding Holocaust-related art losses. Like all art litigation, however, these disputes have interesting features that render the administration of justice in this field a challenging task. Most notably, the enduring nature of artwork plays a central role in art litigation, the outcome of which all too often turns on the question of whether the original owners timely brought their restitution claim.

Therefore, this Article will describe New York's two-step approach for assessing the timeliness of replevin and conversion actions involving stolen cultural property. According to *Guggenheim v. Lubell*, New York law requires courts first to apply a "demand and refusal" rule in order to determine the time of accrual for limitation purposes and, subsequently, to examine the original owner's diligence in tracing his property under the doctrine of laches.¹

The Article's primary purpose, however, is to call attention to the court's increasing receptiveness to the limitation and laches defenses in stolen art litigation in general, and Holocaust-related title disputes in particular. Based on a comprehensive survey of all publicly available

† B.A.E.F. Visiting Scholar, Stanford Law School—Postdoctoral fellow of the Flemish Research Fund. B.A., University of Leuven (Belgium); J.D., University of Leuven & Panthéon-Sorbonne (Paris I); J.S.D., University of Leuven. The author gratefully acknowledges the help and support of Agnes Chong and Franny Lee.

1. *Guggenheim v. Lubell*, 569 N.E.2d 426, 430 (N.Y. 1991).

case law of the past fifteen years on the recovery of stolen art in the New York forum, this Article demonstrates a shift: the courts are interpreting existing rules to provide significantly more protection for a good faith purchaser, as opposed to following New York's traditional policy of favoring the original owner.

INTRODUCTION

At the beginning of the twentieth century, a German team of archaeologists discovered a small gold Assyrian amulet in Iraq.² Along with other artifacts, it was loaded on a freighter bound for Germany in 1914.³ The outbreak of World War I, however, forced the freighter to change course for Portugal, where the items were stored until 1926.⁴ In 1926, the items were released and shipped to the Berlin Vorderasiatisches Museum (Ancient Near East Museum).⁵ There, the gold tablet was inventoried and placed on display, until, in the looming shadow of World War II, the museum was closed and the antiquities were placed in storage.⁶ In spite of these precautions, museum officials discovered that the amulet was missing at the end of the war.⁷ Decades went by and the loss almost passed into oblivion.⁸ Then, in 2006, Hannah Flamenbaum filed an account as executor of the estate of her father, a Polish-born Holocaust survivor, who died in the United States in 2003.⁹ Soon thereafter, Hannah's brother, Israel, raised multiple objections to the account, one of which was that it had failed to properly include the deceased's coin collection.¹⁰ Israel stated that his father possessed, among other gold coins, "one item identified as a gold wafer which is believed to be an ancient Assyrian amulet and the property of a museum

2. *In re* Flamenbaum, 899 N.Y.S.2d 546, 549 (Sur. Ct. 2010) (internal quotations omitted).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

in Germany.”¹¹ His attorney informed the Vorderasiatisches Museum, which demanded return and ultimately filed suit, seeking recovery of the amulet.¹² On March 30, 2010, the Nassau County Surrogate’s Court dismissed the museum’s action in replevin.¹³

The *Flamenbaum* case is the latest link in a long chain of fascinating disputes over Nazi-era looted art that bring wartime owners and current possessors to New York courts. In view of New York City’s status as the leading center of international art trade, the prominence of the New York forum with respect to art litigation is unsurprising. Despite the fact that Holocaust-related title disputes are a rather recent phenomenon,¹⁴ case law on the matter has shed light on the application of the “demand and refusal” rule and laches requirements in replevin actions regarding stolen chattels. After all, these disputes have some interesting features that render the administration of justice in this field a challenging task.

Because Nazi-era title disputes stem from theft and looting on the European continent, they often encounter the difficulties regarding forum and applicable law that typically arise in international litigation. With multiple cross-border transactions and sovereign decisions of foreign governments involved, Nazi-era art litigation tends to be peppered with thorny issues of public and private international law.¹⁵

This Article, however, is devoted to another feature of Nazi-era art litigation. Due to their enduring nature, art objects challenge the law’s relation to time, which was established with regard to consumer goods that generally

11. *Id.* (internal quotations omitted).

12. *Id.*

13. *Id.* at 554.

14. See *infra* note 221 and accompanying text.

15. See, e.g., 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, 239-40 (2004); Helen L. Ostenberg, *International Law in Domestic Forums: The State of the Art*, *Kunstsammlungen zu Weimar v. Elicofon*, 9 BROOK. J. INT’L L. 179, 190-91 (1983); Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-faith Purchasers of Stolen Art*, 50 DUKE L.J. 955, 955 (2001).

have a shorter life span. Art objects, however, are timeless artifacts, passed on from generation to generation. Unfortunately, title problems due to theft and wartime looting are also passed on with the artwork, so that events from days long gone may continue to affect the legal status of many works of art. It is not a coincidence that art litigation proved pivotal in the development of the law regarding the limitation of claims for replevin and conversion.¹⁶

Indeed, under common law, invasions of possessory and property rights are sanctioned by means of these actions in tort. Like other tort claims, they are barred with the lapse of time set out in statutes of limitations—legislatively created mechanisms designed to prescribe the time for raising claims in legal proceedings.¹⁷ Statutes of limitations stem from the belief that time restrictions are indispensable to efficient and fair prosecution.¹⁸ Indeed, fairness to the defendant is most likely the primary consideration underlying the limitation of claims: “There comes a time

16. 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. 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.

17. For some historical background, see, for example, Thomas E. Atkinson, *Some Procedural Aspects of the Statute of Limitations*, 27 COLUM. L. REV. 157 (1927) (detailing historical events that have shaped procedural doctrines of statutes of limitations in English law); Charles C. Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130, 130-31 (1955); Note, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177-80 (1950).

18. Leah E. Eisen, *The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World*, J. CRIM. L. & CRIMINOLOGY 1067, 1072 (1991); Stephen L. Foutty, *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, 1842 (1990); Andrea E. Hayworth, Note, *Stolen Artwork: Deciding Ownership Is No Pretty Picture*, 43 DUKE L.J. 337, 342 (1993). See generally Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 460-500 (1997) (discussing in detail the rationales for statutes of limitations).

when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations.”¹⁹ After all, it would not be equitable to be called on to resist a claim at a time when “evidence has been lost, memories have faded, and witnesses have disappeared.”²⁰ By barring potentially stale claims upon the expiration of the statutory period, an unsuspecting defendant is granted permanent repose and delivered from the lurking threat of surprise litigation over matters from days long gone.²¹ At the same time, statutes of limitations contribute to the effectiveness of the judiciary by protecting the judicial system from the burden of adjudicating inconsequential claims.²² In addition to providing estimates of fairness and efficiency, statutes of limitations serve punitive purposes, “depriving a party of his claim if he does not act promptly in support thereof.”²³

19. Note, *supra* note 17, at 1185; see also Ashton Hawkins et al., *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, 60 n.61 (1995); Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 *GEO. WASH. L. REV.* 68, 75-76 (2005); Paulina McCarter Collins, Comment, *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, 129 (2002); Hayworth, *supra* note 18, at 342.

20. *Nat’l R.R. Passenger v. Morgan* 536 U.S. 101, 125 (2002) (O’Connor, J., concurring in part and dissenting in part) (quoting *Order of R.R. Tels. V. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944)).

21. Malveaux, *supra* note 19, at 76; Ochoa & Wistrich, *supra* note 18, at 494-95; Stephanie Cuba, Note, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 *CARDOZO ARTS & ENT. L.J.* 447, 461 (1999); John G. Petrovich, Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 *UCLA L. REV.* 1122, 1127-28 (1980).

22. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (quoting *Order of R.R. Tels.*, 321 U.S. at 349) (“[Statutes of limitations] are practical and pragmatic devices to spare the courts from litigation of stale claims”); see also Hawkins et al., *supra* note 19, at 60 n.61 (quoting *Duffy v. Horton Mem’l Hosp.*, 488 N.E.2d 820, 822-23 (N.Y. 1985)); Malveaux, *supra* note 19, at 79-81 (discussing in detail the efficiency argument); Note, *supra* note 17, at 1185.

23. Hayworth, *supra* note 18, at 343; see also Eisen, *supra* note 18, at 1072; 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, 17 (1998); Malveaux, *supra* note 19, at 78; Petrovich, *supra* note 21, at 1127. *But cf.* Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*,

As Justice Holmes opined: “[I]f a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example.”²⁴ By penalizing dilatoriness, statutes of limitations “stimulate litigants to prosecute their causes of action diligently.”²⁵ Further authority for the justification and policy goals behind statutes of limitations is found in the Supreme Court’s observation in *Riddlesbarger v. Hartford Insurance Company*:

[Statutes of limitations] are founded upon the general experience of mankind that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. The policy of these statutes is to encourage promptitude in the prosecution of remedies.²⁶

Finally, while these primary considerations run throughout the law of limitation, another collateral policy goal is significant in commercial contexts: by granting repose to those who have dealt in good faith with property, limitation of claims promotes stability in the market. After all, upon the expiration of the statutory period, bona fide

YALE L.J. 2437, 2455-57 (1994) (criticizing the limitation of claims in replevin and conversion regarding stolen artwork).

24. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

25. *Rosenau v. City of New Brunswick*, 238 A.2d 169, 172 (N.J. 1968); see also *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (“[Statutes of limitation] promote repose by giving security and stability to human affairs. . . . They stimulate to activity and punish negligence.”); *O’Keeffe v. Snyder*, 416 A.2d 862, 868 (N.J. 1980) (quoting *Wood*, 101 U.S. at 139); *Fernandi v. Strully*, 173 A.2d 277, 279 (N.J. 1961) (quoting *Wood*, 101 U.S. at 139); *Leake v. Bullock*, 250 A.2d 27, 29 (N.J. Super. Ct. App. Div. 1969); Mary K. Devereaux, Note, *Battle over a Monet: The Requirement of Due Diligence in a Lawsuit by the Owner Against a Good Faith Purchaser and Possessor*, 9 LOYOLA ENT. L.J. 57, 62 (1989); Hayworth, *supra* note 18, at 342; Foutty, *supra* note 18, at 1842.

26. *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386, 390 (1868).

purchasers will feel more secure in their possessory rights, thus enhancing the marketability of private property.²⁷

In addition to statutory limitation, the doctrine of laches has a similar barring effect on claims. Although both mechanisms endorse the same policy against inertia in legal proceedings,²⁸ it is important to understand how each time-related defense operates.²⁹ Compared to statutory limitation, the doctrine of laches, or “estoppel by laches,” is a more flexible defense. Indeed, the former is sometimes perceived as leading to a result that is harsh or even arbitrary. However, it is crucial to understand that statutes of limitations were precisely established to “cut off rights, justifiable or not, that might otherwise be asserted.”³⁰ In doing so, they promote peace and order in society. Finality

27. Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal*, 73 BROOK. L. REV. 155, 199 (2007) (quoting another source); Lerner, *supra* note 23, at 17; 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, 80 (1993); Hayworth, *supra* note 18, at 343; Petrovich, *supra* note 21, at 1128; Note, *supra* note 17, at 1186. *But cf.* Bibas, *supra* note 23, at 2451-53 (criticizing the statute of limitations’ policy of maximizing rather than optimizing marketability).

28. Particularly revealing in this respect is the often quoted tenet: “*Vigilantibus non dormientibus aequitas subvenit*” (“Equity aids the vigilant, not those who sleep on their rights.”). *See, e.g.*, Stone v. Williams, 873 F.2d 620, 623 (2d Cir. 1989); Powell v. Zuckert, 366 F.2d 634, 636 (D.C. Cir. 1966); Kamat v. Kurtha, 2008 U.S. Dist. LEXIS 107102, at *12-13 (S.D.N.Y. Apr. 14, 2008); *see also* HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 28, at 71-76 (2d ed. 1948); Ashraf Ray Ibrahim, *The Doctrine of Laches in International Law*, 83 VA. L. REV. 647, 647 (1997); Uisdean R. Vass & Xia Chen, *The Admiralty Doctrine of Laches*, 53 LA. L. REV. 495, 497 (1992).

29. For more details on the doctrine of laches as implemented by U.S. courts, *see* Thomas G. Robinson, Note, *Laches in Federal Substantive Law: Relation to Statutes of Limitation*, 56 B.U. L. REV. 970, 971-88 (1976); MCCLINTOCK, *supra* note 28, at § 28; Vass & Chen, *supra* note 28, at 495; Note, *supra* note 17, at 1183-85. For more information on the defense of laches in the specific context of claims in replevin regarding stolen artworks, *see* Jeremy G. Epstein, *The Laches Defense in Art Theft Litigation*, 4 IFAR J. 44 (2001); 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, 361-74 (2004) (describing the requirements necessary to satisfy a laches defense and the application of laches to World War II-era art theft cases).

30. Kavanagh v. Noble, 332 U.S. 535, 539 (1947) (citing Rosenman v. United States, 323 U.S. 658, 661 (1945)).

of outcome, regardless of the merits of the claim, is exactly their objective.³¹ The mechanism is dictated and justified by the presumption that beyond a certain time, claims inevitably grow stale. Therefore, the periods prescribed are not totally unfounded, as they bear a rough relation to the times for which reliable evidence for the respective causes of action may be expected to endure.³² In short, the rationale behind the statutes of limitations is *presumed staleness*.³³

The equitable defense of laches is fundamentally different in that the mere passage of time is not the sole determining factor.³⁴ As an equitable defense, laches requires proof of *actual staleness*, consisting in a loss of evidence,³⁵ material and detrimental changes in the position of the defendant,³⁶ or other circumstances that would lead to

31. See *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (“[Statutes of limitation] are, by definition, arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process, but through legislation.”); *Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242, 1248 (7th Cir. 1989) (“In general, statutes of limitations provide a desired order and finality to the litigious process by way of an albeit arbitrary, but bright line.”); *Carter v. Washington Metro. Area Transit Auth.*, 764 F.2d 854, 857 (D.C. Cir. 1985). *But cf.* *Ochoa & Wistrich*, *supra* note 18, at 505 (arguing against the finality imposed by statutes of limitation).

32. Note, *supra* note 17, at 1185-86.

33. Charles D. Webb, Jr., *Whose Art is It Anyway? Title Disputes and Resolutions in Art Theft Cases*, 79 KY. L.J. 883, 884 (1991).

34. In *Gallihier v. Cadwell*, the Supreme Court held:

The question of laches turns, not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during the lapse of years.

Gallihier v. Cadwell, 145 U.S. 368, 371-72 (1892); see also *Kamat v. Kurtha*, 2008 U.S. Dist. LEXIS 107102, at *15-16 (S.D.N.Y. Apr. 14, 2008) (citation omitted) (“[T]he exact duration of delay is not the determining factor in establishing laches.”); Note, *supra* note 17, at 1184.

35. *Robins Island Pres. Fund v. Southold Dev. Corp.*, 959 F.2d 409, 424 (2d Cir. 1992) (“[I]t is impossible for [the defendant] to obtain witnesses or marshal evidence to support its contentions . . .”).

36. See, e.g., *id.* (“A defendant may suffer prejudice . . . because it would be inequitable, in light of a change in defendant’s position, to allow plaintiff’s claim to proceed . . .”); see also *Tri-Star Pictures, Inc. v. Unger*, 14 F. Supp. 2d 339, 361 (S.D.N.Y. 1998); *O’Dette v. Guzzardi*, 611 N.Y.S.2d 296 (App. Div. 1994)

special harm³⁷ if the relief sought by the claimant was granted.³⁸ “Unlike statutory limitations, which are legislatively created and mechanically applied in the courts of law, the doctrine of laches originated outside this statutory purview, as a matter of grace, rather than of right, before the courts of equity”³⁹ As an equitable defense, laches takes into account not only the time that objectively lapsed, but also subjective factors: 1) the reasonableness of the claimant’s delay, and 2) the harm or prejudice actually suffered by the defendant due to the plaintiff’s languor.⁴⁰ As such, the doctrine of laches involves a multi-factor balancing of all the equities, including the owner’s diligence, the purchaser’s behavior, and the prejudice brought about.⁴¹

(citations omitted); 269 Assocs. v. Yerkes, 449 N.Y.S.2d 593, 597 (Civ. Ct. 1982) (“Laches does not involve a mere matter of time, but principally involves a question of the inequity of permitting a claim to be enforced, this inequity being founded on some change in the position or relationship of the parties.”).

37. The harm required for laches is not limited to mere economic harm. *See, e.g.*, Klein v. Gutman, 784 N.Y.S.2d 581, 584 (App. Div. 2004) (citation omitted); Glesesk v. Guidance Realty Corp., 321 N.Y.S.2d 685, 688 (App. Div. 1971) (citation omitted) (“[Harm includes] injury, change of position, intervention of equities, loss of evidence, or other disadvantage resulting from such delay”); *see also* Lerner, *supra* note 23, at 28; Minkovich, *supra* note 29, at 362.

38. In *Solomon R. Guggenheim Found. v. Lubell*, the appellate division explained:

When this potentiality for staleness becomes an actuality because of the plaintiff’s inexcusable delay in acquainting himself with the facts that would enable him to perform the requisite act, an appeal can be made to the conscience of the court to dismiss the action as untimely, notwithstanding that it was commenced within the statutory period.

Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618, 621 (App. Div. 1990), *aff’d*, 559 N.E.2d 426 (N.Y. 1991); *see also* Republic of Turkey v. Metro. Museum of Art, 762 F. Supp. 44, 46 (S.D.N.Y. 1990) (citation omitted); Hawkins et al., *supra* note 19, at 67-68; Robinson, *supra* note 29, at 971-72.

39. Ibrahim, *supra* note 28, at 647; *see also* Robinson, *supra* note 29, at 970.

40. *See* DeWeerth v. Baldinger, 804 F. Supp. 539, 553 (S.D.N.Y. 1992), *rev’d* 38 F.3d 1266 (1994); *see also* Hawkins et al., *supra* note 19, at 60; Kelly Diane 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, 580, 591 (1999); Collins, *supra* note 19, at 133; Minkovich, *supra* note 29, at 361; Elisa B. Pollack, Note, *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, 373 (1992).

41. Bibas, *supra* note 23, at 2446.

Deciding a laches claim calls for a “fact-intensive inquiry into the conduct and background of both parties in order to determine the relative equities.”⁴² Accordingly, laches may mitigate the harsh, mechanical effect of statutory limitation when current possessors have been prejudiced by dispossessed owners who “slumbered on their rights.”⁴³ In short, the difference between both time-based affirmative defenses⁴⁴ “can be traced to a tension between the predictability of the legislatively defined time periods found in statutes of limitations and the traditional flexibility and discretion of the equity court resulting from individual determinations of each case.”⁴⁵

In view of the aforementioned timelessness of artwork, and the impact thereof on the resulting restitution lawsuits, these concepts of statutory limitation and laches recur. In *Flamenbaum*, for instance, the theft of the artifact occurred at the end of World War II. Not surprisingly, the defendant argued that the museum’s claim in replevin was time-barred, either by the statute of limitations, or by the doctrine of laches. The Surrogate’s Court eventually sided with Hannah Flamenbaum, who, as the executor of her father’s estate, had come across the golden amulet among his assets. Although the museum had brought its action within the limitation period, the court still denied the claim on laches grounds.⁴⁶

This Article has a twofold purpose. Part I will examine the current two-step approach for the assessment of the timeliness of replevin and conversion actions involving stolen cultural property. This approach had only recently taken shape in the New York forum in the mid-1990s, around the time of the modern upsurge in Holocaust-related

42. *United States v. Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445, at *70 (S.D.N.Y. Apr. 11, 2002) (citations omitted); *see also* *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991), *aff’g* 550 N.Y.S.2d 618 (App. Div. 1990).

43. Minkovich, *supra* note 29, at 361; Collins, *supra* note 19, at 133.

44. Statutory limitation is also an affirmative defense. *See, e.g.*, *Grosz v. Museum of Modern Art*, 2010 U.S. Dist. LEXIS 1667, at *4 (S.D.N.Y. Jan. 6, 2010) (“The lapse of a limitations period is an affirmative defense that a defendant must plead and prove.”).

45. Robinson, *supra* note 29, at 977.

46. *In re Flamenbaum*, 899 N.Y.S.2d 546, 554 (Sur. Ct. 2010).

title disputes. According to *Guggenheim v. Lubell*, New York law requires the courts first to apply a “demand and refusal” rule in order to determine the time of accrual for limitation purposes, after which the original owner’s diligence in tracing his property is to be given consideration under the doctrine of laches. More specifically, Part I will present the distinctive features of the law of replevin and conversion in the New York forum. First, it will describe how statutory limitation constitutes a notable exception to the *nemo dat* rule, by allowing the passage of time to affect the allocation of rights and burdens between original owners and possessors of stolen chattels. Second, it will review New York’s unique position with regard to the limitation of actions in replevin by analyzing the “demand and refusal” rule, which determines the time of accrual of the original owner’s cause of action. Third, it will explore the corollary diligence requirement and the laches doctrine introduced by New York courts to soften the inconsistencies of “demand and refusal.” Part I concludes by showing that since *Guggenheim v. Lubell*, New York courts have applied a two-fold mechanism of the “demand and refusal” rule in combination with laches to assess the timeliness of actions in replevin.

Part II’s purpose is to call attention to the court’s increasing receptiveness to the limitation and laches defenses in stolen art litigation in general, and Holocaust-related title disputes in particular. Based on a comprehensive survey of all publicly available case law of the past fifteen years on the recovery of stolen art in the New York forum, this Part traces a number of recent developments that demonstrate a shift: courts are interpreting existing rules to provide significantly more protection for a good faith purchaser, as opposed to New York’s traditional policy of favoring the original owner. The analysis concludes that it will be increasingly difficult, to the point of impossibility, for heirs of Holocaust victims to prevail in attempts to recover looted artwork.

I. “DEMAND & REFUSAL” AND LACHES: REPLEVIN AND CONVERSION IN THE NEW YORK FORUM

At common law, a theft victim is well protected. Indeed, unlike most civil law countries, good faith purchase is in

itself not an effective defense against the original owner's claims for conversion or replevin.⁴⁷ Because a thief's title is void, it is impossible for him to transfer good title to any purchaser, either directly or indirectly through a chain of subsequent purchasers. Throughout, title remains vested in the original owner,⁴⁸ regardless of whether the purchaser acquired the stolen object (artwork or any kind of personal property) in good faith or for value.⁴⁹ Accordingly, whoever buys from a thief—directly or indirectly—remains at all times exposed to the original owner's claim.⁵⁰ In legal writing, the Latin tenet *nemo plus iuris ad alium transferre potest quam ipse habet*⁵¹ is traditionally used to express the common law principle of upholding the original owner's rights.⁵² Statutory provisions in the Uniform Commercial

47. See Montagu, *supra* note 27, 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).

48. In *Basset v. Spofford*, the New York Court of Appeals found:

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.

Basset v. Spofford, 45 N.Y. 387, 391 (1871); see also Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 633-34 (2000); 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).

49. See *United States v. Fireman's Fund Ins. Co.*, 2001 U.S. Dist. LEXIS 804, at *5 (S.D.N.Y. Jan. 30, 2001); see also Montagu, *supra* note 27, at 79; Bibas, *supra* note 23, at 2440.

50. Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17, 21 (1993); Phelan, *supra* note 48, at 633-34; Petrovich, *supra* note 21, at 1124.

51. DIG. 50.17.54 (Ulpian, Ad Edictum 46) (4 THE DIGEST OF JUSTINIAN 962) (Momsen et al., eds. 1985) ("No one can transfer greater rights to someone else than he possesses himself.").

52. See LYNDEL V. PROTTE & PATRICK J. O'KEEFE, LAW AND THE CULTURAL HERITAGE: MOVEMENT 397 (1989). However, it should be observed that, under certain conditions, a good faith purchaser for value may obtain title from a seller

Code,⁵³ the Sale of Goods Act of 1979,⁵⁴ and their predecessors⁵⁵ mark the central role of the *nemo dat* doctrine in American and English property law.⁵⁶

A. *Statutory Limitation: The Exception to the Nemo Dat Rule*

In all common law jurisdictions, statutory limitation constitutes a major exception to the traditional *nemo dat* doctrine. The mechanism allows the passage of time to affect the allocation of rights and burdens between purchasers of stolen chattels and original owners.⁵⁷ As previously argued,⁵⁸ with regard to stolen art litigation, the expiration of the limitation period often is an obvious affirmative defense to the original owner's action in replevin, because it is not unlikely for stolen artwork to resurface several decades after it went missing.⁵⁹

1. *Statutory Limitation: A Combined Action of Term and Accrual.* In common law jurisdictions, the limitation term for actions in replevin tends to be rather short. In the United States it typically ranges from two to six years.⁶⁰

with a merely voidable title. *Id.* at 397-405. Similarly, under U.C.C. § 2-403(2), entrustment of possession of personal property to a merchant who deals in such goods gives the latter 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 47, at 1446-48.

53. U.C.C. § 2-403(1) (2007).

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

55. Sale of Goods Act, 1893, 56 & 57 Vict., c. 71, § 21 (Eng.); AN ACT TO MAKE UNIFORM THE LAW OF THE SALES OF GOODS § 23, at 15 (Conference of Comm'rs on Unif. State Laws, ed. 1906).

56. 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 3-12, at 265-68 (5th ed. 2002); see also 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 47, at 1445.

57. See Montagu, *supra* note 27, at 80; Schwartz, *supra* note 48, at 4.

58. See *supra* notes 16, 46, and accompanying text.

59. Hawkins et al., *supra* note 19, at 50; Walton, *supra* note 40, at 579; McCord, *supra* note 48, at 990.

60. 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)

Similarly, in the United Kingdom, the limitation term for actions to reclaim personal property is six years.⁶¹ Yet, knowing when the limitation period starts to run is as important as determining the length of the applicable limitation term.⁶² The postponement of the statutory limitation's starting point explains why in most jurisdictions with a vibrant art market, in spite of relatively short limitation terms, actions in replevin may still be brought decades after the theft, such as with World War II art looting. Legally speaking, the timeliness of an action depends upon a combination of term and "accrual."⁶³ The "accrual of the cause of action" refers to the moment when all necessary elements of the cause of action are present and accordingly determines when the crucial limitations countdown begins.⁶⁴

However, the notion of accrual introduces a complex problem. Most often, legislation merely defines the limitation period for claims in replevin, without specifying the event that marks the accrual of the cause of action.⁶⁵ The issue of accrual was mainly left for the courts to decide,

(West 2006); D.C. CODE ANN. § 12-301(2) (LexisNexis 2005); FLA. STAT. ANN. § 95.11(3)(i) (West 2002); 735 ILL. COMP. STAT. ANN. 5/13-205 (West 2003); N.J. STAT. ANN. § 2A:14-1 (West 2000); N.Y. C.P.L.R. 214(3) (McKINNEY 2003); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (West 2002). *But see* LA. CIV. CODE ANN. art. 3492 (1994).

61. Limitation Act, 1980, c. 58, § 2 (Eng.). 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 id.* §§ 3-4; PROTTE & O'KEEFE, *supra* note 52, at 419.

62. *See* Collins, *supra* note 19, at 130; Cuba, *supra* note 21, at 455; Petrovich, *supra* note 21, at 1128.

63. Malveaux, *supra* note 19, at 86; Montagu, *supra* note 27, at 81; William G. Crimmins, Note, *Evolution of Illinois Tort Statutes of Limitation: Where Are We Going and Why?*, 53 CHI-KENT L. REV. 673, 677; Foutty, *supra* note 18, at 1842; Hayworth, *supra* note 18, at 343; Petrovich, *supra* note 21, at 1128-29; Note, *supra* note 17, at 1200.

64. Crimmins, *supra* note 63, at 677; Petrovich, *supra* note 21, at 1129; Note, *supra* note 17, at 1200.

65. *See* Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119, 126 (1988); Montagu, *supra* note 27, at 81; Foutty, *supra* note 18, at 1841; Petrovich, *supra* note 21, at 1129.

which resulted in considerable dissension among U.S. jurisdictions.⁶⁶

2. *The Doctrines of Adverse Possession and Fraudulent Concealment.* Until 1980, it was generally held that for actions with regard to personal property, the limitation period began to run upon the commission of the tortious act.⁶⁷ There was indeed a large degree of uniformity among the U.S. jurisdictions in determining the time of accrual by applying the rules on adverse possession to stolen chattels.⁶⁸ Provided the other elements of adverse possession were satisfied, the time of the wrongful taking marked the accrual of such cause of action, irrespective of the owner's knowledge of the theft.⁶⁹ However, retrieval of stolen artwork is quite an undertaking. All too often, even the

66. See Kreder, *supra* note 27, at 199; Linda F. Pinkerton, *Due Diligence in Fine Art Transactions*, 22 CASE W. RES. J. INT'L L. 1, 2 (1990); Thomas, *supra* note 56, at 256; 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).

67. Thomas, *supra* note 56, at 256.

68. See, e.g., Paula A. Franzese, "Georgia on My Mind"—Reflections on *O'Keeffe v. Snyder*, 19 SETON HALL L. REV. 1, 2-7 (1989); Gerstenblith, *supra* note 65, at 12; William F. Walsh, *Title by Adverse Possession*, 17 N.Y.U. L.Q. REV. 44, 80-84 (1939); Webb, *supra* note 33, at 885-87; Collins, *supra* note 19, at 130; Cuba, *supra* note 21, at 453-55. 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 (that is, 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. All elements must be satisfied in order to bar the original owner's action in replevin. See generally Henry Winthrop Ballantine, *Claim of Title in Adverse Possession*, 28 YALE L.J. 219, 219-24 (1919); Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1123 (1985).

69. Hawkins et al., *supra* note 19, at 78; Eisen, *supra* note 18, at 1075-76; Hayworth, *supra* note 18, at 347-48; Petrovich, *supra* note 21, at 1142-43; see also *Rabinof v. United States*, 329 F. Supp. 830, 841-43 (S.D.N.Y. 1971) (holding that defendant's possession of a violin had not 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); *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."); *Reynolds v. Bagwell*, 198 P.2d 215, 217 (Okla. 1948).

most diligent owner is unable to ascertain the identity of the thief or subsequent purchaser until after the limitation period for adverse possession has long expired, and hence legal action is futile.⁷⁰ Indeed, because the doctrine of adverse possession examines the actions of the adverse possessor instead of the original owner, the latter's diligence in tracing his property is considered irrelevant.⁷¹

In these situations, the only feasible argument for the original owner was fraudulent concealment, which would lead to equitable estoppel.⁷² This equitable tolling mechanism effectively delays accrual for the duration of the fraudulent concealment and "prevents a wrongdoer, who induces the injured party's delay by fraud, from relying on the statute of limitations as a defense."⁷³ Accordingly, the

70. Thomas, *supra* note 56, at 256; Walton, *supra* note 40, at 579.

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

72. 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."); *Naftzger v. Am. Numismatic Soc'y*, 49 Cal. Rptr. 2d 784, 789 (Ct. App. 1996); *Strasberg v. Odyssey Group, Inc.*, 59 Cal. Rptr. 2d 474, 479 (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."); see also John P. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875, 897-901 (1933); Gerstenblith, *supra* note 65, at 127; Hayworth, *supra* note 18, at 345-46; Emily J. Henson, Note, *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, 1103-04, 1110, 1139 (2002); Petrovich, *supra* note 21, at 1130-31.

73. Gerstenblith, *supra* note 65, at 127; see also *Gen. Stencils, Inc. v. Chiappa*, 219 N.E.2d 169, 170 (N.Y. 1966). For a discussion of what conduct on the part of the adverse possessor might constitute fraudulent concealment, see Gerstenblith, *supra* note 65, 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) (applying a different accrual theory (the discovery rule) and rendering an alternative finding that the doctrine of fraudulent concealment could also be applicable); cf. *Close-Barzin v. Christie's, Inc.*, 857 N.Y.S.2d 545, 546 (App. Div. 2008) (holding that equitable estoppel did not apply because the plaintiff possessed all the facts necessary to make a claim within the limitations period).

limitation period will not start to run until the thief or bad faith purchaser starts to hold the property openly or transfers it to an innocent purchaser.⁷⁴

However, complications arise when the courts need to apply the traditional doctrine of adverse possession to stolen personal property, as this doctrine was designed to fit the theft of land.⁷⁵ The doctrine's extrapolation to cover smaller, easily movable, and concealable objects is problematic because the ordinary (that is "open and notorious"⁷⁶) usage of such chattels would almost never put the original owner on notice.⁷⁷ Especially with regard to artwork, fraudulent concealment tends to be virtually indistinguishable from open, bona fide possession, as private and inconspicuous possession of artwork necessarily involves some concealment.⁷⁸ However,⁷⁹ a mere failure to publicly show

74. Petrovich, *supra* note 21, at 1131 n.36.

75. Dawson, *supra* note 72, at 898-901; Gerstenblith, *supra* note 65, at 128; Bibas, *supra* note 23, at 2437; Petrovich, *supra* note 21, at 1143.

76. *See supra* note 68.

77. Franzese, *supra* note 68, at 7; Bibas, *supra* note 23, at 2441; Petrovich, *supra* note 21, at 1144.

78. In *O'Keeffe v. Snyder*, the Supreme Court of New Jersey strikingly held that:

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); *see also* PROTTE & O'KEEFE, *supra* note 52, at 422; Eisen, *supra* note 18, at 1077-78.

one's artwork generally does not amount to fraudulent concealment, as the doctrine requires some affirmative fraudulent act: an *active* and *intentional* concealment of both the location and identity of the possessor.⁸⁰

Perhaps because of the equivocation arising from these complications, numerous U.S. jurisdictions abandoned the traditional adverse possession rule when dealing with possessory rights over movable and easily concealable objects such as artwork.⁸¹ In order to mitigate the unjustifiably harsh effects that may result from imposing a limitation period that starts to run upon the wrongful taking, the courts have devised different triggering events and ways of applying the statute of limitations.⁸²

B. *Accrual in the New York Forum: The "Demand and Refusal" Rule*

A considerable number of states, including California, Illinois, Indiana, Massachusetts, New Jersey, Ohio and Pennsylvania, have substituted the traditional rule of instant accrual (upon a wrongful taking) with the now widespread discovery rule.⁸³ However, New York courts take a special position with regard to the limitation of actions in replevin and adhere to a clearly distinct accrual doctrine: the "demand and refusal" rule. Given New York's role as the center of the international art trade, this unique accrual

79. Cuba, *supra* note 21, at 454; Eisen, *supra* note 18, at 1078. See also Hayworth, *supra* note 18, 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"). But see Petrovich, *supra* note 21, at 1146-47 ("the [O'Keefe] standard of openness . . . glosses over the undeniable fact that not all works of all artists—even many works of considerable value—merit museum display.").

80. Dawson, *supra* note 72, at 898-901; Hawkins et al., *supra* note 19, at 79; Henson, *supra* note 72, at 1139; Petrovich, *supra* note 21, at 1131 n.36.

81. Bibas, *supra* note 23, at 2444; Cuba, *supra* note 21, at 454-55; Sherlock, *supra* note 66, at 488.

82. Franzese, *supra* note 68, at 7; Walton, *supra* note 40, at 579.

83. Bert Demarsin, *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*, 28 CARDOZO ARTS & ENT. L.J. 255, 264-72 (2010); see also Thomas, *supra* note 58, at 258.

doctrine for the law of replevin and conversion is very influential.

1. “*Demand and Refusal*” as Substantive Prerequisites. In *Menzel v. List*,⁸⁴ the New York courts applied the “demand and refusal” rule to measure the accrual time of an action in replevin regarding a Chagall gouache that was confiscated during the Holocaust.⁸⁵ The New York Supreme Court held that List’s limitation defense failed, as it was well-settled in New York law that “[i]n replevin, as well as in conversion, the cause of action against a person who lawfully comes by a chattel arises, not upon the stealing or the taking, but upon the defendant’s refusal to convey the chattel upon demand.”⁸⁶ Originally, the “demand and refusal” rule was developed to protect bona fide purchasers from being sued for conversion prior to committing a knowingly illicit act.⁸⁷ It is upon the refusal of an original owner’s demand for return that the tort actions for conversion or replevin lie.⁸⁸

84. *Menzel v. List*, 253 N.Y.S.2d 43 (App. Div. 1964), *modified on other grounds*, 279 N.Y.S.2d 608 (App. Div. 1967), *modification rev’d*, 246 N.E.2d 742 (N.Y. 1969).

85. 267 N.Y.S.2d at 809. 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 in 1941. *Id.* at 806. The Menzel family managed to escape to the United States, but the Nazis confiscated the gouache. *Id.* Once the war was over, they tried to trace their stolen Chagall, yet its whereabouts remained unknown until 1955. *Id.* at 807. At that time the work resurfaced on the Parisian market, where a New York dealer bought it and subsequently sold it to an admittedly good faith purchaser, Albert List. *Id.* It was not until November 1962, when Mrs. Menzel noticed a reproduction of the work in an art book, that she located the gouache in List’s possession, whereupon she demanded its return. *Id.* When List refused to turn over the gouache, Mrs. Menzel filed an action in replevin. *Id.*

86. *Id.* at 809 (citing *Gillet v. Roberts*, 57 N.Y. 28 (1874); *Cohen v. Keizer*, 285 N.Y.S. 488 (App. Div. 1936)). However, the “demand and refusal” requirement did not affect the tolling of the limitation period in any of these cases.

87. See *Hawkins et al.*, *supra* note 19, at 69-72 (analyzing in detail the development of the rule from the time of *Gillet* until *Menzel*).

88. In *State v. Seventh Regiment Fund, Inc.*, a case regarding converted military artifacts, the New York Court of Appeals held:

[C]ourts from an early date have protected unsuspecting defendants by requiring plaintiffs, under some circumstances, to show that they demanded the goods and were refused. In this way, a bona fide purchaser who performs no wrongful act relative to a plaintiff’s goods is

Accordingly, by immunizing the innocent possessor from sudden civil and criminal liability for unintentional takings, the “demand and refusal” rule shields the good faith possessor from unnecessary litigation and at the same time stimulates private dispute resolution.⁸⁹ However, New York courts argued that when the converter took possession with knowledge of the tortious character of his actions, the conversion occurred at the time of the taking, not at the time of the subsequent demand for return.⁹⁰ Consequently, against a thief or purchaser in bad faith, the cause of action arises at once and no demand is necessary before initiating a lawsuit in conversion or replevin.⁹¹

However, in spite of the “demand and refusal” rule’s policy of protecting innocent purchasers, the *Menzel* court’s decision arguably falls in favor of the original owner:

[W]ith respect to a bona fide purchaser of personal property a demand by the rightful owner is a substantive, rather than a procedural prerequisite to the bringing of an action. If that be so, then the statute of limitations did not begin to run until demand and refusal.⁹²

ensured “an opportunity to deliver the property to the true owner, before he shall be made liable as a *tort feasor* [sic] for a wrongful conversion.”

State v. Seventh Regiment Fund, Inc. 774 N.E.2d 702, 711 (N.Y. 2002) (quoting *Gillet*, 57 N.Y. at 34) (citing *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991)); see also Schwartz, *supra* note 48, at 7; Bibas, *supra* note 23, at 2445; Collins, *supra* note 19, at 133; Sydney M. Drum, Comment, *DeWeerth v. Baldinger: Making New York a Haven for Stolen Art?*, 64 N.Y.U. L. REV. 909, 916 (1989).

89. Gerstenblith, *supra* note 65, at 134-35; Bibas, *supra* note 23, at 2445.

90. *Seventh Regiment Fund*, 774 N.E.2d at 711.

91. *Id.* at 711 (citations omitted) (“Naturally, if demand would be futile because the circumstances show that the defendant knows it has no right to the goods, demand is not required. One such circumstance, of course, arises when the defendant is a thief.”); see also *Cutler-Hammer, Inc. v. Troy*, 126 N.Y.S.2d 452, 454 (App. Div. 1953); *Del Piccolo v. Newburger*, 9 N.Y.S.2d 512, 513 (App. Div. 1939); *N.Y. City Transit Auth. v. N.Y. Historical Soc’y*, 635 N.Y.S.2d 998, 1000 (Sup. Ct. 1995) (illustrating how the taking of property *without right* constitutes an instant conversion, without demand and refusal being necessary to render the possessor liable); *Hawkins et al.*, *supra* note 19, at 70; *Thomas*, *supra* note 58, at 258.

92. *Menzel v. List*, 253 N.Y.S.2d 43, 44 (App. Div. 1964) (citations omitted). More recently, the New York Court of Appeals reiterated that the demand

By considering “demand and refusal” as a *substantive* element of the torts of replevin and conversion, the *Menzel* court effectively postponed the time of accrual of the cause of action from the moment of the theft until the moment of refusal by the current possessor.⁹³ Originally, the “demand and refusal” rule merely affected the perpetration of a tortious infraction with respect to an innocent possessor, without bearing any consequences on the running of the limitation period.⁹⁴ Instead, the court ordered that the Chagall be returned to Menzel,⁹⁵ thereby adopting somewhat questionable reasoning: “if the innocent purchaser could not be sued until demand and refusal had been made, then the former owner could sue within three years of refusal, regardless of the passage of time from the taking of the property until the demand.”⁹⁶ In this way, the

requirement is substantive, rather than procedural. *See Seventh Regiment Fund*, 774 N.E.2d at 711 n.7; *Guggenheim*, 569 N.E.2d at 430-31; *see also* Hawkins et al., *supra* note 19, at 72; Eisen, *supra* note 18, at 1079-80 (commenting on the difference between a procedural and a substantive prerequisite). It is noteworthy that the Connecticut Supreme Court did not consider the demand a substantive requirement for a replevin action, as the court held that demand was not an element of a replevin case, but purely a protection for the innocent possessor. *Atlas Ins. Co. v. Gibbs*, 183 A. 690, 693 (Conn. 1936); *see also* Petrovich, *supra* note 21, at 1138 (commenting on the *Atlas* case and the true nature of the demand prerequisite).

93. *Menzel v. List*, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966); *see also* Gerstenblith, *supra* note 51, at 135; Montagu, *supra* note 27, at 84; Drum, *supra* note 88, at 918; Eisen, *supra* note 18, at 1080.

94. *See Gillet*, 57 N.Y. at 33; *Cohen v. Keizer*, 285 N.Y.S. 488 (App. Div. 1936). However, in *Duryea v. Andrews*, 12 N.Y.S. 42 (Sup. Ct. 1890), a New York case about a stolen horse, the court seemed to relate the “demand and refusal” rule to the running of the limitation period. The court held that the statute of limitations did not start to run until demand was made. *Id.* Unfortunately, the opinion is rather vague about the good faith of the possessor, and it lacks citations. *Cf.* Hawkins et al., *supra* note 19, at 70. Nevertheless, *Duryea v. Andrews* had some influence, as the Kansas Court of Appeals cited it in *Daniel v. McLucas*. *See Daniel v. McLucas*, 55 P. 680, 680 (Kan. Ct. App. 1899) (citing *Duryea*, 12 N.Y.S. at 42) (holding that demand and refusal were prerequisites for tolling the statute of limitations). *But see* *Christensen Grain, Inc. v. Garden City Coop., Equity Exch.*, 391 P.2d 81, 85 (Kan. 1964) (overruling *Daniel v. McLucas* as being an incorrect statement of the law of accrual and holding that the demand requirement does not create an exception to the statute of limitations).

95. *Menzel*, 267 N.Y.S.2d at 808.

96. Hawkins et al., *supra* note 19, at 63-64.

Menzel court established a precedent for determining accrual and triggering the running of the limitation period for actions in replevin.

2. *Inconsistencies in the System of "Demand and Refusal."* Although the "demand and refusal" rule allows original owners to overcome the difficulties associated with the doctrine of adverse possession, the New York accrual theory has nonetheless been severely criticized.⁹⁷ The criticism stems from the corrupted interpretation of the "demand and refusal" rule, which transformed a protective measure for bona fide purchasers into a mechanism of favoring the original owners of converted chattels.⁹⁸ Worse still, the manner in which the *Menzel* court applied the "demand and refusal" rule as an owner-friendly accrual theory not only subverts the rationale of the demand requirement (that is, safeguarding innocent purchasers against sudden civil and criminal liability for unintentional possession of converted goods),⁹⁹ but may serve to entrap the innocent purchaser altogether.

The effect of the *Menzel* decision was significant. An innocent purchaser's peace of mind was no longer a priority. After all, aggrieved owners were allowed to bring causes of action irrespective of the passage of the statute of limitations' designated time bar, provided that they have satisfied the demand prerequisite.¹⁰⁰ So in late sixties New York, title to artwork could no longer be conveyed with

97. Gerstenblith, *supra* note 65, at 135; Hawkins et al., *supra* note 19, at 69-75; Eisen, *supra* note 18, at 1080-81; Petrovich, *supra* note 21, at 1137-40; see also Nicholas D. Ward, *The Georgia Grind Can the Common Law Accommodate the Problems of Title in the Art World, Observations on a Recent Case*, 8 J.C. & U.L. 533, 554 (1982); Foutty, *supra* note 18, at 1846.

98. See, e.g., Gerstenblith, *supra* note 65, at 135; Foutty, *supra* note 18, at 1846.

99. In *Butler v. Wolf Sussman, Inc.* the Indiana Supreme Court explained in simple terms the rationale behind the "demand and refusal" rule:

This rule is based on the presumption which the law indulges that one who has lawfully come into possession of property which he is not entitled to retain will, upon demand, surrender it to the person entitled thereto and that he ought to be afforded an opportunity so to do without being subjected to the inconvenience and expense of a law suit.

Butler v. Wolf Sussman, Inc., 46 N.E.2d 243, 244 (Ind. 1943).

100. Gerstenblith, *supra* note 65, at 138; Bibas, *supra* note 23, at 2445; Eisen, *supra* note 18, at 1080; Petrovich, *supra* note 21, at 1140.

certainty, regardless of the length of time for which solid provenance could be established.¹⁰¹ Accordingly, incentives for a purchaser to verify the provenance of prospective purchases were effectively eliminated, because any extra effort he invested in diligence and scrutiny prior to purchase would be irrelevant if a challenge by an original owner later arose.

Worse still, some commentators point out that the demand requirement, when used as an accrual theory, leads to absurd results because it may actually reward bad faith.¹⁰² In *Harpending v. Meyer*, an action in conversion against a good faith purchaser of converted jewels, the California Supreme Court phrased their argument sharply:

[T]he operation of a rule which exempts a *bona fide* purchaser from being sued until after demand made, is, in all the cases to which it has been applied, favorable to the *bona fide* purchaser, and it is claimed to have been devised for his protection. If applied to this case, its operation is exactly the reverse of that. To hold that the statute did not commence running in favor of these defendants from the time of the delivery of the goods to them, because of that time they were conscious of no wrong-doing, which, if they had been conscious of, would have set the statute in motion in their favor, involves an absurdity. . . . We are unwilling to give a conscious wrong-doer any advantage over a constructive wrong-doer.¹⁰³

101. Gerstenblith, *supra* note 65, at 140.

102. Gerstenblith, *supra* note 65, at 138-39; Hawkins et al., *supra* note 19, at 66; Thomas, *supra* note 58, at 258; Eisen, *supra* note 18, at 1080-81; Petrovich, *supra* note 21, at 1139.

103. *Harpending v. Meyer*, 55 Cal. 555, 561 (1880). While referring to the “demand and refusal” rule, the New York Court of Appeals observed in *State v. Seventh Regiment Fund, Inc.*:

This leads to the circumstance that we described as “anomalous” in *Lubell*: an owner who belatedly discovers the theft of a possession would rather sue a bona fide purchaser—against whom the conversion cause of action accrues upon demand and refusal—than a thief, against whom demand would be futile, and the claim accrues at once.

State v. Seventh Regiment Fund, Inc. 774 N.E.2d 702, 712 (N.Y. 2002) (citing *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429 (N.Y. 1991)); see also *Wertheimer v. Cirker’s Hayes Storage Warehouse, Inc.*, No. 105575-00, 2001 N.Y. Misc. LEXIS 693, at *15 (Sup. Ct. 2001), *aff’d* 300 A.D.2d 117 (N.Y. App. Div. 2002).

Practically speaking, under the *Menzel* court's "demand and refusal" rule, an innocent purchaser might never acquire certainty of title by way of the expiration of a limitation period. Conversely, the limitation period is triggered from the time of the taking for a conscious convertor, who may acquire title with certainty after the set limitation period.¹⁰⁴ The thief and bad faith possessor would find repose after only a few years, while the demand requirement would eliminate limitation period protections to the detriment of innocent purchasers, as owners may postpone their demand indefinitely.¹⁰⁵

Given these anomalies, some subsequent New York cases have questioned the inequitable way in which *Menzel* transformed the "demand and refusal" rule into an accrual

104. This was precisely the thrust of the defendant's argument in *Kunstsammlungen zu Weimar v. Elicofon*:

Elicofon contends that the *Menzel* rule should be abandoned because it favors a thief as against a *bona fide* purchaser, since for a thief the statute of limitations begins to run immediately upon the theft while a *bona fide* purchaser must wait, possibly indefinitely, for a demand from the owner. Insofar as a bad faith purchaser is treated as a thief for the purposes of the statute of limitations, Elicofon contends that the bad faith purchaser is also preferred by the *Menzel* rule to the good faith purchaser. This, he argues, is anomalous, since the demand rule, whose original rationale was to ensure that the innocent purchaser would be informed of his defect in title before being made liable as a tortfeasor is intended for the benefit of the innocent purchaser.

Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150, 1163 (2d Cir. 1982) (citation omitted). It should be noted that there exist some balancing factors, such as the doctrines of fraudulent concealment or equitable estoppel, which will often prevent purchasers in bad faith and thieves from benefitting from the limitation defense. See Gerstenblith, *supra* note 65, at 139 n.61. For more on the anomaly inherent to the "demand and refusal" rule and the potential meaning of the doctrine of fraudulent concealment, leading to equitable estoppel, see *infra* notes 267-89 and accompanying text.

105. See Gerstenblith, *supra* note 65, at 138-39; Bibas, *supra* note 23, at 2445-46; Petrovich, *supra* note 21, at 1139. In *DeWeerth v. Baldinger*, the Second Circuit phrased the argument in a very clear manner, when it stated:

The rule may disadvantage the good-faith purchaser, however, if demand can be indefinitely postponed. For, if demand is delayed, then so is accrual of the cause of action, and the good-faith purchaser will remain exposed to suit long after an action against a thief or even other innocent parties would be time-barred.

DeWeerth v. Baldinger, 836 F.2d 103, 108 (2d Cir. 1987).

mechanism. In *Stroganoff-Scherbatoff v. Weldon*,¹⁰⁶ a 1976 case regarding artwork taken from Russian aristocrats in the aftermath of the Bolshevik revolution, the defendant raised the obvious limitation defense.¹⁰⁷ After all, more than fifty years had passed since the alleged misappropriation. Unfortunately, the court found for the defendant on other grounds, and the ruling deals primarily with the act of state doctrine.¹⁰⁸ However, in dictum, the district court commented on limitation issues by stating that the action in conversion was untimely, and drew attention to statutory language evidently overlooked in the *Menzel* case.¹⁰⁹ According to the *Stroganoff* court, section 206(a) of the New York Civil Practice Law and Rules (CPLR) is relevant when considering the impact of the demand prerequisite on the tolling of the statute of limitations.¹¹⁰ The district court held:

Under New York CPLR § 206(a), a demand is necessary before a person is entitled to bring an action in conversion. That statute provides in part: “[W]here a demand is necessary to entitle a person to commence an action, the *time within which the action must be commenced shall be computed from the time when the right to make the demand is complete.*”¹¹¹

With respect to determining when the right to make the demand should be considered complete, New York courts have repeatedly argued for the moment at which the alleged wrongful act occurs. In *Federal Insurance Co. v. Fries*, for example, the court stated:

In short, the statute of limitations runs, not from the demand, but from the time when the [original owner] was entitled to make

106. 420 F. Supp. 18 (S.D.N.Y. 1976).

107. In the early 1920s, the Soviets nationalized the art collection of Count Alexander Sergevitch-Stroganoff. *Id.* at 21. The majority of the artwork was sold at a Berlin auction in 1931, including a portrait by Anthony van Dyck and Houdon’s bust of Diderot. *Id.* at 20. In 1931, the portrait was sold to a London dealer, who in turn sold it on to Weldon, a New York collector. *Id.* In 1974, a New York collector donated the Diderot bust to the Metropolitan. *Id.*

108. *See id.* at 22.

109. *See id.* at 22 n.5; Gerstenblith, *supra* note 65, at 137 n.56; Petrovich, *supra* note 21, at 1136.

110. *See Stroganoff*, 420 F. Supp. at 22 n.5; Hawkins et al., *supra* note 19, at 71.

111. N.Y. C.P.L.R. § 206(a) (MCKINNEY 2003) (emphasis added).

the demand. Were the rule otherwise, a plaintiff might extend the statute indefinitely, merely by postponing the making of a demand.

Here the [original owner] was entitled to make demand on December 12, 1967, the day [he] mistakenly gave the rings to defendant. Of course, the [original owner] was ignorant until August, 1969, of the facts which gave it the right to make a demand. But ignorance does not stop the clock, unless the defendant engages in fraudulent or misleading conduct . . .¹¹²

Under this approach, the original owner's *right* to make a demand existed as soon as the possessor exercised control over the gouache in a way that was contrary to the former's proprietary rights, even if he was prevented from making the demand by lack of knowledge of the possessor's identity.¹¹³

Despite the *Stroganoff* court's astute eye and sophisticated argument, the New York courts continued to apply *Menzel's* accrual theory in deciding actions in replevin and conversion regarding personal property.¹¹⁴ However, the owner-friendly "demand and refusal" rule was soon softened to some extent by applying due diligence and laches doctrines.¹¹⁵

C. *Adjustments to the "Demand and Refusal" Rule: Inserting Due Diligence and Laches*

1. *Elicofon and DeWeerth: Inserting Due Diligence.* In *Kunstsammlungen zu Weimar v. Elicofon*¹¹⁶ a federal district court was given the opportunity to reinterpret the "demand and refusal" rule when it was asked to apply New York law to an action in replevin regarding two looted Dürer paintings.¹¹⁷ The defendant argued that the claim in

112. *Fed. Ins. Co. v. Fries*, 355 N.Y.S.2d 741, 747-48 (Civ. Ct. 1974) (internal citations omitted).

113. *Hawkins et al.*, *supra* note 19, at 71; *Petrovich*, *supra* note 21, at 1137.

114. *See, e.g.*, *Johnson v. Gumer*, 464 N.Y.S.2d 318 (App. Div. 1983); *see also* *Drum*, *supra* note 88, at 918.

115. *Bibas*, *supra* note 23, at 2446.

116. 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982).

117. *Elicofon*, 536 F. Supp. at 829. Until 1943, a pair of Dürer portraits was on view at the *Staatliche Kunstsammlungen zu Weimar*, an art museum in

replevin was time-barred, because the cause of action had accrued at the time he bought the paintings in 1946.¹¹⁸ The district court, however, rejected that line of reasoning. It held instead that the limitation clock started ticking only after the defendant had refused to honor the museum's demand to surrender the property, affirming that "the rule applied in *Menzel* is the existing New York [accrual] rule."¹¹⁹

Yet in applying the demand requirement, the court differed on the interpretation of the "demand and refusal" rule as formulated in *Menzel*. The parties disagreed on the issue of whether the demand requirement vested a corollary duty of care in the original owner to attempt to trace the stolen property.¹²⁰ The district court acknowledged that *Menzel* had not dealt with this issue, but nonetheless left the question unanswered on the basis that there was no need to decide the issue given that "undisputed evidence clearly demonstrate[d] that the [museum] made a diligent

Germany. *Id.* at 831. The portraits depicted Hans and Felicitas Tucher. *Elicofon*, 678 F.2d at 1152 n.1. When the military tide started to turn against Nazi-Germany, the director of the Weimar museum anticipated the bombardment of the city and had valuable items transferred to *Schloss Swartzburg*, a nearby castle in what was to become East Germany. *Elicofon*, 536 F. Supp. at 831. The Dürer paintings were stashed in a storeroom within the castle for safekeeping. *Id.* In July 1945, around the time that the American troops that were quartered in the surroundings of the *Schloss* were replaced by a more permanent regiment of the Red Army, the paintings were reported stolen. *Id.* at 835. In 1966, they were discovered in the Brooklyn home of Edward Elicofon, where the portraits had been openly displayed to friends since the day he had purchased them from an American ex-soldier, some twenty years earlier. *Elicofon*, 678 F.2d at 1152-53, 1156. The ex-serviceman seller claimed to have bought them in Germany before returning to New York. *Id.* at 1156. Satisfied with that statement, Elicofon purchased the portraits for \$450. *Id.* When the discovery of the looted paintings was published on the front page of the *New York Times*, a demand for recovery from Germany was not long due. *Id.* Yet Elicofon refused, and the East German museum filed suit. *Id.* at 1156. See generally Kent L. Killelea, *Property Law: International Stolen Art—Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982), 23 HARV. INT'L L.J. 466, 467-69 (1983); Ostenberg, *supra* note 15, at 184-86; Henson, *supra* note 72, at 1114-15; Meredith Van Pelt, Comment, *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, 455 (1990).

118. *Elicofon*, 536 F. Supp. at 829, 832.

119. *Id.* at 849.

120. *Id.*

although fruitless effort to locate the paintings.”¹²¹ Accordingly, there simply was no unreasonable delay in making the demand.

On appeal, however, the Second Circuit could not sidestep the issue. The court reverted to a strict interpretation of the “demand and refusal” rule in *Menzel* and decided that no corollary duty of care was part of the substantive demand prerequisite in the State of New York.¹²² The court firmly reiterated the rule:

As between the policy, urged by Elicofon, of allowing the statute of limitations to run against an owner regardless of his ignorance, and tolling it indefinitely against a good faith purchaser until a demand is made, we are satisfied that New York has chosen the latter course. We therefore hold that the cause of action accrued in 1966 and the statute of limitations did not begin to run until then.¹²³

Nonetheless, the Second Circuit’s conclusions erred on the side of caution: “[E]ven if New York had a reasonable inquiry rule under which the statute of limitations begins to run when the owner knew or should have known of the stolen property’s location, the GDR exercised reasonable diligence and cannot be held responsible for the late discovery of the Duerer paintings.”¹²⁴

With *DeWeerth v. Baldinger*,¹²⁵ the Second Circuit was given the opportunity to reconsider the purport of the decision taken in *Elicofon*.¹²⁶ The factual background of both cases shows some remarkable similarity, as *DeWeerth* also involved a painting that American servicemen allegedly stole from a German castle at the end of World War II.¹²⁷

121. *Id.* at 849-50.

122. *Elicofon*, 678 F.2d at 1163-64; *see also* Drum, *supra* note 88, at 924.

123. *Elicofon*, 678 F.2d at 1163-64.

124. *Id.* at 1164 n.25.

125. 658 F. Supp. 688 (S.D.N.Y.), *rev'd*, 836 F.2d 103 (2d Cir. 1987), *remanded*, 804 F. Supp. 539 (S.D.N.Y. 1992) (mem.) (granting relief from judgment).

126. Drum, *supra* note 88, at 923.

127. *DeWeerth*, 836 F.2d at 105. In 1943, Gerda Dorothea DeWeerth, a German citizen, entrusted a Monet painting to her sister for safekeeping in her castle in Oberbalzheim, Southern Germany. *Id.* at 104-05. Two years later, shortly after the end of the war, American troops were billeted on the premises of the castle. *Id.* at 105. However, in the fall of 1945, right after the soldiers had

Again, it was not surprising that the defendant called upon the statute of limitations or, alternatively, the doctrine of laches as a defense.¹²⁸ By openly denouncing DeWeerth's unreasonable delay in the commencement of the proceedings, Baldinger strongly advocated the necessity of modifying the "demand and refusal" rule to include a corollary obligation on the part of the plaintiff to use due diligence in tracing a stolen object, whether it be on a laches or a statute of limitations basis.¹²⁹ At trial, however, the United States District Court for the Southern District of New York relied on *Elicofon* to rule in favor of DeWeerth.¹³⁰ The court found DeWeerth's action timely, as she had not unreasonably delayed her demand for the return of the painting.¹³¹ The court again side-stepped the due diligence issue, by reducing all Baldinger's affirmative defenses to

left, the painting went missing. *Id.* Upon learning about the theft, DeWeerth took immediate steps to investigate and recover the painting. In 1946, she reported the loss to the military government responsible for administrating the area after World War II. *Id.* In 1948, she solicited the assistance of her lawyer to attempt to locate and recover the work, and in 1955 she made inquiries to an art expert. *Id.* Finally, in 1957, DeWeerth reported the Monet as missing to the *Bundeskriminalamt*, the West-German Federal Bureau of Investigation. *Id.* Unfortunately, none of these efforts were successful. *Id.* After more than a decade of unfruitful attempts at recovery, Gerda DeWeerth suspended her search efforts. *Id.* In the meantime, by December 1956, the Monet had found its way to the United States. *Id.* A New York City gallery, Wildenstein & Co., had acquired the painting from a Geneva art dealer. *Id.* In June 1957, Baldinger purchased the painting for \$30,900 from Wildenstein. *Id.* Although the Monet figured at two public exhibitions in New York, and there had been four published references to the picture, DeWeerth did not pick up the trail until July 1981, when her nephew discovered the lost Monet in a 1974 *Claude Monet: Bibliographie et Catalogue Raisonné, Vol. 1 1840-1881*. *Id.* The book mentioned that the work had been exhibited in 1970 at Wildenstein's. *Id.* When Wildenstein refused to reveal the possessor's identity or the Monet's whereabouts, DeWeerth filed suit against Wildenstein in New York Supreme Court, seeking disclosure of the necessary information to bring an action in replevin. *Id.* at 106. On December 1, 1982, the State Supreme Court ordered Wildenstein to reveal the identity of the purchaser, Edith Baldinger. *See DeWeerth*, 658 F. Supp. at 692. By letter, DeWeerth immediately demanded Baldinger to return the Monet. *See id.* When the latter refused to honor her request, DeWeerth filed suit. *Id.*

128. *DeWeerth*, 658 F. Supp. at 693.

129. *Id.*

130. *See id.* at 694.

131. *Id.* at 694-95.

one core issue: whether DeWeerth's delay in filing a claim was unreasonable.¹³² According to the district court, there was no real need to discuss a diligence requirement, since DeWeerth's diligence was undisputed.¹³³ Under its timeliness analysis, the court factored the individual circumstances of DeWeerth into its decision and stressed the fact that she was an elderly woman.¹³⁴ After all, when she made her last effort to trace the artwork in 1957, DeWeerth was already sixty-three years old.¹³⁵ In addition, the court observed that the published references to the Monet, which had ultimately led to the painting's discovery, were found in specialized art literature that was not generally circulated.¹³⁶ In this context, the district court explicitly rejected any argument put forward to compare DeWeerth's efforts to those of the government-owned art museum in the *Elicofon* case.¹³⁷ The plaintiffs in each case clearly differed in resources, knowledge, and experience.¹³⁸ Further, the court noted that for over ten years, DeWeerth had shown considerable initiative to recover her property.¹³⁹ Therefore, the district court concluded that, in spite of many years of delay, DeWeerth's fruitless efforts were substantial enough to deny barring her action in replevin on grounds of untimeliness.¹⁴⁰

132. See Drum, *supra* note 88, at 927; Foutty, *supra* note 18, at 1849; Henson, *supra* note 7, at 1119.

133. *DeWeerth*, 658 F. Supp. at 694 ("The court in *Elicofon* did not decide the issue because 'the undisputed evidence clearly demonstrate[d] that the [plaintiff] made a diligent although fruitless effort to locate the paintings.' The same is true in this case." (quoting *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829, 849-50 (E.D.N.Y. 1981)) (internal citations omitted)).

134. *Id.*

135. See *id.* at 694; see also Drum, *supra* note 88, at 928 & n.159; Foutty, *supra* note 18, at 1849 & n.98; Pollack, *supra* note 40, at 367.

136. *DeWeerth*, 658 F. Supp. at 694.

137. *Id.* at 694-95.

138. *Id.* ("[A]ny comparison with *Elicofon* is inapposite. There the plaintiff was a government-owned art museum, with resources, knowledge and experience that far exceeded any means an individual such as Mrs. DeWeerth could muster to carry on a credible search for a missing painting.").

139. See *id.* at 694.

140. See *id.* at 695; see also Drum, *supra* note 88, at 928; Foutty, *supra* note 18, at 1849; Henson, *supra* note 72, at 1120; Pollack, *supra* note 40, at 367.

Upon appeal, the Second Circuit reassessed DeWeerth's diligence and reversed the district court's decision. The appeal court stated that: "[w]here demand and refusal are necessary to start a limitations period, the demand may not be unreasonably delayed."¹⁴¹ Accordingly, the Second Circuit further developed the *Elicofon* and *Menzel* decisions to insert a due diligence requirement into the "demand and refusal" rule.¹⁴² The Second Circuit acknowledged that New York courts had not previously applied such a requirement, but found that it was justified for three important policy considerations.¹⁴³ First, the court recalled that New York had a "policy of favoring the good faith purchaser" and of discouraging stale claims.¹⁴⁴ Second, the court indicated that New York law needed to be made more harmonious with the law in other jurisdictions. It explicitly noted that the owner-friendly "demand and refusal" rule was at odds with the rules on accrual applicable in other states.¹⁴⁵ Finally, the court reasoned that the imposition of a due diligence requirement would further the protection of defendants from stale claims, the general policy promoted by any statute of limitations.¹⁴⁶ Nevertheless, the Second Circuit refrained from formulating guidelines for determining the amount of diligence required, and preferred to leave each

141. *DeWeerth v. Baldinger*, 836 F.2d 103, 107 (2d Cir. 1987); *see also* *Hawkins et al.*, *supra* note 7, at 74-75; *Walton*, *supra* note 28, at 589-90.

142. *DeWeerth*, 836 F.2d at 106-08.

143. *Id.* at 107, 109-10; *see also* *Drum*, *supra* note 72, at 932-37 (thoroughly analyzing these underlying policies).

144. *DeWeerth*, 836 F.2d at 109-10.

145. While specifically referring to *O'Keefe*, the Second Circuit reasoned:

Other jurisdictions have adopted limitations rules that encourage property owners to search for their missing goods. In virtually every state except New York, an action for conversion accrues when a good-faith purchaser acquires stolen property; demand and refusal are unnecessary. . . . It is true that New York has chosen to depart from the majority view. Nevertheless, the fact that plaintiff's interpretation of New York law would exaggerate its inconsistency with the law of other jurisdictions weighs against adopting such a view. At least one other state has recently confronted the limitations problem in the context of stolen art and has imposed a duty of reasonable investigation.

Id. at 109 (citing *O'Keefe v. Snyder*, 416 A.2d 862 (N.J. 1980)) (citations omitted).

146. *Id.* at 108-10.

matter to be assessed in accordance with “the circumstances of the case.”¹⁴⁷ The court consequently re-evaluated DeWeerth’s efforts to locate and recover her missing painting and was persuaded by her inaction and deficiencies in her initial search.¹⁴⁸ According to the Second Circuit, DeWeerth had failed to give more than minimal information to the authorities and art experts, thus hindering the probability of actual recovery.¹⁴⁹ In addition, rather than a real attempt to recover the artwork, the Second Circuit considered her conversations with her lawyer more as an insurance matter.¹⁵⁰ The court in particular faulted her for not having consulted the Monet *Catalogue Raisonné* earlier than 1981, as in practice she had stopped all efforts to trace the painting in 1957.¹⁵¹ Finally, the court found that she had failed to take advantage of German or American programs to trace the stolen Monet, despite the fact that her family had used the system to recover other stolen art objects.¹⁵²

The Second Circuit was severe, characterizing DeWeerth’s efforts as minimal attempts for recovery that could not be absolved by her elderly age, and holding that “although an individual, DeWeerth appears to be a wealthy and sophisticated art collector; even if she could not have mounted a more extensive investigation herself, she could have retained someone to do it for her.”¹⁵³ Instead of certifying the decision to the New York Court of Appeals,¹⁵⁴ the Second Circuit articulated and applied a new standard, purporting to establish, as a federal court deciding a

147. *Id.* at 110.

148. Foutty, *supra* note 18, at 1850.

149. *DeWeerth*, 836 F.2d at 111.

150. *Id.*

151. *Id.* at 112.

152. *Id.* at 111-12; *see also* Webb, *supra* note 33, at 889-90.

153. *DeWeerth*, 836 F.2d at 112.

154. Certification of a question to the New York Court of Appeals is the means by which a federal court deciding New York law requests an answer or guidance from a state’s highest court on a point of law that is unclear, yet crucial to resolve the case. However, the Second Circuit did not certify the matter to the New York Court of Appeals because it did not believe that the matter would recur with sufficient frequency. *Id.* at 108 n.5; *see also* Hawkins et al., *supra* note 19, at 74 n.152.

diversity action, how New York law would be decided.¹⁵⁵ Yet shortly thereafter, it became clear that the Second Circuit was mistaken.

2. Solomon R. Guggenheim Foundation v. Lubell: *Inserting Laches*. In *Solomon R. Guggenheim Foundation v. Lubell*,¹⁵⁶ the New York Court of Appeals stated that a diligence rule corollary to the demand requirement was a misunderstanding of New York law and renounced its existence.¹⁵⁷ In this case, the Guggenheim Foundation, which operates the Guggenheim Museum in New York City, sought to recover a 1912 gouache by Chagall.¹⁵⁸ The work had disappeared from the museum storage sometime in the late 1960s and was worth an estimated \$200,000.¹⁵⁹ When in 1986 the foundation demanded that Rachel Lubell surrender the work, the latter, being a bona fide purchaser,

155. Bibas, *supra* note 23, at 2446-47; Foutty, *supra* note 18, at 1850; Pollack, *supra* note 40, at 367.

156. 550 N.Y.S.2d 618 (App. Div. 1990), *aff'd*, 569 N.E.2d 426 (N.Y. 1991).

157. *Id.* at 429-30; *see also* Bibas, *supra* note 23, at 2447.

158. *Guggenheim*, N.E.2d at 427. The Chagall gouache, known as *Le Marchand de Bestiaux*, was donated to the Guggenheim in 1937. *Id.* at 428. However, in the late 1960s the museum discovered that the work was not where it was supposed to be. *Id.* It was not until the Guggenheim undertook the decennial comprehensive inventory of the collection in 1969 that the museum was able to conclude that the gouache had in fact been stolen, most likely by a mailroom employee. *Id.* Believing that publicizing the theft would only drive the gouache further underground, the Guggenheim tactically decided not to inform other museums, galleries, or artistic organizations, and not to report the theft to any law enforcement authority. *Id.* In 1974, the museum's Board of Trustees, who considered that all recovery efforts had been exhausted, voted to "deaccession" the gouache and removed it from the museum's records. *Id.* Yet by that time, *Le Marchand de Bestiaux* was hanging in the house of Rachel Lubell who, together with her late husband, had purchased the gouache in May 1967 from the Robert Elkton Gallery, a well-known Madison Avenue dealer. *Id.* at 427-28. The invoice and receipt indicated that the gouache had been in the collection of a named individual, who later turned out to be the museum mailroom employee suspected of the theft. *Id.* at 428. For more than twenty years, the Lubells openly displayed the work at their home. *Id.* at 427. As they had no reason to believe that the painting had been stolen, they twice agreed to publicly exhibit the work, once in 1967 and again in 1981. *Id.* at 428. In 1985, a private art dealer brought a transparency of the painting to Sotheby's for an auction estimate. *Id.* The Sotheby's expert had previously worked at the Guggenheim and recognized the gouache as the stolen piece. *Id.* The expert notified the museum, which discovered that Lubell possessed the gouache. *Id.*

159. *Id.* at 427.

refused.¹⁶⁰ Soon thereafter, the foundation filed a lawsuit for recovery.¹⁶¹ In court, Lubell argued that the action in replevin was barred by the three-year statute of limitations, particularly in light of the museum's lack of effort to locate its property in the twenty-year interval between the theft and its fortuitous discovery.¹⁶²

The trial court found for the defendant, relying on the logic of the Second Circuit's decision in *DeWeerth*.¹⁶³ It applied the New York "demand and refusal" rule, yet reasoned that "in order to avoid prejudice to a good faith purchaser, demand [could not] be unreasonably delayed."¹⁶⁴ Because the museum had done little more in twenty years than search its own premises, the trial court found that its conduct was unreasonable as a matter of law and granted Lubell's motion for summary judgment on the grounds that the museum's cause of action was time-barred.¹⁶⁵

The appellate division modified the trial decision, holding that the trial court erred in concluding that "delay alone can make a replevin action untimely when knowledge is imputed."¹⁶⁶ The court thought "it plain that the relative possessory rights of the parties cannot depend upon the mere lapse of time, no matter how long."¹⁶⁷ The court applied the demand requirement,¹⁶⁸ yet added that bringing an action upon demand and refusal within the limitation period does not end the inquiry.¹⁶⁹ It was also crucial to determine "whether a reasonable diligent search could have

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 428-29. Unfortunately, the trial court's decision is unpublished, so one must rely on the court of appeals, which repeats relevant parts of the trial court decision.

164. *Id.* at 428-29.

165. *Id.* at 428.

166. *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 621 (App. Div. 1990).

167. *Id.* at 622.

168. *Id.* at 620 ("[A]bsent a demand there is no cause of action for replevin against a good-faith purchaser, and absent a cause of action, the statute cannot begin to run.").

169. *Id.* at 621; *see also* Henson, *supra* note 72, at 1124.

enabled the plaintiff to make an earlier demand.”¹⁷⁰ However, the appellate division also deviated from the decision in *DeWeerth*, holding that:

[W]hether [the museum] was obligated to do more than it did in searching for the gouache depends on whether it was unreasonable not to do more, and whether it was unreasonable not to do more is an issue of fact relevant to the defense of laches and not the Statute of Limitations. The action, therefore, should not have been dismissed as barred by the Statute of Limitations.¹⁷¹

According to the appellate division, Lubell’s lack of diligence argument had more to do with laches than with the statute of limitations. The court clarified its new characterization, explaining that if such a defense were to succeed, Lubell had to articulate prejudice in addition to mere delay in demanding return of the gouache.¹⁷² With regard to the requirement of prejudice, the court noted that “rather than harming [Lubell], delay alone could be viewed as having benefited her, in that it gave her that much more time to enjoy what she otherwise would not have had.”¹⁷³

The New York Court of Appeals, affirming the appellate division, eliminated the corollary diligence requirement earlier imposed by the Second Circuit in *DeWeerth*.¹⁷⁴ Accordingly, the court reiterated a pure “demand and refusal” rule to be the controlling law in New York.¹⁷⁵ The

170. *Guggenheim*, 550 N.Y.S.2d. at 621.

171. *Id.* at 619.

172. *Id.* at 622 (“[W]e prefer to characterize the defense urged here—lack of diligence in searching for stolen property . . . as laches. Indeed, we do so mainly in order to point up that if such a defense is to be deemed meritorious, prejudice must be articulated in addition to delay.”).

173. *Id.* at 622 (citing *Marcus v. Village of Mamaroneck*, 283 N.E.2d 856, 859 (N.Y. 1946)).

174. *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 430 (N.Y. 1991) (“We have reexamined the relevant New York case law and we conclude that the Second Circuit should not have imposed a duty of reasonable diligence on the owners of stolen art work for purposes of the Statute of Limitations.”).

175. *See id.* at 429 (“The rule in this State is that a cause of action for replevin against the good-faith purchaser of a stolen chattel accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it. Until demand is made and refused, possession of the

court stated that “there is no reason to obscure its straightforward protection of true owners by creating a duty of reasonable diligence.”¹⁷⁶ The Court of Appeals referred to two factors to explain why it extinguished the Second Circuit’s diligence approach. First, the court believed that a due diligence rule would easily become arbitrary by lack of an objective standard,¹⁷⁷ as it considered that:

The value of the property stolen, the manner in which it was stolen, and the type of institution from which it was stolen will all necessarily affect the manner in which a true owner will search for missing property. We conclude that it would be difficult, if not impossible, to craft a reasonable diligence requirement that could take into account all of these variables and that would not unduly burden the true owner.¹⁷⁸

Second, the Court of Appeals argued that the “demand and refusal” rule—though not the only possible method of measuring the accrual of replevin—still affords the best protection to true owners of stolen property. The court recalled that “New York had already considered—and rejected—adoption of a discovery rule.”¹⁷⁹ The 1986

stolen property by the good-faith purchaser for value is not considered wrongful.”).

176. *Id.* at 430.

177. *Id.* at 430-31. The court illustrated its point, as it held:

Here, the parties hotly contest whether publicizing the theft would have turned up the gouache. According to the museum, some members of the art community believe that publicizing a theft exposes gaps in security and can lead to more thefts; the museum also argues that publicity often pushes a missing painting further underground. In light of the fact that members of the art community have apparently not reached a consensus on the best way to retrieve stolen art, it would be particularly inappropriate for this Court to spell out arbitrary rules of conduct that all true owners of stolen art work would have to follow to the letter if they wanted to preserve their right to pursue a cause of action in replevin.

Id. (internal citations omitted).

178. *Id.* at 431.

179. *Id.* at 430. The court explained:

In 1986, both houses of the New York State Legislature passed Assembly Bill 11462-A (Senate Bill 3274-B). . . . This bill provided that the three-year Statute of Limitations would run from the time [certain not-for-profit] institutions gave notice, in a manner specified by the statute, that they were in possession of a particular object. Governor

Assembly Bill 11462-A would have substituted the jurisprudential “demand and refusal” rule for a legislated discovery rule for actions in replevin regarding art objects possessed by certain not-for-profit institutions. “In his veto message, [Governor Cuomo] expressed his concern that the statute [did] not provide a reasonable opportunity for individuals or foreign governments to receive notice of a museum’s acquisition and take action to recover it before their rights are extinguished.”¹⁸⁰ The Governor feared that the bill, if it went into effect, “would have caused New York to become a haven for cultural property stolen abroad since such objects [would] be immune from recovery under the limited time periods established by the bill.”¹⁸¹ With this context in mind, the court felt strongly that placing the diligence burden on the original owner would boost illegal art trade in New York.¹⁸² Consequently, *Guggenheim* voided the due diligence requirement imposed by *DeWeerth* on an original owner seeking to defeat a statute of limitations defense. Rather than shifting the burden onto the wronged owner, it was better policy to give “the owner relatively greater protection and place[s] the burden of investigating the provenance of a work of art on the potential purchaser.”¹⁸³

As the appellate division had already suggested, the New York Court of Appeals thought that the best way to achieve this result was through the equitable defense of laches. The court argued:

Despite our conclusion that the imposition of a reasonable diligence requirement on the museum would be inappropriate for purposes of the statute of limitations, our holding today should not be seen as either sanctioning the museum’s conduct or suggesting that the museum’s conduct is no longer an issue in this

Cuomo vetoed the measure, however, on advice of the United States Department of State, the United States Department of Justice and the United States Information Agency.

Id. (citing Irvin Molotski, 3 *U.S. Agencies Urge Veto of Art-Claim Bill*, N.Y. TIMES, July 23, 1986, at C15); see also Hawkins et al., *supra* note 19, at 62-63; Drum, *supra* note 88, at 935-36.

180. *Guggenheim*, 569 N.E.2d at 430 (internal quotation marks omitted).

181. *Id.* (internal quotation marks omitted).

182. *Id.* at 431.

183. *Id.*

case. We agree with the Appellate Division that the arguments raised in the appellant's summary judgment papers are directed at the conscience of the court and its ability to bring equitable considerations to bear in the ultimate disposition of the painting. As noted above, although appellant's Statute of Limitations argument fails, her contention that the museum did not exercise reasonable diligence in locating the painting will be considered by the Trial Judge in the context of her laches defense.¹⁸⁴

By raising the equitable defense of laches, a bona fide purchaser can mitigate the unfairness of the "demand and refusal" rule. Laches calls for the evaluation of the conduct of both the original owner and the purchaser,¹⁸⁵ thus allowing a possessor to keep the art object provided he can show prejudice in addition to unreasonable delay.¹⁸⁶ The main effect of this equitable doctrine is to transfer the burden of proof to the bona fide purchaser, requiring him to show that the original owner had exerted unreasonably little effort in tracing its stolen property.

3. *Reinforcement of the Laches Approach.* In the immediate years after *Guggenheim*, the laches approach became well established. In *Republic of Turkey v. Metropolitan Museum of Art*,¹⁸⁷ Turkey, which claimed ownership of all antiquities found within its territory, sought to recover several illegally excavated artifacts from the Metropolitan.¹⁸⁸ In spite of the museum's attempt to distinguish the case at bar from *Guggenheim*,¹⁸⁹ the district court found it applicable, holding that "the [museum's] claims of delay [went] solely to whether the defense of laches [was] available and not to a defense based on the

184. *Id.*

185. *Id.*; see also Walton, *supra* note 40, at 592-93; Hayworth, *supra* note 18, at 371-72.

186. See *State v. Seventh Regiment Fund, Inc.* 774 N.E.2d 702, 712 (N.Y. 2002).

187. 762 F. Supp. 44 (S.D.N.Y. 1990). The parties settled in 1993 when the Metropolitan agreed to restitute several objects. See 1 RALPH E. LERNER & JUDITH BRESLER, *ART LAW—THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* 276 (3d ed. 2005).

188. *Id.* at 45.

189. See *Metropolitan Museum of Art*, 762 F. Supp. at 46; see also Hayworth, *supra* note 18, at 373.

statute of limitations.”¹⁹⁰ Consequently, the court did not require a showing of due diligence and disparaged *DeWeerth*’s holdings as “creative.”¹⁹¹

Soon thereafter, in *Golden Budha Corp. v. Canadian Land Co. of America*, the Court of Appeal for the Second Circuit also adopted *Guggenheim*’s laches approach.¹⁹² This case revolved around an action in conversion, brought against a U.S. corporation for allegedly hiding the proceeds of the “Yamashita Treasure.”¹⁹³ In 1971, an adventurer¹⁹⁴ had unearthed the treasure¹⁹⁵ in the Philippines. However, Ferdinand and Imelda Marcos seized the treasure-trove for their own personal use and benefit, and entered into a scheme with the Canadian Land Company of America to convert the proceeds into property located in the United States.¹⁹⁶ Since it was possible that some defendants had obtained parts of the treasure innocently, the Second Circuit pointed out that the “demand and refusal” rule applied.¹⁹⁷ With regard to the issue of laches, the court

190. See *Metropolitan Museum of Art*, 762 F. Supp. at 46-47.

191. See *id.* at 45; see also 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, 403 n.195 (1996); Preziosi, *supra* note 71, at 236.

192. 931 F.2d 196 (2d Cir. 1991).

193. *Id.* at 198. The court stated:

The provenance of the Yamashita Treasure is shrouded in mystery. According to the complaint, it was hidden in [t]he Philippines by the Japanese occupation forces prior to the end of World War II and the fall of The Philippines in 1945 Although appellees question whether the treasure ever existed, it is an historical fact that Lieutenant General Yamashita . . . served as Commander of Japanese forces in the Philippines during World War II. General MacArthur accused Yamashita of sacking the City of Manila and its shrines and monuments and urged his execution as a war criminal.

Id. (citations omitted) (internal quotation marks omitted).

194. For procedural reasons, the adventurer assigned his rights in the “Yamashita Treasure” to the Golden Budha Corporation, owned by a long-time friend and having its principal place of business in Atlanta, Georgia. *Id.* at 199.

195. The treasure trove “was comprised of gold bullion, precious stones, jewelry, works of art and coins, as well as a huge enigmatic golden buddha” *Id.* at 198.

196. *Id.* at 199.

197. *Id.* at 201.

referred to *Guggenheim* and repeated that “[w]here recovery is sought from an innocent purchaser, no duty of reasonable diligence is imposed under New York law upon the owner of stolen property, although the owner’s laches may be taken into account.”¹⁹⁸

Likewise, in *Hoelzer v. City of Stamford*¹⁹⁹ the Second Circuit had another opportunity to implement what had clearly become the law of the State of New York. Although the case did not involve stolen art *per se*, it did address the matter of when the statute of limitations should begin to run on an owner’s claim in replevin.²⁰⁰ At trial, the district court declared ownership of a set of murals in favor of the City of Stamford.²⁰¹ On appeal, Hoelzer contended that the district court erred in its finding, as the city had “unreasonably delayed its demand for return.”²⁰² This time, clearly apprised of the relevant New York law,²⁰³ the Second Circuit found that the city’s repossession claim was not affected by lack of diligence, as it held that “an owner need not act with due diligence before demanding return of her

198. *Id.* (citing *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429 (N.Y. 1991)).

199. 722 F. Supp. 1106 (S.D.N.Y. 1989), *aff’d*, 933 F.2d 1131 (2d Cir. 1991), *modified*, 972 F.2d 495 (2d Cir. 1992).

200. *Id.* at 1133-35; *see also* Pollack, *supra* note 40, at 374-77. In 1971, the General Services Administration (GSA) in Washington, D.C. delivered six large mural paintings to Hoelzer to have them professionally restored. *Hoelzer*, 722 F. Supp. at 1134. The murals by James Daugherty had hung on the walls of the Stamford High School from 1934 until 1970, when they were inadvertently discarded by construction workers during the renovation of the school. *Id.* Fortunately, a student noticed the paintings resting close to the trash, rescued them, and eventually turned them over to the GSA. *Id.* In the meantime, the school had made several unsuccessful inquiries as to the location of the murals. *Id.* In 1986, the GSA informed Hoelzer, yet uncompensated for his work, that the murals belonged to the Stamford High School. *Id.* at 1135. When the school asked for their return, Hoelzer indicated that he was willing to sell the murals, as he claimed them to be his property, since the school had repudiated its rights by abandoning them in 1970. *Id.* In an action seeking a declaratory judgment to quiet title, Hoelzer contended that the statute of limitations for the city’s action in replevin had run before it asserted ownership to the murals. *Id.*

201. *Id.* at 1114.

202. *Hoelzer*, 933 F.2d at 1135.

203. *See id.* at 1137 (citing *Golden Budha*, 931 F.2d 196 (2d Cir. 1991); *Guggenheim*, 569 N.E.2d 426 (N.Y. 1991); *Republic of Turkey v. Metro. Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990)).

property.”²⁰⁴ Therefore, in spite of the city’s almost complete inertia from 1970 until 1986, the cause of action only accrued when the city made its first demand for return of the murals, which Hoelzer refused.²⁰⁵ Although Hoelzer had not explicitly asserted laches, the court nonetheless drew attention to the relevance of the parties’ due diligence with regard to that equitable doctrine, which the court qualified as “sufficient[] [to] safeguard[] the interests of a good faith purchaser.”²⁰⁶

A fourth application of the newborn laches approach “involved a procedurally unusual postscript to *DeWeerth v. Baldinger*.”²⁰⁷ Perplexed by the outcome of *Guggenheim*, DeWeerth moved to vacate the decision of the Second Circuit, which had awarded her Monet to Baldinger.²⁰⁸ In

204. *Hoelzer*, 933 F.2d at 1137. “Thus, the relevant statute of limitations begins to run upon the owner’s demand for return of the art work and the possessor’s refusal, regardless of the apparent intensity of the owner’s search up until that point.” *Id.* at 1138.

205. *Id.* at 1137; see also Hawkins et al., *supra* note 19, at 76.

206. See *Hoelzer*, 937 F.2d at 1137. Likewise revealing is the concurring opinion of Judge Newman, *Deweerth’s* author:

The New York Court of Appeals ruled that, for purposes of the statute of limitations, New York law contains no requirement of due diligence on the part of the original owner in locating property allegedly stolen from it. However, the Court also ruled that the diligence of the original owner in seeking to locate its property was a relevant consideration in applying the doctrine of laches . . . The result of this decision is to permit a court encountering a dispute between a theft victim and a good-faith possessor to consider and balance all the equities, including the reasonableness of the efforts the theft victim made to locate the property and the reasonableness of the possessor’s basis for believing that it was entitled to obtain and keep the property.

Such a broad inquiry will permit a sensitive resolution of difficult disputes in which there is often much to be said for the positions of each of the contending sides. Now that New York has authoritatively advised us that the diligence of the original owner is to be considered not in determining accrual of the statute of limitations, as we thought in *DeWeerth*, but only in assessing the equities under the doctrine of laches, we must apply that approach to all cases governed by New York law.

Id. at 1139 (Newman, J., concurring) (citations omitted).

207. Hawkins et al., *supra* note 19, at 76; see also LERNER & BRESLER, *supra* note 159, at 275-76; Minkovich, *supra* note 29, at 368-69.

208. See Hawkins et al., *supra* note 7, at 76.

May 1991, she brought a motion before the Second Circuit, which the court denied without opinion.²⁰⁹ She continued to pursue reprieve from the 1987 verdict by filing a new cause of action in a federal district court under Federal Rules of Civil Procedure 60(b)(5) and 60(b)(6).²¹⁰ The district court found for DeWeerth, and qualified the New York Court of Appeal's decision in *Guggenheim* as "a new development justifying Rule 60 relief."²¹¹ In assessing Baldinger's laches defense, Judge Broderick emphasized the fact that restitution would not leave Baldinger without recourse. After all, the latter could shift the final responsibility for lack of care in purchasing and reselling the artwork to non-bankrupt third parties "up the chain of possession."²¹² Judge Broderick ordered Baldinger to surrender the Monet, rejecting her laches defense and arguments of unreasonable delay and prejudice.²¹³

However, DeWeerth's victory was fleeting. Soon Baldinger appealed and the case returned to the Second Circuit, which again sidestepped the laches issue.²¹⁴ Based upon arguments of finality and DeWeerth's choice of federal court instead of state forum, the Second Circuit awarded the painting once again to Baldinger.²¹⁵ It held that Judge

209. See *DeWeerth v. Baldinger*, 804 F. Supp. 539, 545 (S.D.N.Y. 1992), *rev'd*, 24 F.3d 416 (2d Cir. 1994), *withdrawn, amended after petition for reh'g*, 38 F.3d 1266 (2d Cir. 1994).

210. *DeWeerth*, 804 F. Supp. at 548. The district court explained:

Pursuant to Rule 60(b)(5), a party may be relieved from a final judgment or order, *inter alia*, where the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. Rule 60(b)(6) provides for relief from a final judgment where there is any other reason justifying relief from the operation of the judgment.

Id. (internal quotation marks omitted).

211. *Id.* at 541.

212. *Id.* at 552-53 ("Thus plaintiff's delay does not put the innocent purchaser in the position of facing loss of the asset without recourse, whereas a ruling for defendant would leave plaintiff, as the theft victim, with no recourse at all.").

213. *Id.* at 553.

214. See Minkovich, *supra* note 17, at 370.

215. LERNER & BRESLER, *supra* note 187, at 275-76; Hawkins et al., *supra* note 19, at 76-77.

Broderick had improperly used his discretion in deciding that the “important interest in the finality of the judgment in this case, which was more than four years old at the time of that ruling, was outweighed by any injustice DeWeerth believe[d] she ha[d] suffered by litigating her case in the federal as opposed to state forum.”²¹⁶ By her poor choice of forum, DeWeerth bore the risk that a federal court would arbitrarily decide an open question of state law.²¹⁷ When the U.S. Supreme Court denied DeWeerth’s petition for *certiorari*, the Monet saga came to an end and the painting remained with Baldinger.²¹⁸

II. THE NEW YORK COURTS’ INCREASED RECEPTIVENESS TO THE LIMITATION AND LACHES DEFENSES IN CULTURAL PROPERTY LITIGATION

In the mid-1990s, the world witnessed a sudden revival of Nazi-era art litigation, which continues to the present day.²¹⁹ This modern upsurge can be attributed to a variety of causes, each of which enhanced the public’s awareness of the Nazi-era looting or the availability of information allowing retrieval.²²⁰ In addition, it is not unreasonable to assume that the modern upsurge in claims would not have occurred were it not for the resurfacing of the spoliated works in the art market or in publicly exhibited collections,

216. *DeWeerth v. Baldinger*, 38 F.3d 1266, 1275 (2d Cir. 1994).

217. Hawkins et al., *supra* note 19, at 77.

218. *DeWeerth v. Baldinger*, 486 U.S. 1056 (1994), *denying cert. to* 836 F.2d 103 (2d Cir. 1987).

219. See generally KATJA LUBINA, *CONTESTED CULTURAL PROPERTY* 159-66 (2009); MUSEUMS AND THE HOLOCAUST 13-21 (Norman Palmer ed., 2000); Michael Bazyley, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 160-89 (2000); see also Lawrence M. Kaye, *Looted Art: What Can and Should Be Done*, 20 CARDOZO L. REV. 657, 658 (1998); Kreder, *supra* note 27, at 155-58; Schwartz, *supra* note 48, at 1; Cuba, *supra* note 21, at 448.

220. LUBINA, *supra* note 219, at 160-66; 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, 198 (2006); Michele I. Turner, *The Innocent Buyer of Art Looted During WWII*, 32 VAND. J. TRANSNAT’L L. 1511, 1519-22 (1999); Collins, *supra* note 19, at 119; Cuba, *supra* note 21, at 448-49; Minkovich, *supra* note 29, at 353-55.

due to the death of the generation of original post war purchasers.²²¹

Part I described how, at the time of the aforementioned revival of Holocaust-related disputes, New York courts cemented an approach to assessing the timeliness of actions in replevin and conversion regarding stolen cultural property. According to the principles the New York Court of Appeals set out in *Guggenheim*, this approach dictates that under New York law, a cause of action to recover a chattel against a party who has lawfully obtained the property arises not when the object is initially taken, but when the demand for its return is refused. This approach does not mean, however, that an original owner may be lax in searching for missing property or may delay unreasonably in making a demand. The owner must be diligent, because even where the three-year limitation period has not run, the claim may be barred by the doctrine of laches, if the current possessor can show he has suffered prejudice due to the owner's unreasonable delay.

Part II will analyze all publicly available case law of the past fifteen years on the recovery of stolen cultural property, especially Nazi-era takings, in the New York forum. Based on this comprehensive survey of recent case law, which unlike the few pre-1995 Nazi-era title disputes has not been discussed as a whole in the literature, Part II will call attention to the courts' increasing receptiveness to the limitation and laches defenses in stolen art litigation in general, and Holocaust-related title disputes in particular. The analysis will lead to the conclusion that henceforth it will be unlikely for Holocaust survivors (or their heirs) to prevail in their attempts to obtain recovery of their stolen heirlooms. In spite of former policies favoring the position of original owners, New York law appears to have shifted in the other direction.

221. Hector Feliciano et al., *Nazi Stolen Art*, 20 WHITTIER L. REV. 67, 73 (1998); Owen C. 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, 46. (1999); Howard N. Spiegler, *Recovering Nazi-Looted Art: Report from the Front Lines*, 16 CONN. J. INT'L L. 297, 299 (2001); Collins, *supra* note 19, at 120; Minkovich, *supra* note 29, at 354.

A. *The New York Courts' Increased Receptiveness to the Limitation Defense*

Over the past fifteen years, New York courts have continued to apply the well-established “demand and refusal” rule to determine the moment of accrual of the original owner’s cause of action in replevin.²²² Recent case law, however, has introduced two mechanisms that have increasingly favored the actual possessor, contrary to the *Menzel* court’s preference of safeguarding the rights of the original owner. One mechanism employed by the New York courts involved a rather discretionary advance of the moment of accrual in certain cases by inferring an implicit demand and refusal from the parties’ actions or inactions. In addition, in some recent cases, the courts have accepted the parties’ conscious exploitation of inherent anomalies in the demand and refusal rule to accelerate accrual.

1. *Implicit Demand and Refusal.* In *Grosz v. Museum of Modern Art*,²²³ the United States District Court for the Southern District of New York inferred an implicit refusal from the position the museum had taken during ongoing negotiations with the Grosz heirs. The case concerned a lawsuit, brought by Martin and Lilian Grosz, the son and daughter-in-law of the late German artist George Grosz, against the Museum of Modern Art (“MoMA”), seeking the return of three of his major caricatural works that were being held in the MoMA collection: *Republican Automatons*, *Portrait of the Poet Max Herrman-Neisse*, and *Self-Portrait with Model*.²²⁴ Although Grosz was not Jewish, his work typified the kind of “*Entartete Kunst*” (degenerate art)

222. A great deal of these title disputes concerned converted artwork or collectibles. See *Doss, Inc. v. Christie’s, Inc.*, No. 08 Civ. 10577 (LAP), 2009 WL 3053713 (S.D.N.Y. Sept. 23, 2009); *Interested Lloyd’s Underwriters v. Ross*, No. 04 Civ. 43281 (RWS), 2005 WL 2840330, at *1 (S.D.N.Y. Oct. 28, 2005); *Christie’s Inc., v. Davis*, 247 F. Supp. 2d 414 (S.D.N.Y. 2002); *McGough v. Leslie*, 884 N.Y.S.2d 756 (App. Div. 2009); *Douglas v. Christie’s Int’l, PLC*, 640 N.Y.S.2d 530 (App. Div. 1996); *Sports Legends, Inc. v. Carberry*, 2008 N.Y. Misc. LEXIS 7881, at *1 (Sup. Ct. Mar. 10, 2008); *In re Lumerman*, 856 N.Y.S.2d 469 (Sur. Ct. 2008).

223. 2010 U.S. Dist. LEXIS 1667, 09 Civ. 3706 (CM) (THK), at *1 (S.D.N.Y. Jan. 6, 2010), *aff’d*, No. 10-257, 2010 U.S. App. LEXIS 25659, at *1 (2d Cir. Dec. 16, 2010).

224. *Id.* at *1.

Hitler hated.²²⁵ “As a result Grosz fled Germany in 1933.²²⁶ After his departure, he was branded an “enemy of the state” by the Third Reich, and in 1938, the Nazi-government rendered him stateless, revoking his citizenship and confiscating what remained of his assets.²²⁷ In the years following his emigration, the three caricatures were on consignment with Alfred Flechtheim, Grosz’s exclusive dealer.²²⁸ After Flechtheim’s death in 1937, Grosz’s work allegedly “fell prey to a network of unscrupulous art professionals, who took advantage of the political climate at that time to divest Grosz of his ownership.”²²⁹ Each of the works entered the MoMA collection in due course, either by sale or donation, between the late 1940s or early 1950s.²³⁰

On November 24, 2003, the Grosz heirs first demanded return of the works on the contention that they were wrongfully taken during the Nazi reign.²³¹ Over the next years the heirs and the MoMA exchanged a series of letters and had several meetings to discuss the ownership of the artwork.²³² At no point during these negotiations did MoMA acknowledge the Grosz heirs’ ownership of the works or relinquish custody of them, despite their demand.²³³ However, throughout these years, the museum administration communicated that it had engaged researchers to study the provenance of the paintings, had planned meetings with its Board of Trustees, and had retained former Attorney General Katzenbach to review the research as an independent expert.²³⁴ On April 12, 2006, the museum at last sent a final letter firmly expressing its continued refusal to turn over the paintings.²³⁵ On April 10,

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at *2.

229. *Id.* at *5-6.

230. *See id.* at *6-16 (describing in detail how the paintings ended up in the museum).

231. *Id.* at *16.

232. *Id.*

233. *Id.*

234. *Id.* at *27.

235. *Id.*

2009, when they thought they were still within the relevant three-year limitation period, the Grosz heirs commenced an action in replevin.²³⁶ The museum moved to dismiss the complaint as time-barred, arguing that refusal had unmistakably occurred earlier during the negotiation process, given the museum's previous letters and continued retention of the paintings.²³⁷

In order to determine the exact moment of accrual, the district court analyzed the purport of the museums' communication towards the Grosz family.²³⁸ The court's analysis was not limited to the museum's written communication, but also encompassed acts that could be deemed as an implicit refusal.²³⁹ In its decision, the court relied on scant available case law that addressed the requirements of a "refusal" for purposes of the "demand and refusal" rule.²⁴⁰

The *Grosz* court first quoted the New York Appellate Division's decision in *Feld v. Feld*.²⁴¹ In *Feld*, the parties were the sons of the late Maude and Samuel Feld.²⁴² The plaintiff Stuart Feld had "resided with his parents as an adult from 1961 to 1967, and claim[ed] that he left various items of his personal property with them when he moved out, including antiques and objects of art."²⁴³ He wrote to his parents in 1971 and 1974 to assert ownership over these items and "directed their return through an intermediary."²⁴⁴ However, his father conditioned any return of the artwork upon resolution of unrelated claims made by the parents against their son and his antiques firm.²⁴⁵ No further action occurred until the parents' death in 1995.²⁴⁶

236. *Id.*, at *16.

237. *Id.* at *16, *22-25.

238. *Id.* at *28-38.

239. *Id.*

240. *Id.* at *24.

241. *Id.* (quoting *Feld v. Feld*, 720 N.Y.S.2d 35 (App. Div. 2001)).

242. *Feld*, 720 N.Y.S.2d at 36.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

Soon thereafter, Stuart Feld brought an action in replevin against his brother, individually and as estate executor, seeking the return of the art objects he had left behind in 1967 which were listed as part of the parent's estate.²⁴⁷ The New York Supreme Court dismissed the brother's motion for summary judgment, which argued that the claim was time-barred.²⁴⁸ The court found there had been no clear refusal by the parents to return the property, so that the cause of action had not accrued.²⁴⁹ The appellate division, however, found the action in replevin was time-barred, reasoning that for limitation purposes:

A demand need not use the specific word "demand" so long as it clearly conveys the exclusive claim of ownership. A demand consists of an assertion that one is the owner of the property and that the one upon whom the demand is made has no rights in it other than allowed by the demander. By the same reasoning, a refusal need not use the specific word "refuse" so long as it clearly conveys an intent to interfere with the demander's possession or use of his property.²⁵⁰

According to the court, the father's 1974 letter clearly constituted a refusal: he had conditioned return of the artwork on resolution of other disputes, and demonstrated conduct that was inconsistent with Stuart Feld's asserted ownership.²⁵¹

The second case relied on by the *Grosz* court similarly concerned converted artwork. *Spanierman Gallery Profit Sharing Plan v. Merritt*²⁵² involved an interpleader action to determine the appropriate disposition of the painting *Grand Canyon* by Arthur Wesley Dow.²⁵³ Spanierman argued, *inter*

247. *Id.*

248. *Id.*

249. *Id.* at 36-37.

250. *Id.* at 37 (citations omitted).

251. *Id.*

252. No. 00 Civ. 5712 (THK), 2004 WL 1781006, at *1 (S.D.N.Y. Aug. 10, 2004).

253. *Id.* Spanierman Gallery asserted that Merritt sold the work to Fagan. *Id.* Fagan subsequently put the painting up for auction in Massachusetts, where Spanierman acquired it for \$165,000. *Merritt v. Fagan*, No. CV9903378665, 2002 WL 1331839, at *1 (Conn. Super. Ct. May 17, 2002), *aff'd*, 828 A.2d 685 (Conn. App. Ct. 2003). Merritt, on the other hand, contended that she transferred the painting to Fagan for appraisal purposes only and that Fagan

alia, that Merritt's title claim was time-barred.²⁵⁴ The district court, interpreting New York law, reiterated New York's "demand and refusal" rule, as set out in *Guggenheim*.²⁵⁵ As the parties disputed the precise time of refusal, and thus accrual, the court explained that demand and refusal could be implicit, thereby repeating verbatim the words of the appellate division in *Feld*.²⁵⁶

Finally, the *Grosz* court addressed *Borumand v. Assar*, a 2005 case in which the United States District Court for the Western District of New York took the *Feld* doctrine one step further, holding that refusal need not be conveyed in words at all.²⁵⁷ In *Borumand*, the defendant never explicitly informed the plaintiff that he would not relinquish possession.²⁵⁸ Although he had maintained that he would do so, he never actually turned over the property.²⁵⁹ The court ultimately held that the cause of action accrued one year after the initial demand, since by that time, the plaintiff should have reasonably concluded that the defendant's actions in putting her off amounted to a refusal.²⁶⁰

Bearing in mind the decisions in *Feld*, *Spanierman*, and *Borumand*, the *Grosz* court analyzed the correspondence between the parties.²⁶¹ It granted the museum's motion to dismiss, holding that the three-year limitation period had

had breached the contract and converted the painting. *Id.* In November 1999, Merritt commenced a lawsuit against Fagan in a Connecticut state court, seeking damages for breach of contract and conversion. *Spanierman Gallery*, 2004 WL 1781006, at *2. She was awarded over \$395,000 in damages. *See* Merritt, 2002 WL 1331839, at *7. After filing the lawsuit against Fagan, Merritt's attorney made a report to the FBI, which seized the painting after an investigation. *Spanierman Gallery*, 2004 WL 1781006, at *2. The U.S. Attorney's Office then commenced an interpleader action. *Id.*

254. *Spanierman Gallery*, 2004 WL 1781006, at *1.

255. *Id.* at *4.

256. *See id.* at *5 (quoting *Feld v. Feld*, 720 N.Y.S.2d 35, 37 (App. Div. 2001)).

257. *Borumand v. Assar*, No. 01-CV-6258P, 2005 WL 741786, at *14 (W.D.N.Y. Mar. 31, 2005) ("Actions may be sufficient to constitute a refusal if they amount to an overt and positive act of conversion.").

258. *Id.*

259. *Id.*

260. *Id.* at *16.

261. *Grosz v. Museum of Modern Art*, 2010 U.S. Dist. LEXIS 1667, 09 Civ. 3706 (CM) (THK), at *28-38 (S.D.N.Y. Jan. 6, 2010).

commenced no later than July 20, 2005.²⁶² At that time the museum had communicated in a letter that it challenged the plaintiff's alleged rights to possession of the works.²⁶³ Although the same letter also contained language that could temper an original owner's decision to bring suit, the court found that, "coupled with the museum's continued retention of the artwork, the letter indicated the museum's continuing intent to interfere with the rights the family had asserted in its demand."²⁶⁴ "This is all the refusal the law could possibly require before plaintiff's causes of action for conversion or replevin (as well as the corresponding equitable claims) accrued."²⁶⁵ After all, "the museum's actions and statements were inconsistent with the demander's claim to ownership."²⁶⁶

Generally, the technique of inferring a demand and/or refusal from the parties' actions or inactions is not unreasonable. Actions, as we all know, can sometimes speak louder than words. Although in most cases implicit refusal causes the limitation period to commence earlier and can thus affect the timeliness of the original owner's action, the technique is not specifically aimed at denying a plaintiff's chances for recovery. There are still circumstances in which it could benefit an owner by allowing him to bring a claim without first making explicit demand upon the possessor.

Nonetheless, the technique of implicit "demand and refusal" bestows considerable discretion upon the court, as in some cases it can rather easily upset the owner's chances of arguing that he indeed brought a timely action. Again, this is not contrary to the rationales underlying statutory limitation; it simply gives more scope to the courts to secure the effectiveness of the judiciary, penalize obvious dilatoriness, and hold back surprise litigation over matters from days long gone. In this sense, the decision in *Feld* merits approval, given that the letter in which the father communicated his conditions for return necessarily

262. *Id.* at *31.

263. *Id.*

264. *Id.*

265. *Id.* at 31.

266. *Id.* at *35. Soon thereafter, the district court dismissed as futile the Grosz heirs' motions for reconsideration and leave to amend. *Grosz v. Museum of Modern Art*, 2010 U.S. Dist. LEXIS 20248, at *1 (S.D.N.Y. Mar. 3, 2010).

amounted to a refusal, and is further fortified by nearly twenty years of complete silence that followed the letter. However, it is questionable whether application of the same discretion is equally satisfactory in cases where the parties are obviously in the process of negotiation. In *Grosz*, the court advanced accrual to an earlier time in the course of the parties' negotiations in order to frustrate an action the plaintiff clearly considered timely in view of a later letter from the museum that expressed formal refusal. While these circumstances cannot be determinative of whether the *Grosz* heirs should have been entitled to the paintings, in situations where the time of accrual is ambiguous and debatable, a decision on the merits of the case rather than on technicalities would be more satisfactory, especially in sensitive cases involving claims for Holocaust-related losses.

2. *Consciously Exploited Anomaly*. Unlike the implicit "demand and refusal" rule, which is justified under appropriate circumstances, a second mechanism, which successfully exploits the anomaly inherent in the "demand and refusal" rule, appears most objectionable.

Recall that the *Menzel* court's introduction of the "demand and refusal" rule for limitation purposes was greeted with criticism. The rule created an inherent anomaly by subverting the rationale behind the demand requirement of safeguarding innocent purchasers against sudden liability for unknowingly possessing converted goods.²⁶⁷ Worse still, as has been exposed by some commentators, this anomaly is even more egregious because using the "demand and refusal" rule as a mechanism to determine accrual actually rewards bad faith.²⁶⁸ In practice, a bona fide purchaser will almost never acquire title through the running of the limitations period, while a conscious convertor, such as a thief or bad faith purchaser, may find repose after only three years.²⁶⁹

The *Grosz* court was well-aware of the mechanism's inherent anomaly.²⁷⁰ Consequently, for purposes of deciding

267. See *supra* Part I.B.2.

268. Gerstenblith, *supra* note 65, at 138-39; Hawkins et al., *supra* note 19, at 66; Thomas, *supra* note 56, at 258; Eisen, *supra* note 18, at 1080-81; Petrovich, *supra* note 21, at 1139.

269. See *supra* notes 104-05 and accompanying text.

270. *Grosz*, 2010 U.S. Dist. LEXIS 1667, at *18. The district court reiterated:

the motion and in order to apply the “demand and refusal” rule, the court assumed that the heirs were not alleging that the museum had acquired any of the works in bad faith.²⁷¹ Leaving aside whether any equitable problems were posed, the court observed that if MoMA actually took title to the artwork in bad faith, then absent any tolling of the limitation period due to fraudulent concealment, the heirs’ claims had been barred some time in the 1950s, three years after the museum would have knowingly acquired wrongful ownership.²⁷²

The court’s observation regarding potential equitable tolling was not without reason. In that connection it is often argued that the anomaly inherent in the “demand and refusal” rule is actually only on the surface; as the doctrine of fraudulent concealment, leading to equitable estoppel, in principle can prevent bad faith purchasers and thieves from benefitting from the limitation defense. Indeed, in *General Stencils, Inc. v. Chiappa*, the New York Court of Appeals explained that the “demand and refusal” rule does not favor the thief or the bad faith purchaser over the bona fide purchaser.²⁷³ The court held that the doctrine of equitable estoppel prevents a wrongdoer from asserting the limitations defense so as to take “refuge behind the shield of his own wrong.”²⁷⁴ Most likely, a wrongdoer’s possession will not satisfy the “open and notorious” requirement. However, the doctrine of equitable estoppel is a strict one, as it

Under New York law, the statute of limitations for conversion and replevin automatically begins to run against a bad faith possessor on the date of the theft or bad faith acquisition—even if the true owner is unaware the chattel is missing. By contrast, “An innocent purchaser of stolen goods becomes a wrongdoer only after refusing the owner’s demand for their return.” Therefore, a cause of action accrues against a bona fide purchaser when the purchaser refuses to return the property in question.

Id. (citations omitted) (quoting *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1161 (2d Cir. 1982)).

271. *Id.* at *22-23. However, the court observed that its assumption did contradict certain allegations in the heirs’ complaint, notably that at the time of acquisition the museum clearly knew that it was trying to purchase a stolen Grosz. *Id.* at *23 n.3.

272. *Id.* at *23 n.4.

273. 219 N.E.2d 169, 171 (N.Y. 1966).

274. *Id.* at 170; *see also* *Kunstsammlungen zu Weimar*, 678 F.2d at 1163-64.

traditionally arises only against a wrongdoer who commits egregious, affirmative acts of concealment. Under *Chiappa's* rationale, the requirements for estoppel would not be satisfied if, for example, a bad faith purchaser openly displays stolen paintings in his home.²⁷⁵ Consequently, in some cases of theft or bad faith acquisition, the doctrine of fraudulent concealment is actually powerless, allowing a bad faith defendant, undeserving of the protection of the demand requirement, to get off scot-free, insulated from suit by the statute of limitations' bar. It is this inequity that the *Grosz* court seemed concerned about when it commented that if MoMA had actually acquired the artwork in bad faith, then the heirs' claims would have been barred three years after the conscious acquisition, precisely because it saw no reason to toll the statute of limitations on the basis of fraudulent concealment.²⁷⁶

In that connection, the district court referred to the decision in *Close-Barzin v. Christie's, Inc.*²⁷⁷ In this case, the appellate division found that the plaintiff's action for conversion brought against Christie's was time-barred for two reasons. First, the court held that the action was commenced more than three years after the alleged taking of the property had occurred.²⁷⁸ In view of the plaintiff's contention that the defendants knowingly consigned and sold the plaintiff's property, the court held that "demand and refusal" were not prerequisites of an action for conversion.²⁷⁹ Second, the court ruled that Christie's was also not barred by the doctrine of fraudulent concealment from asserting the statute of limitations defense.²⁸⁰ Although the plaintiff had alleged bad faith, the court held that she was not affirmatively "induced" by the defendants to refrain from pursuing her claims²⁸¹ and that she "had

275. *But see* *Kunstsammlungen zu Weimar*, 678 F.2d at 1163, n.23 (disagreeing with such a narrow reading of *Chiappa*). According to the Second Circuit, "*Chiappa* stands for the general proposition, resting on estoppel principles, that a defendant who commits affirmative wrongdoing should not be afforded the benefits of the statute of limitations defense." *Id.*

276. *Grosz*, 2010 U.S. Dist. LEXIS 1667, at *23, n.4.

277. 857 N.Y.S.2d 545 (App. Div. 2008).

278. *Id.* at 546.

279. *Id.*

280. *Id.*

sufficient information to commence an action for conversion well within the limitations period.”²⁸²

The decision in *Close-Barzin* painfully illustrates how in practice bad faith converters may be better protected. Although the outcome is openly contrary to the outcomes the *Menzel* court aimed to achieve by adopting a “demand and refusal” rule, *Close-Barzin* is unfortunately not an isolated case. Strangely enough, in the recent title dispute *Kapernekas v. Brandhorst*, regarding two works of art by contemporary artist Damien Hirst, the United States District Court for the Southern District of New York seemed comfortable observing that the plaintiff’s claim was time-barred depending upon “whether [the] defendant [had] openly dealt with the works in a manner that would preclude [the] plaintiff from invoking the demand and refusal rule.”²⁸³ If the defendant had dealt with the works in good faith, the plaintiff’s cause of action would not have accrued until demand was made; however, if the defendant had openly acted in bad faith, then it was a lost cause, as the plaintiff would not have the benefit of the “demand and refusal” rule to prevent his claim from being time-barred.

A similarly troubling illustration of the anomaly can be found in *Johnson v. Smithsonian Institution*, another dispute regarding converted artwork.²⁸⁴ The district court

281. *Id.* (emphasis added).

282. *Id.*

283. *Kapernekas v. Brandhorst*, 638 F. Supp. 2d 426, 428 (S.D.N.Y. 2009).

284. *Johnson v. Smithsonian Inst.*, 9 F. Supp. 2d 347 (S.D.N.Y. 1998), *aff’d in part and rev’ in part* by 189 F.3d 180 (2d Cir. 1999). In this case, James Johnson, the representative of distributees of the estate of his artist uncle William Johnson, brought an action in replevin and conversion against the Smithsonian Institution and the Rosenfeld Gallery. *Smithsonian*, 9 F. Supp. 2d at 349. From 1926 until 1947 Johnson had created over 1,000 artworks, many of which were exhibited at prestigious venues throughout the world. *Id.* His agent was the Harmon Foundation, a non-profit organization that assisted African-American artists. *Id.* In 1946, Johnson moved to Europe and, prior to the move, requested the return of all of his artwork, yet the foundation fraudulently held on to several of his creations. *Id.* at 350. Soon thereafter, Johnson was diagnosed with syphilis-induced paresis and pronounced mentally incompetent. *Id.* at 349. He died in 1970 in a New York State psychiatric institution. *Id.* The New York Supreme Court appointed a committee to administer his assets. *Id.* The committee stored the artwork in their possession in a warehouse facility between 1948 and 1956. *Id.* In 1955, it attempted to sell his work, but to no avail. *Id.* The committee then sought leave to abandon the artwork, which the

dismissed the claims by contrasting the “demand and refusal” rule with the rule of instant accrual for intentional conversions, as it reasoned:

Johnson allegedly requested that his art be returned to him in 1946. Allegedly, the Harmon Foundation tortiously held onto the art in 1946. The three year statute of limitations for conversion or replevin thus began running at that time, even though Johnson was allegedly unaware that the Foundation—which was the original tortfeasor, as opposed to a good-faith purchaser—did not return the art in spite of Johnson’s demand.²⁸⁵

Moreover, the court added that Johnson’s lack of legal capacity did not operate to equitably toll the statute of limitations under New York law, “because the disability did not exist at the time the cause of action accrued.”²⁸⁶ The Second Circuit affirmed the dismissal of all claims against the Smithsonian, but reversed and remanded the dismissal of claims against the Rosenfeld Gallery.²⁸⁷ It explained that the gallery would have prevailed if Johnson had alleged bad faith instead of good faith:

“Although seemingly anomalous,” the Rosenfeld Gallery was not protected by the same statute of limitations because the gallery was not alleged to have been a “thief.” The statute of limitations does not begin to run on any claims against a good-faith purchaser of stolen artwork, which the gallery is alleged to have been, until “the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it.” No demand was made upon the Rosenfeld Gallery until 1995 and the

court granted on April 30, 1956. *Id.* at 350. Soon thereafter the committee transferred Johnson’s artwork to the Harmon Foundation which had expressed an interest in restoring the paintings for their historical significance. *Id.* Consequently, the foundation held in its possession both the 1947 artwork it had fraudulently withheld, along with artwork transferred from the committee in 1956. In 1967, the Harmon Foundation donated some 1,154 pieces to the Smithsonian, where most of it remained. *Id.* At some point in the 1980s or 1990s, Rosenfeld Gallery acquired approximately thirty pieces of Johnson’s artwork. *Id.* Johnson’s work is now recognized as having substantial value—artistically, economically, and historically. In 1995, James Johnson demanded that Rosenfeld and the Smithsonian return to Johnson’s heirs all of his artwork in their possession, and was refused. *Id.* He filed a complaint on July 16, 1997. *Id.* at 349.

285. *Id.* at 354.

286. *Id.*

287. *Smithsonian*, 189 F.3d at 190.

complaint in this lawsuit was served less than three years later, in 1997, within the time pre-scribed by the statute.²⁸⁸

The preceding cases are troubling despite *Guggenheim's* characterization of "seemingly anomalous." They illustrate how in specific circumstances, the "demand and refusal" rule may lead to actual unfairness. In that respect, defendants, especially those who held the disputed artwork openly as most museums do, may soon be tempted to systematically argue that they are bad faith converters in order to accelerate accrual by exploiting the anomaly inherent in New York's accrual doctrine.²⁸⁹ The demanding requirements of fraudulent concealment, leading to equitable estoppel, render this mechanism disturbingly common in Nazi-era title disputes.

B. *The New York Courts' Increased Receptiveness to the Laches Defense*

When the upsurge in Nazi-era art litigation overwhelmed the New York art world in the late 1990s, *Guggenheim* had only recently established the application of laches as a remedial development in the law of replevin. With misappropriations that had occurred more than five decades ago, Holocaust-related title disputes were well-placed to further develop New York's unique approach. On numerous occasions, the New York state and federal courts relied on *Guggenheim* to apply laches to balance the interests of victimized owners and good faith purchasers.²⁹⁰

288. *Id.* at 188 n.6 (quoting *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E. 426, 429 (N.Y. 1991)).

289. *See, e.g., Martin v. Briggs*, 663 N.Y.S.2d 184, 186 (App. Div. 1997) (illustrating that the defendants argued open, yet bad faith conversion of paintings that were held on bailment, in order to benefit from a shorter limitation period).

290. Of note, the doctrine of laches issue did not arise solely in the New York courts in the context of applying New York substantive law to determine ownership. Pursuant to Section 202 of the CPLR, the laches issue also surfaced as procedural law of forum, even when the courts applied foreign substantive law. *See, e.g., Warin v. Wildenstein & Co.*, 746 N.Y.S.2d 282, 282-83 (App. Div. 2002). In this case, the great-nephew of Alphonse Kann, a French-Jewish collector who fled to London in anticipation of a German invasion, brought an action for the recovery of eight illuminated manuscripts from the Wildenstein Foundation. *Warin v. Wildenstein & Co.*, No. 115143/99, 2001 N.Y. Misc. LEXIS

In assessing whether laches barred the plaintiff's action in replevin, the courts stood by the doctrine's standard twofold requirement of unreasonable delay and prejudice.²⁹¹ However, for a considerable period, the double requirement for a successful laches defense was practically insurmountable for defendants in stolen art cases. Consider that neither *Guggenheim*, nor its immediate successors such as *Turkey v. Metropolitan*, *Golden Budha*, *Hoelzer* or the *DeWeerth* sequel, actually found for the defendant on a laches basis. Even if the possessor could somehow make a case for unreasonable delay, he came up short on the prejudice requirement.²⁹² Yet in view of recent decisions, the laches defense has undeniably gained strength in stolen art cases, especially Holocaust-related disputes, as the courts have shown increasing willingness in finding that the passage of time was unreasonable and resulted in prejudice.

1. *Unreasonable Delay*. Given the doctrine's equitable nature, laches operates on a fact-specific basis.²⁹³ After all, whether the delay in bringing the action in replevin was unreasonable depends entirely on the circumstances of the case. In practice, the question of unreasonable delay is tantamount to whether the original owner was reasonably diligent in tracing his stolen property,²⁹⁴ which is a quintessential determination of fact. Therefore, one would expect laches to be resolved at a fact-finding trial proceeding. Indeed, the significance of assessing material issues of fact often precluded the court from granting

542, at *1-2, *5 (Sup. Ct. Sept. 4, 2001); see also *Bakalar v. Vavra*, 550 F. Supp. 2d 548, 551 (S.D.N.Y. 2008); *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, No. 98 Civ. 7664 (KMW), 1999 U.S. Dist. LEXIS 1327, at *23-24 (S.D.N.Y. Aug. 18, 1999); *Wertheimer v. Cirker's Hayes Storage Warehouse, Inc.*, No. 105575/00, 2001 N.Y. Misc. LEXIS 693, at *14-19 (Sup. Ct. Sept. 28, 2001).

291. See, e.g., *Sanchez v. Trs. of the Univ. of Pa.*, No. 04 Civ. 1253 (JSR), 2005 U.S. Dist. LEXIS 636, at *6-7 (S.D.N.Y. Jan. 13, 2005) ("Under the doctrine of laches, a suit will be dismissed when a plaintiff has engaged in unreasonable delay in bringing suit and defendant has suffered prejudice as a result of the delay."); *In re Flamenbaum*, 899 N.Y.S.2d 546, 552 (Sur. Ct. 2010) ("The doctrine of laches is an equitable defense based on an unreasonable delay by a victim in bringing a claim, which in turn causes prejudice to the possessor.").

292. See *supra* note 173 and accompanying text.

293. *In re Flamenbaum*, 899 N.Y.S.2d at 553.

294. See *Sanchez*, 2005 U.S. Dist. LEXIS 636, at *7.

summary judgment motions brought on laches grounds.²⁹⁵ On the other hand, in the past decade, New York courts have resolved a number of cases on summary judgment, deeming the carelessness displayed by the original owner in tracing his property so apparent that laches could be found as a matter of law.²⁹⁶ Although it is important not to overestimate the purport of the latter fact-driven decisions, they have weight and provide some insight into the standards the courts may take into consideration in deciding future cases.

In *Guggenheim*, the museum prevailed without having made any effort to obtain recovery for over twenty years. However, it is very likely that future cases in which there is almost complete inaction on the part of the theft victim over a considerable period of time are bound to end in failure.

295. See, e.g., *Malanga v. Chamberlain*, No. 38886/05, 2008 N.Y. Misc. LEXIS 4711 (Sup. Ct. Aug. 13, 2008); *aff'd.*, 896 N.Y.S.2d 385 (App. Div. 2010). The dispute revolved around a work of art, known as *315 Johns*, which consists of 315 eight inch square silkscreens depicting John Chamberlain's face, a world-renowned sculptor. *Malanga*, 2008 N.Y. Misc. LEXIS at *1-2. In the 1960s, Gerard Malanga was Andy Warhol's right-hand man. *Id.* at *2. Malanga alleged that in 1971, he, along with fellow artists, created the small silk-screens that were later incorporated into *315 Johns*. *Id.* They were all done in Warhol's style, but without his knowledge. *Id.* Sometime in 1977, the portraits were moved to Chamberlain's loft where the latter allegedly agreed to store them without charge. *Id.* Until Malanga reconnected with Chamberlain in 2004, he had not given any further thought to the portraits. *Id.* However, on that occasion, Chamberlain advised Malanga that in 2000 he had sold the portraits for \$5,000,000 by depicting the artwork as a genuine Warhol. *Id.* Thereupon Malanga commenced an action for conversion and replevin. *Id.* The appellate division affirmed the supreme court's denial of the defendant's motion for summary judgment, because "triable issues of fact existed as to whether the plaintiff's delay in making a demand and commencing the action was unreasonable and inexcusable, and whether the delay resulted in prejudice to the defendant." *Malanga*, 896 N.Y.S.2d at 387.

296. E.g. *In re Ash-Peters*, 821 N.Y.S.2d 61, 69 (App. Div. 2006). In *In re Peters*, the appellate division held:

Where the due diligence of the original owner of a work of art raises questions of fact, the issue of whether its lack of diligence operated to the prejudice of the party currently in possession of the artwork is appropriately resolved at trial. However, where the original owner's lack of due diligence and prejudice to the party currently in possession are apparent, the issue may be resolved as a matter of law.

Id. (citations omitted).

Indeed, the courts are increasingly willing to find the owner's efforts unsatisfactory.

For instance, in *Wertheimer v. Cirker's Hayes Storage Warehouse, Inc.*,²⁹⁷ a Holocaust-related title dispute regarding a Pissarro painting,²⁹⁸ the New York Supreme Court dismissed the action on the grounds of laches. With respect to the unreasonableness of the delay, the court emphasized that since the early 1950s, the Wertheimers had literally done nothing to recover the painting. The court especially took issue with the fact that the original owner failed to report the painting missing to the Art Loss Register or contact galleries or museums about the loss.²⁹⁹

Other Holocaust-related lawsuits support the same conclusion, either questioning the fact that the original owner or his immediate heirs did not seek compensation or

297. No. 105575/00, 2001 N.Y. Misc. LEXIS 693 (Sup. Ct. Sept. 28, 2001), *aff'd.*, 752 N.Y.S.2d 295 (App. Div. 2002).

298. When Pierre Wertheimer, the plaintiff's grandfather, fled France in June 1940, he left his art collection behind with Parisian friends. *Id.* at *2. In October 1940, his son Jacques, who had just been decommissioned from the French army, was waiting for an exit visa to join his family in the United States when he met Mr. Ehrlich, who claimed to be his father's longtime friend. *Id.* at *2-3. Jacques advised Ehrlich that he wished to take his father's art collection with him. *Id.* at *3. Thereupon Ehrlich convinced the Wertheimers that he could help them organize a shipment, yet as soon as Ehrlich laid hands on the artwork, he disappeared. *Id.* By 1945, when Pierre was able to return to France, Ehrlich had dispersed most of the artwork, including the Pissarro. *Id.* Pierre filed a complaint against Ehrlich in 1947. *Id.* at *4. As a result of the proceedings against Ehrlich, Pierre was able to recover most of the stolen artworks, but not the Pissarro. *Id.* In the late 1940s and 1950s, the Wertheimers took several further steps to recover the painting. *Id.* at *5. A 1947 publication made reference to the missing work and listed the property as removed from France during World War II. *Id.* In addition, Pierre caused influential people to contact a number of governmental entities in Europe charged with recovering lost art. *Id.* To date, it is unclear what actually happened to the painting after Ehrlich disposed of it. *Id.* at *6. Nevertheless, the Pissarro resurfaced in New York in 1951. *Id.* In 1999, through a long chain of subsequent transactions, the painting finally ended up in the possession of an Arizona art dealer, who shipped it to New York in anticipation of a sale. *Id.* at 7. At the Cirker's Hayes Storage Warehouse, however, the artwork was seen by a dealer who was aware of its connection to the Wertheimer family. *Id.* at *8-9. In March 2000, the dealer notified the family of the painting's whereabouts and Wertheimer filed an action in replevin. *Id.*

299. *Id.* at *18-19. The appellate division affirmed the judgment. *Wertheimer*, 752 N.Y.S.2d at 296.

recovery after World War II, or emphasizing their omission to contact the authorities and list the loss with the appropriate registries. In *In re Ash-Peters*,³⁰⁰ the estate of Maria Ash, the wife of Holocaust victim Curt Glaser, sought to recover *Strasse in Kragero* by Edvard Munch from an individual who purchased the work in good faith at a Sotheby's auction.³⁰¹ However, the court stated that the action was barred by the statute of limitations and the doctrine of laches. With respect to laches, the court emphasized that after World War II, "Maria [Ash] made no mention of the painting in her claim seeking restitution from the German government," and thus was responsible for the purchaser's difficult position by allowing a painting with particularly troublesome provenance to circulate freely.³⁰²

In *In re Flamenbaum*,³⁰³ the recent Nazi-era lawsuit regarding an Assyrian amulet, the Surrogate's Court of New York again found for the defendant on laches grounds.³⁰⁴ In this case the original owner had also taken no steps to trace

300. *In re Ash-Peters*, 821 N.Y.S.2d at 61.

301. *Id.* at 63-64. Professor Glaser, the director of the State Museum in Berlin, was Jewish and therefore forced to resign from his position and flee Germany in 1933. *Id.* at 63. The professor's art collection was auctioned off to finance his flight. *Id.* However, the Munch painting, which the artist himself once gave to Glaser, was left in the care of Glaser's brother, an art dealer, "who apparently sold the work within the following year without first obtaining consent." *Id.* The painting eventually entered the large collection of Albert Otten, a Jewish steel magnate. *Id.* at 64. "In 1937, [Otten], too, was forced to flee Germany but, unlike Glaser, [he] was able to send many of his paintings out of the country." *Id.* Professor Glaser died in 1943. *Id.* At that time "his interest in the painting, if any, passed to his wife, [Maria Ash], and upon her death, to her estate." *Id.* In the case at bar, the controversy arose when the Otten family sold the painting through Sotheby's in June 2002. *Id.* The executrix of the estate sought an order directing the auctioneer "to disclose the identity of the purchaser and the whereabouts of the painting." *Id.* Unlike the trial court, the Appellate Division concluded that the petitioner had "failed to establish a meritorious cause of action so as to warrant disclosure." *Id.* at 63. Of interest were the court's considerations concerning the statute of limitations and laches issue, as it held that "[u]nder any alternative view of the facts, the estate's potential action against the good-faith purchaser was barred" *Id.*

302. *Id.* at 68-69.

303. 899 N.Y.S.2d 546 (Sur. Ct. 2010). For more factual background, see *supra* note 1 and accompanying text.

304. *Id.* at 554.

the artifact for about sixty years.³⁰⁵ The court put much weight on the fact that the loss was never reported to any legal authority in any country, nor was the work listed as missing with any international art registry.³⁰⁶ The court especially felt strongly about the original owner's continued passivity, even after learning that the amulet had allegedly been seen in the market.³⁰⁷

It is interesting to contrast these cases with the decision in *United States v. Fireman's Fund Insurance Co.*, a title dispute regarding a stolen painting by George Benjamin Luks.³⁰⁸ The court refused to find the original owner's claim barred by laches, as in the wake of the theft he had promptly reported the loss to the police, his insurance company, and the gallery where he had purchased the painting.³⁰⁹ The court called his conduct "both appropriate and reasonable by any standard," certainly in view of the fact he was a mere private owner.³¹⁰

*Sotheby's Inc. v. Shene*³¹¹ seems to establish the only clear exception to the current policy of requiring reporting, registration, and continuous and significant efforts over time to locate the missing work. The case revolved around a title dispute between a dealer in ancient books and the German State of Baden-Wurttemberg regarding a sixteenth-century German volume of drawings and etchings, known as the *Augsburger Geschlechterbuch*.³¹² The

305. *Id.*

306. *Id.* at 553-54.

307. *Id.*

308. *U.S. v. Fireman's Fund Ins. Co.*, No. 99 Civ. 2622 (BSJ), 2001 U.S. Dist. LEXIS 804, at *1 (S.D.N.Y. Jan. 30, 2001).

309. *Id.* at *2.

310. *Id.* at *11.

311. No. 04 Civ. 10067 (TPG), 2005 U.S. Dist. LEXIS 37524 (S.D.N.Y. Dec. 23, 2005).

312. *Id.* at *3-5. "From at least 1858 to 1945, the book was stored in . . . the Staatsgalerie Stuttgart, and was therefore stamped on each page with that institution's insignia." *Id.* at *3. "After World War II, the Staatsgalerie discovered that the book was missing from [the] storage facility in Waldenburg, where the museum had stored certain artifacts to protect them during the war." *Id.* The book appeared to have been destroyed during fires that broke out when allied soldiers seized the storage facility. *Id.* "During the events leading to [the interpleader action], however, the parties learned that the book had instead

district court held that, although the original owners did not look for the book, there was no basis for finding laches as it was only in 2004 that Baden-Wurtemberg learned that the *Geschlechterbuch* still existed.³¹³ Until then, it reasonably believed that the book, like so many other artifacts, had been destroyed in the war.³¹⁴ Moreover, Baden-Wurtemberg could demonstrate that it “diligently pursued claims for other objects that it believed had been stolen, rather than destroyed.”³¹⁵ “Once the Staatsgalerie and Baden-Wurtemberg finally learned of the book’s existence in 2004, as a result of contacts from Sotheby’s, they moved swiftly and diligently” to reclaim it.³¹⁶

In *Greek Orthodox Patriarchate of Jerusalem v. Christie’s, Inc.*,³¹⁷ on the other hand, the original owner was found at fault for decades of inactivity, during which the patriarchate forbore from reporting the theft to the authorities, spreading the news in the art world, or listing the work missing with the appropriate registries.³¹⁸ The dispute concerned a palimpsest, a tenth-century manuscript containing a copy of certain writings of Archimedes.³¹⁹ The palimpsest was once part of the library of the Greek Orthodox Patriarchate of Jerusalem, but had disappeared from the collection at least 70 years before.³²⁰ The

likely been stolen by John Doty, a U.S. Army Captain who was stationed in Waldenburg.” *Id.* In June 2001, Rob Shene, a dealer in ancient books, purchased the *Geschlechterbuch* for about \$3,800 from Margulis, a book dealer who had bought it from the Doty family. *Id.* at *3-4. In March 2004, Shene consigned the book to Sotheby’s. *Id.* at 4. However, prior to the auction, Sotheby’s contacted the Staatsgalerie “to obtain information about the book’s provenance.” *Id.* Shortly thereafter, the German consulate notified Sotheby’s that Baden-Wurtemberg, which had acquired legal ownership of the *Staatsgalerie*’s collections some time after WWII, was entitled to the book and demanded its return. *Id.* Thereupon, Sotheby’s brought the interpleader action. *Id.* at 5.

313. *Id.* at *12.

314. *Id.*

315. *Id.*

316. *Id.*

317. No. 98 Civ. 7664 (KMW), 1999 U.S. Dist. LEXIS 13257 (S.D.N.Y. Aug. 18, 1999).

318. *Id.* at *33.

319. *Id.* at *1.

320. *Id.* at *2. In the nineteenth century the palimpsest was incorporated into the library of the Patriarchate in Jerusalem and subsequently transferred to a

Patriarchate rediscovered the book at Christie's New York in 1998 and demanded its return, but to no avail.³²¹ Although the district court ultimately ruled that the defendant had acquired title to the manuscript under French law,³²² it still addressed the laches defense. The court found that, based upon the record, the Patriarchate had not been diligent at all.³²³ The case was especially interesting because the district court rebutted the Patriarchate's argument that as an order of monks, it could not be expected to spend its days searching for a painting.³²⁴ However, with *DeWeerth* in mind, the court severely observed that "if the Patriarchate was able to retain counsel with impressive speed to bring an action the night before the Christie's auction, it could have retained counsel to search for the Palimpsest, or at least make some inquiries, at some point during the previous seventy years."³²⁵

In *Sanchez v. Trustees of the University of Pennsylvania*,³²⁶ the district court displayed similar severity towards the rather poor and uneducated heirs of Pablo Sanchez when it dismissed, as barred by laches, their action

monastery in Constantinople. *Id.* at *3-4. Although the Patriarchate maintains that the palimpsest must have been stolen from the monastery, it is unclear what actually happened to the manuscript before Mr. Sirieix, a French businessman, acquired the palimpsest sometime in the 1920s. *Id.* at *6. However, by lack of any document evidencing transfer of title of the palimpsest, the circumstances surrounding his purchase are also unclear. *Id.* Since 1947, Sirieix's daughter, Anne Guersan, looked after the manuscript. *Id.* In the 1960s, when the Guersans became concerned about the manuscript's condition, they showed it to several scholars and had it professionally restored. *Id.* at *6-7. In the early 1970s, the Guersans first considered selling the palimpsest. *Id.* at *7. Following international distribution of a brochure, the family received numerous inquiries from American universities. *Id.* at *7-8. Eventually, they consigned the palimpsest to Christie's. *Id.* at *8. After additional research, it was brought to New York for sale in October 1998. *Id.* at 9. One week before the auction, the Patriarchate notified Christie's that it believed it was the rightful owner of the manuscript and filed an action seeking its return. *Id.*

321. *Id.* at *9.

322. *See id.* at *18-23.

323. *Id.* at *30.

324. *Id.* at *31-32.

325. *Id.* at *31.

326. No. 04 Civ. 1253 (JSR), 2004 U.S. Dist. LEXIS 1355 (S.D.N.Y. July 19, 2004), *later proceeding*, 2005 U.S. Dist. LEXIS 636 (S.D.N.Y. Jan. 13, 2005).

for recovery of a valuable collection of pre-Columbian artifacts.³²⁷ The artifacts had been stolen from the plaintiffs' grandfather over eighty years ago and ultimately transferred to the University of Pennsylvania in 1920.³²⁸ In 2003, Sanchez's grandson Luis was finally able to locate the artifacts and demanded their return, which the university refused.³²⁹ Although the plaintiffs' education and income level were poor, they were admonished by the court:

But how much money or education does it take to write letters, do a little research in the relevant literature, ask a librarian at the New York Public Library (whose main branch is close to Luis' apartment) to help do such research, or, in more recent years, do an internet search? The desultory efforts Sanchez engaged in between 1970 and the present are not remotely enough to satisfy the requirements of a diligent search.³³⁰

Indeed, over the years, the family's efforts to trace the collection had been limited.³³¹ They did not write to any galleries or museums, nor did they ask for help from experts on archaeology or pre-Columbian art.³³² Pablo Sanchez's grandson only started actively looking for the artifacts in 1985, when he visited the Metropolitan Museum of Art and several New York art galleries.³³³ However, when he finally hired an attorney, the latter was able to locate the collection at the University of Pennsylvania within a few months.³³⁴ Therefore, the court held that, "no reasonable fact-finder could find that [Sanchez's] efforts were diligent."³³⁵

It is obvious from the foregoing that in assessing the plaintiff's diligence, the court also takes into consideration how difficult or unlikely it was for him to actually retrieve his property. In *In re Ash-Peters*, the court observed that, like the Glaser heirs, the Otten family who had acquired the

327. *Sanchez*, 2004 U.S. Dist. LEXIS 1355, at *4.

328. *Id.* at *2.

329. *Id.*

330. *Sanchez*, 2005 U.S. Dist. LEXIS 636, at *9-10.

331. *See id.* at *4.

332. *Id.* at *5.

333. *Id.*

334. *Id.* at *5-6.

335. *Id.* at *8.

Munch painting lived in Manhattan. The painting had been exhibited as part of the Otten collection at prominent museums, galleries, and universities during the second half of the twentieth century, so that it was possible for the Glaser heirs to have rediscovered the painting earlier.³³⁶

It is clear that in this respect, the potential of today's level of information technology is a two-edged sword. The breakthrough of the internet around the millennium was a reason for optimism for victims of art theft and looting, as online databases and world-scale theft registries significantly boosted chances of recovery. However, technology can also turn against them, not in the context of discovering the whereabouts of stolen artwork, but because of the subsequent legal embroilments that can ensue. In practice, courts take into consideration the fact that information that allows for faster discovery is somehow within an original owner's reach. In addition, well-intentioned mechanisms that were developed to assist in recovery of stolen works quickly became easy criteria for dismissing the original owner's action. As the facilities available to victims of art theft increased, so did the standards of due diligence. This bittersweet irony seems especially true with respect to Nazi-era lootings, where there have been numerous initiatives to seek recovery, both in the immediate years after World War II and more recently in the wake of the late 1990s revival. Courts that look for "equitable" reasons to dismiss an original owner's action in replevin on laches grounds can easily find a "crucial" means of redress the owner did not undertake. It is especially worrying that the heirs of Holocaust victims would be judged on the fact that their ancestors did not avail themselves of postwar restitution programs. Many did not survive and their heirs were not always aware of the possessions of their relatives. Those surviving the concentration or extermination camps most likely had other priorities in the months following their return.

Finally, time is perhaps the defendant's best ally. Where in the 1990s, in view of the very recent declassification of war- and Holocaust-related files,³³⁷

336. *In re Ash-Peters*, 821 N.Y.S.2d 61, 68-69 (App. Div. 2006).

337. LUBINA, *supra* note 219, at 161; Pollock, *supra* note 220, at 198; Turner, *supra* note 220, at 1519-20; Collins, *supra* note 19, at 119; Cuba, *supra* note 21, at 448-49; Minkovich, *supra* note 29, at 353.

defendants may have had difficulty claiming that the original owner unreasonably delayed commencing suit, each passing day now makes the burden of proof more difficult for the original owner.

2. *Prejudice.* With regard to the prejudice requirement, the passage of time is even more advantageous to the defendant. In the mid-1990s, the population of Holocaust survivors who were adults and were established enough to own artwork in the 1930s and 1940s began to shrink drastically; by 2010, all of them, barring a few rare exceptions, had died. Even the current numbers of the younger generation, namely the wartime children, are diminishing. The same trend holds true for those who (inadvertently) bought looted art in the late 1930s, 1940s and early 1950s.³³⁸ These observations are extremely important, as they will have a decisive effect on most Nazi-era lawsuits. After all, for laches purposes, loss of evidence is perhaps the most obvious harm flowing from the plaintiff's unreasonable delay.

It is noteworthy that in *Wertheimer*, the court held that the delay caused the defendant prejudice in asserting his possessory rights, because none of the parties to the original bailment were alive.³³⁹ The court found it virtually impossible for the current possessor to prove that any of its predecessors in interest had acquired good title.³⁴⁰ Accordingly, the action was found barred by laches, and the ruling was affirmed by the appellate division.³⁴¹ In *In re Ash-Peters*, the court similarly held that the plaintiff's action was barred by laches. The court emphasized that:

338. See Hector Feliciano et al., *Nazi Stolen Art*, 20 WHITTIER L. REV. 67, 73 (1998); Pell, *supra* note 221, at 46; Pollock, *supra* note 220, at 198; Spiegler, *supra* note 221, at 299; Turner, *supra* note 220, at 1520; Collins, *supra* note 19, at 120; Minkovich, *supra* note 29, at 354.

339. *Wertheimer v. Cirker's Hayes Storage Warehouse, Inc.*, No. 105575/00, 2001 N.Y. Misc. LEXIS 693, at *18-19 (N.Y. Sup. Ct. 2001), *aff'd* 752 N.Y.S.2d 295, 296 (App. Div. 2002).

340. *Wertheimer*, 2001 N.Y. Misc. LEXIS 693, at *18-19.

341. 752 N.Y.S.2d at 296 (“[W]hether this was the case, can no longer be determined with any degree of certainty, the documentary record being very scant and all persons with direct knowledge of the relevant matters apparently having died long ago.”) (alteration in original).

The delay by the Glaser family and the estate in asserting any claim of ownership during the approximately 70-year odyssey of *Strasse in Kragero* has prejudiced the good-faith purchaser since none of the parties to the original sale of the painting—Professor Glaser, Albert Otten and Paul Glaser—are alive.³⁴²

Further, in *In re Flamenbaum*, the court made note of the second prong of the test for laches: “A defense of laches ‘is deficient if it fails to include allegations showing not only a delay, but also injury, change of position, intervention of equities, loss of evidence, or other disadvantage resulting from such delay.’”³⁴³ The court deemed that the death of the key witnesses was a vital factor with regard to the prejudice requirement:

As a result of the museum’s inexplicable failure to report the tablet as stolen, or take any other steps toward recovery, diligent good-faith purchasers over the course of more than sixty years were not given notice of a blemish in the title. That, coupled with the fact that Riven Flamenbaum’s death has forever foreclosed his ability to testify as to when and where he obtained the tablet, has severely prejudiced the estate’s ability to defend the museum’s related claim to the tablet. These are precisely the circumstances in which the doctrine of laches must be applied.³⁴⁴

The powerful impact of the death of direct witnesses on the success of a laches defense is even more obvious in cases where the theft occurred prior to the Nazi-looting. In *Greek Orthodox Patriarchate of Jerusalem v. Christie’s, Inc.*,³⁴⁵ the court held that the seventy-year delay in coming forward to claim ownership rendered it unfeasible for the Guersans to prove ownership.³⁴⁶ “[T]he critical witness (Mr. Sirieix) [was] deceased, memories [had] faded, and key documents, assuming they existed at all, [were] missing.”³⁴⁷ Accordingly, the passage of time rendered trial “virtually impossible,” as the court “would be confronted with the Patriarchate’s claim

342. *In re Ash-Peters*, 821 N.Y.S.2d 61, 69 (App. Div. 2006).

343. *In re Flamenbaum* 899 N.Y.S.2d 546, 554 (Sur. Ct. 2010) (quoting *Glenesk v Guidance Realty Corp.*, 321 N.Y.S.2d 685, 688 (App. Div. 1971)).

344. *Id.*

345. No. 98 Civ. 7664 (KMW), 1999 U.S. Dist. LEXIS 13257 (S.D.N.Y. Aug. 18, 1999).

346. *Id.* at *1.

347. *Id.* at *33.

that it clearly possessed the Palimpsest at the beginning of this century against defendants' claim that they clearly possess it at the end, with little or no evidence of what happened in between."³⁴⁸ In *Sanchez*, the theft had occurred even earlier.³⁴⁹ It was therefore not surprising that the district court found that allowing the lawsuit to proceed more than eighty years after the theft would cause real and substantial prejudice to the defendants. "The long delay ha[d] resulted in deceased witness[es], faded memories, lost documents, [and] hearsay testimony of questionable value."³⁵⁰ The court emphasized that, given all individuals originally involved were long deceased, it was extremely difficult for the defendants to substantiate: (1) that the collection was not stolen or, (2) that they had made vigilant efforts to ensure the purchase transaction was legal and appropriate.³⁵¹

Recent case law also highlights the pivotal role that evidence from direct witnesses, or the loss of such evidence, plays in the court's assessment of the laches prejudice requirement. *Bakalar v. Vavra*,³⁵² another recent Holocaust-related title dispute regarding the ownership of a Schiele drawing, entitled *Seated Woman with Bent Left Leg*,³⁵³

348. *Id.* at *33-34.

349. *Sanchez v. Trustees of the Univ. of Pa.*, No. 04 Civ. 1253 (JSR), 2005 U.S. Dist. LEXIS 636, at *10 (S.D.N.Y. Jan. 13, 2005).

350. *Id.* (quoting *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 621 (App. Div. 1990)) (alteration in original).

351. *Id.*

352. *Bakalar v. Vavra*, 237 F.R.D. 59 (S.D.N.Y. 2006), *later proceeding*, 550 F. Supp. 2d 548 (S.D.N.Y. 2008).

353. *Id.* at 61. At the outbreak of World War II, the drawing belonged to Fritz Grunbaum, a well-known Viennese cabaret performer. *Id.* The Grunbaum family was Jewish, and persecuted during the war. *Id.* Fritz died in Dachau in 1941, his wife Elisabeth in Maly Trostinec in 1942. *Id.* at 61-62. What happened to their extensive art collection between the German occupation of Austria in 1938 and 1952 is a mystery. *Id.* at 62. Between 1952 and 1956 the Galerie Gutekunst in Bern, Switzerland, run by Eberhart Kornfeld, acquired numerous works by Schiele from Mathilde Lukacs, who did not disclose that she was Elisabeth Grunbaum's sister. *Id.* In September 1956, the Galerie Gutekunst sold the drawing and nineteen other Schiele works to a New York gallery. *Bakalar v. Vavra*, 2008 U.S. Dist. LEXIS 6689, at *3. There, David Bakalar, a Massachusetts businessman, purchased the work for \$3,300 on November 12, 1963. *Bakalar*, 2006 U.S. Dist. LEXIS 55438, at *3-4. In 2004, Bakalar consigned the drawing to Sotheby's, which auctioned it off in London for

clearly illustrates the crucial role of this type of evidentiary deficiency. This case involved a delay of over sixty-eight years, during which witnesses had passed away, memories had faded, and documents had disappeared.³⁵⁴ However, the court refused to find laches as a matter of law, because a central witness was still alive, namely the wartime art dealer Kornfeld who had reintroduced the drawing in the market in the 1950s.³⁵⁵

The foregoing analysis of case law discussed how in most of these Nazi-era title disputes, all of the wartime witnesses had already died. Within a decade, the few remaining Holocaust survivors will most likely pass away. While New York's laches approach may have favored the victims of Nazi-looting who brought their claims in the 1990s, the equitable doctrine that initially seemed so owner-friendly is currently approaching its expiration date. Owners' benefits will likely terminate within the next few years, and the laches defense will grow to become an impervious shield for current possessors.

CONCLUSION

This Article analyzed recent developments in Holocaust-related art litigation in the New York forum. Restitution lawsuits stemming from Nazi-era art spoliation are not only compelling from a historical point of view; they also raise interesting legal issues. Most notably, these disputes have distinguishing features that advance and expound the law concerning the timeliness of actions in replevin and conversion, as they originate from decades-old looting of art objects, which, unlike average consumer goods, are enduring.

In common law jurisdictions, the concepts of statutory limitation and laches play a central role in the assessment

approximately \$726,000. *Bakalar v. Vavra*, 2010 U.S. App. LEXIS 18343, at *6-7 (2d Cir. Sept 2, 2010). However, the sale was never consummated, because Milos Vavra and Leon Fischer, whom an Austrian court in 2002 had declared to be the legal heirs of Grunbaum's estate, asserted a claim to the drawing. *Id.* On March 21, 2005, Bakalar filed an action seeking a declaratory judgment that he was the drawing's rightful owner and the heirs counterclaimed. *Bakalar v. Vavra*, 237 F.R.D. at 61.

354. *Bakalar*, 2006 U.S. Dist. LEXIS 55438, at *11.

355. *Id.* at *11-12.

of the timeliness of the plaintiff's claim. Although both of these time-related defenses endorse the same policy against inertia in legal proceedings, they clearly differ. Statutory limitation is a legislatively-created, theoretically objective mechanism, since the passage of time is its sole determining factor. Laches, on the other hand, is an equitable defense that takes into account subjective factors to assess both the reasonableness of the plaintiff's delay and the prejudice it caused to the defendant.

In spite of common law's solidly established *nemo dat* rule, the passage of time actually affects the allocation of rights and burdens between original owners and possessors of stolen chattels. In that connection it is noteworthy that, in order to assess the timeliness of an original owner's restitution claim, the New York courts reserve a role for both time-related defenses. According to *Guggenheim v. Lubell*, New York law requires the courts first to apply a "demand and refusal" rule in order to determine the time of accrual for limitation purposes, after which the original owner's diligence in tracing his property is to be given consideration under the doctrine of laches.

In developing this two-step approach, New York courts clearly took into account the interests of the original owner. Indeed, the "demand and refusal" rule allows aggrieved owners to effectively postpone the time of accrual of the cause of action so that they can bring their action irrespective of the passage of time of the statute of limitations' designated time bar, provided that they have satisfied the demand requirement. In addition, the *Guggenheim* court refused to impose a due diligence requirement on the original owner, but rather placed the burden of proof on the purchaser by requiring him to show under a laches theory that he had suffered prejudice due to the original owner's unreasonably minimal effort in tracing his stolen property.

Based on a comprehensive survey of all publicly available case law on the recovery of stolen art in the New York forum, this Article called attention to the courts' increasing receptiveness to the limitation and laches defenses in stolen art litigation in general, and Holocaust-related title disputes in particular. Although they continued to apply *Guggenheim's* two-step approach of "demand and refusal" and laches, the New York courts have increasingly favored the current possessor over the past fifteen years,

contrary to the *Guggenheim* court's preference to safeguard the rights of the original owner.

With regard to the limitation defense, this Article questioned the New York courts' rather discretionary advance of the moment of accrual in the *Grosz* case, by inferring an implicit refusal from the parties' actions or inactions, especially in Nazi-era art disputes where the actual time of accrual is debatable. Moreover, the parties' successful yet absurd exploitation of anomalies inherent in the "demand and refusal" rule to accelerate accrual by arguing bad faith is particularly objectionable, because it is contrary to logic and good policy.

With regard to the laches defense, recent case law clearly shows that whereas laches' twofold requirement proved practically insurmountable for defendants in pre-1995 cases, the courts have displayed increasing willingness in finding that the passage of time was unreasonable and resulted in prejudice.

As all claims eventually grow stale, it is evident that there will always come a point where the passage of time is more likely than not to be found excessive, so that the court will deny the plaintiff's action in replevin. This is obviously not different for the field of Nazi-era art litigation. This Article's purpose was to call attention to a number of recent developments regarding the limitation and laches defenses that seem to have caused that shift. Indeed, taking into consideration these recent developments, it is justified to say that, henceforth, (heirs of) Holocaust survivors will most likely no longer prevail in any attempt to obtain recovery of their stolen heirlooms. Considering that all Holocaust-related art claims are bound to grow stale one day, it seems that for the majority of the New York cases that time has come.