DISMISSING PROVENANCE: THE USE OF PROCEDURAL DEFENSES TO BAR CLAIMS IN NAZI-LOOTED ART AND SECURITIZED MORTGAGE LITIGATION

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I. INTRODUCTION

To buy, or not to buy. The seasoned collector earmarks pages in the gallery's upcoming sale catalogue while the naïve first-time homebuyer favorites listings on their Realtor.com® app. Seemingly worlds apart, these two buyers face an important legal challenge: the possibility that the property they buy, the coveted Old-Master canvas or somewhat neglected Arts and Crafts bungalow, has disputed provenance and a troubling kink in the chain of title.

Art and real estate constitute significant personal and cultural assets that are often deeply important to their individual owners and society at large. Nonetheless, art with questionable provenance and real estate with uncertain transfers of title present strikingly analogous challenges for current owners and title holders—whether museums and individuals with this art in their

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collections, or financial institutions and good-faith purchasers acquiring the title to real estate at foreclosure sales.

The provenance of fine art ushers a unique set of legal concerns when that art was once among the 650,000 works looted by the Nazis during the Second World War.[1] With multiple transfers between individual owners and interested financial institutions since the turn of the twenty-first century, the seven million properties foreclosed in the wake of the subprime mortgage collapse have similarly unsettled provenance.[2] Just as art represents a comparatively minor casualty of the Holocaust, the legal ramifications of the Great Recession may have initially appeared rather inconsequential to American real property regimes, which have been well established and fairly unwavering since the dawn of the American Republic.[3] To the contrary, art- and real estate-related litigation jointly display title disputes in response to these respective eras that stand to have drastic and lasting effects on two of America's most significant property markets.[4]

Outside equitable arguments for the restitution of art and the reversal of potentially improper real estate foreclosures, technical defenses represent the legal fulcrum of title dispute litigation for art and real estate alike. Museums, collectors, and other purchasers or recipients of Nazi-looted art may bar their adversaries' ownership claims by asserting that the statute of limitations has run or that those claims were unreasonably delayed under the doctrine of laches. Financial institutions and other foreclosure sale purchasers may similarly bar the ownership claims of their adversaries regardless of merit by asserting that those claimants lack standing to challenge the foreclosure of a securitized mortgage.

As a point of clarification, this Article neither seeks to nor equates the actions committed by the Nazis during the Second World War with the lending practices of twenty-first century America. This Article draws a parallel between the potential legal challenges and litigation facing American lending institutions, title insurance companies, and real property owners in the coming years with the decades of similar litigation amongst either museums or private collectors and the heirs to Nazi-looted art. This Article proceeds in three parts. Part I examines the historical context of the legal issues discussed herein by exploring the broad federal responses to both the Second World War and the Great Recession. Part II examines the title disputes over Nazi-looted art and securitized mortgage

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[1] Alex Shoumatoff, *The Devil and the Art Dealer*, VANITY FAIR NEWS (April 2014), http://www.vanityfair.com/news/2014/04/degenerate-art-cornelius-gurlitt-munich-apartment (last visited Apr. 5, 2015).

[2] *National Foreclosure Report*, CORELOGIC (2015), http://www.corelogic.com/about-us/researchtrends/national-foreclosure-report.aspx# (last visited Apr. 5, 2015).

[3] *See* Dale A. Whitman & Drew Milner, *What We Have Learned From the Mortgage Crisis About Transferring Mortgage Loans*, 49 REAL PROP. TR. & EST. L.J. 1, 3 (2014).

[4] *See infra* Parts II & III.

foreclosures resulting from these decisive periods. Part III builds on these discussions to present the similar availability of technical defenses that swiftly bar claims of alleged ownership in both art and real estate title litigation.

II. FEDERAL RESPONSES

In understanding the present legal implications of Nazi-looted art and securitized mortgage foreclosures, it is worth revisiting the history of these pivotal eras. The depth with which the United States felt the impact of the Second World War and the Great Recession nearly eighty years later, as well as the Federal government's response to these key moments in history, compels this reexamination. The United States government reacted to both the Nazi's mass displacement of art and the nation's post-2007 foreclosure crisis through separate, but notable legislative and policy initiatives on national and international platforms.

A. The Second World War

The United States and other Western nations responded to the Nazi's unprecedented appropriation of art with multiple agreements and institutional initiatives. Although the Federal government publicly recognized that "[t]he Nazis' policy of looting art was a critical element and incentive in their campaign of genocide,"[5] many scholars firmly criticize the United States for an inadequate response. As prominent art law attorney Howard Spiegler identifies: "the Federal government has been on all sides of the Nazi-looted art cases."[6]

The Nazi's systematic destruction of European art collections is well-charted territory in historical and legal scholarship. Forming a central policy enterprise of the Nazi regime, the "art confiscation program is considered the greatest displacement of art in human history."[7] The Nazis succeeded in stealing and relocating between one-fourth to one-third of the art in continental Europe.[8] "This wholesale plunder" served a two-fold purpose: rid Hitler's ideal nation of degenerate works—primarily modern pieces by artists like Picasso and Klimt—and secure the works of Old Masters and other praiseworthy art for the

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[5] Holocaust Victims Redress Act of 1998, Pub. L. No. 105-158, 112 Stat. 15 (1998).
[6] Howard N. Spiegler, *Introduction and Overview of Nazi Looted Cases*, 17 CAN. CRIM. L. REV. 3, 10 (2012). *See* Katherine N. Skinner, *Restituting Nazi-Looted Art: Domestic, Legislative, and Binding Intervention to Balance the Interests of Victims and Museums*, 15 VAND. J. ENT. & TECH. L. 673, 680 (2013). ("U.S. federal action to resolve Nazi-art restitution has been aspirational rather than practical....").
[7] Spiegler, *supra* note 6, at 6.
[8] David Wissbroecker, *Six Klimts, a Picasso, & a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DEPAUL-LCA J. ART & ENT. L. 39, 40 (2004).

unparalleled Führer museum in Linz, Austria; a pinnacle of the unrealized Nazi state that never came to fruition.[9]

At the end of the war, the Allies and Western nations encountered a tremendous challenge: locate, catalogue, and repatriate vast quantities of stolen, displaced works of art. Countless meetings of the Allies failed to achieve a unified policy for handling this art.[10] The United States tasked its Officers of the Monuments, Fine Arts and Archive Services unit, originally established during the war, with locating Nazi art repositories, fortifying them, and returning the works to their "rightful" owners.[11] In an attempt to avoid complicated individual claims, the American and British restitution policy sought to return art to the government of the countries from which it was looted, not private owners.[12] Other governments also established post-war restitution commissions to handle claims,[13] and when the Allies' art collection points closed in 1951, the coalition had successfully processed millions of works.[14]

While the Allies focused the restitution on returning art to governments, international law evolved along a contrary path and created a system of rights for individual claimants in the post-War era. The 1907 Hague Convention—in place long before the War—prohibited the systematic raiding orchestrated by the Nazis, but provided no prohibition on seizure against the individual.[15] After the Second World War, the Nuremberg Tribunal Charter created a platform through which international law began acknowledging individual rights.[16] The Charter included multiple Nazi art policies amongst prohibited war crimes.[17] During the Nuremberg Trials, former Nazi leaders were prosecuted for organized pillaging and thefts, including art.[18] Multiple rulings found that "the looting and

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[9] *See* Spiegler, *supra* note 6, at 6; Emily A. Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. REV. 473, 476 (2010).

[10] Lynn H. Nicholas, *Plenary Session on Nazi-Confiscated Art Issues*, NAZI-CONFISCATED ART ISSUES (Univ. S. Florida) at 449, http://fcit.usf.edu/holocaust/resource/assets/heac4.pdf (last visited Apr. 21, 2015).

[11] 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, 37 (1999).

[12] Nicholas, *supra* note 10, at 449-50; Spiegler, *supra* note 6, at 6-7.

[13] Nicholas, *supra* note 10, at 449-50.

[14] Pell, *supra* note 11, at 37.

[15] Pell, *supra* note 11, at 38-39 (citing Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 631, C.T.I.A. Num. 8425.000, 1910 WL 4483 at *15 (Articles 46 & 47 prohibiting seizure by a state of private property during war).

[16] Pell, *supra* note 11, at 39.

[17] *Id.*

[18] *Id.* (citing Judgment of the International Military Tribunal (Sept. 30, 1946)) *in* 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411-14, 481-86 (1948) ("Article 6 of the Nuremberg Charter lists among the 'war crimes' the "plunder of public or private property" or 'devastation not justified by military necessity.'").

destruction of art and other cultural property constituted 'systematic plunder of public or private property,' in violation of Nuremberg Charter Article 6(b) and that these actions constituted 'war crimes' under international law."[19] Decades later, international efforts followed the Trials with increased sanctions for the export of stolen art under the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership in Cultural Property.[20]

Despite the Allies' apparent dedication to repatriation and the recognition of these crimes under international law, Nazi-related restitution efforts remained slow until the mid-to-late 1990s.[21] This late twentieth-century resurgence in public interest for Nazi-appropriated art spurred increased attention from the United States government. Scholars consistently credit the newfound focus on the filing of the first modern Nazi-looted art litigation,[22] as well as the convergence of increasing attention from academicians and journalists, the emergence of previously classified materials in post-Soviet Russia, and most significantly, the revolutionary effects of the Internet.[23]

Internet databases created in the last twenty years now catalogue Nazi-looted art and seek to facilitate continued repatriation; functioning much like online versions of the European repositories in which the Allies stored and sorted recovered works in the years after the War. The Art Loss Register, a prominent example of these online repositories, operates "the world's largest private database of lost and stolen art, antiques and collectables."[24] Many American museums have contributed to the effort, even openly recognizing "that many works of art . . . ha[ve] not been returned to their rightful owners or their heirs."[25] As art law attorney Raymond Dowd identifies, "museums have set up Provenance Research Projects on their websites, detailing the importance of checking provenance of artwork that changed hands from the 1933-1945 time period."[26]

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[19] Pell, *supra* note 11.
[20] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (1972).
[21] Graefe, *supra* note 9, at 476.
[22] *In re* Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, 719 N.E.2d 897 (N.Y. 1999).
[23] *See* Spiegler, *supra* note 6, at 7-8; Graefe, *supra* note 9, at 476.
[24] Art Loss Register, *About Us*, INT'L ART & ANTIQUE LOSS REGISTER LTD. (2015), http://www.artloss.com/about-us (last visited Apr. 8, 2015).
[25] Graham W.J. Beal, *Establishing Continuous Ownership Records*, DETROIT INST. ARTS, http://www.dia.org/art/provenance.aspx (last visited Apr. 8, 2015).
[26] Raymond J. Dowd, *Nazi Looted Art and Cocaine: When Museum Directors Take It, Call the Cops*, 14 RUTGERS J. L. & RELIGION 529, 534 (2013) (citing *Provenance Research Project*, ART INST. CHICAGO, http://www.artic.edu/aic/collections/provenance (last visited Apr. 8, 2015); *The Provenance Research Project*, MOMA, http://www.moma.org/collection/provenance/ (last visited Apr. 8, 2015); *Provenance Research*, PHILADELPHIA MUSEUM OF ART, http://

The Federal government offered its own tripartite response to this post-1990 increase in art-repatriation interest. First, the government enacted the Holocaust Victims Redress Act in 1998.[27] Following the directive of the 1907 Hague Convention, the Act required that "all governments should undertake good-faith efforts to facilitate the return of Nazi-confiscated property."[28] Second, Congress enacted the U.S. Holocaust Assets Commission Act of 1998, which established the Presidential Commission on Holocaust Assets.[29] The Commission analyzed persisting issues surrounding restitution and published a final report that stressed "an organized Federal role in implementing these initiatives must be maintained, although it is equally of the belief that the Federal government should not, and cannot, accomplish these goals by itself."[30] To date, the government has yet to implement any of these suggestions or formulate specific legislation guiding the restitution of this art.[31]

Finally, the government signed three executive agreements that ostensibly advocated for the resolution of Nazi-looted art claims. The government first convened at a 1998 conference in Washington, D.C. to study the persisting issues related to these assets.[32] The resulting Washington Conference Principles on Nazi-Confiscated Art, adopted in forty-four nations, promulgated eleven non-binding guidelines for achieving just resolutions in disputed art cases.[33] Second, the Vilnius Forum Declaration followed the Washington Conference Principles in 2000 and "ask[ed] all governments to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust era to the original owners or their heirs."[34] The third agreement, the Terezín Declaration, resulted from a 2009 conference that "[r]ecall[ed] the Washington Conference

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www.philamuseum.org/research/98-108.html (last visited Apr. 8, 2015); *Provenance Research*, CLEVELAND MUSEUM OF ART, http:// www.clevelandart.org/research/in-curatorial/provenance-research (last visited Apr. 8, 2015).

[27] Holocaust Victims Redress Act of 1998, Pub. L. No. 105-158 112 Stat. 15 (1998). *See* Skinner, *supra* note 6, at 680.

[28] Holocaust Victims Redress Act § 202.

[29] Transmittal letter from Edgar M. Bronfman, Chair, Presidential Advisory Comm'n on Holocaust Assets in the United States, to the President of the United States (Dec. 15, 2000), *available at* http://pcha.ushmm.org/plunderrestitution.html/htlm/transmittalletter.html (last visited Apr. 21, 2015).

[30] *Id.*

[31] Skinner, *supra* note 6, at 680-81.

[32] Spiegler, *supra* note 6, at 8.

[33] Skinner, *supra* note 6, at 681; Spiegler, *supra* note 6, at 8.

[34] Vilnius Forum Declaration, LOOTEDART.COM: THE CENTRAL REGISTRY OF INFORMATION ON LOOTED CULTURAL PROPERTY 1933-1945 (Oct. 5, 2000), http://www.lootedartcommission.com/vilnius-forum (last visited Apr. 7, 2015). *See* Skinner, *supra* note 6, at 681.

Principles" and "urge[d] all stakeholders to . . . facilitate just and fair solutions."[35] While these responses and agreements call for proactive initiatives, the recent resolutions are not binding and art conflicts in the United States still fall upon the courts.

B. The Great Recession

More than nine years after the subprime mortgage market began showing signs of impending catastrophe, the United States continues grappling with the effects of the foreclosure crisis.[36] The statistics speak for themselves. Since the peak of homeownership, America has lost seven million homes to foreclosure.[37] Around 4.4 million of those foreclosures occurred between September 2008 and April 2013.[38] At the onset of the crash, a proliferation of scholarship began to espouse the subject, reporting drastic increases in borrower delinquency nationwide.[39] When the crisis emerged in late 2007, roughly 2.23% of American homeowners were seriously delinquent on their mortgages.[40] Fast forward to the height of the so-called "meltdown" and 9.67%—almost 4.3 million mortgages—were delinquent.[41]

As with the Nazi-looted art phenomenon, responsive legislation and policy initiatives similarly developed in reaction to the crash of America's real estate and lending markets. The Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law on July 21, 2010, represents one of the Federal government's seminal responses to the Great Recession.[42] Recognizing the critical role that mortgage foreclosures played in the country's economic plight, the government promulgated specific reforms for the mortgage industry through the Mortgage Reform and Anti-Predatory Lending Act.[43]

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[35] Terezín Declaration on Holocaust Era Assets and Related Issues (June 30, 2009), *available at* http://www.holocausteraassets.eu/en/news-archive/detail/terezin-declaration/

[36] *See* National Foreclosure Report (2015) *supra* note 2.

[37] *Id.*

[38] National Foreclosure Report, CORELOGIC (April 2013), http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-april-2013.pdf (last visited Apr. 9, 2015).

[39] *See, e.g.*, Elizabeth Renuart, *Toward a More Equitable Balance: Homeowner and Purchaser Tensions in Non-Judicial Foreclosure States*, 24 LOY. CONSUMER L. REV. 562 (2012).

[40] *Id.* at 562 (citing Mortgage Bankers Association, National Delinquency Survey, Q1 2007 at 4, Q4 2009 at 4).

[41] *Id.*

[42] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[43] *Id.*

Simultaneously with Congress' legislative efforts in 2010, the Federal Reserve published its first report analyzing the impact of the foreclosure crisis.[44] The report resulted from the twelve Federal Reserve presidents' creation of the Mortgage Outreach and Research Efforts (MORE) program established in early 2009.[45] The MORE initiative followed the Banks' establishment of online Foreclosure Resource Centers the prior year.[46] As the report explains, the "goal [wa]s simple: Leverage the Fed's substantial knowledge of and expertise in mortgage markets in ways that are useful to policymakers, community organizations, financial institutions and the public."[47]

As a supplement to the MORE initiative, a joint effort of banking regulators—the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Board of Governors of the Federal Reserve System—also established the Independent Foreclosure Review.[48] The Review focused principally on "determin[ing] whether eligible homeowners suffered financial injury because of errors or other problems during their home foreclosure process between January 1, 2009 and December 31, 2010."[49]

Legislative and analytical initiatives made way to litigation. In recent years, the Federal government reached three prominent settlements with financial institutions and other entities relating to lending practices.[50] As "the largest consumer financial protection settlement in U.S. history," the National Mortgage Settlement exceeded fifty billion dollars.[51]

The Second World War and the Great Recession were vastly different eras in history, yet each left lasting impacts in its wake. As periods of undisputed

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[44] Federal Reserve Mortgage Outreach and Research Efforts, *Addressing the Impact of the Foreclosure Crisis*, FEDERAL RESERVE SYSTEM (2010), https://www.chicagofed.org/~/media/others/region/foreclosure-resource-center/more-report-final-pdf.pdf?la=en (last visited Apr. 9, 2015).

[45] *Id.* at 3.

[46] *Id.* at 5.

[47] *Id.* at 3.

[48] *What You Need to Know: Independent Foreclosure Review*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (Mar. 9, 2015), www.federalreserve.gov/consumerinfo/independent-foreclosure-review.htm (last visited Apr. 9, 2015); INDEPENDENT FORECLOSURE REVIEW, https://independentforeclosurereview.com/ (last visited Apr. 9, 2015).

[49] INDEPENDENT FORECLOSURE REVIEW, *supra* note 48.

[50] The National Mortgage Settlement, the Ocwen National Servicing Settlement, and the SunTrust Settlement. *See Joint State-Federal National Mortgage Servicing Settlements*, OFFICE OF THE ATTORNEY GENERAL (2015), http://www.nationalmortgagesettlement.com/ (last visited Apr. 9, 2015); *Ocwen National Servicing Settlement*, NATIONAL OCWEN SETTLEMENT ADMINISTRATOR (2014), https://nationalocwensettlement.com/mainpage/Home.aspx (last visited Apr. 9, 2015); *National SunTrust Settlement*, SUNTRUST SETTLEMENT ADMINISTRATOR (Mar. 2015), https://nationalsuntrustsettlement.com/mainpage/Home.aspx (last visited Apr. 9, 2015).

[51] *About the Settlement*, OFFICE OF THE ATTORNEY GENERAL (2015), http://www.nationalmortgagesettlement.com/about (last visited Apr. 9, 2015).

significance for society, the success of Federal government initiatives to curb the periods' respective effects met both praise and criticism. Legal repercussions were, therefore, nothing short of inevitable.

III. TITLE DISPUTE LITIGATION

Recent litigation transpiring throughout the country over art allegedly stolen by the Nazi Regime and securitized mortgage foreclosures closely examines nuanced issues in title and property rights. At the heart of these disputes is a question of ownership and whether subsequent transfers to good-faith purchasers of art and real estate are valid.

A. Nazi-Looted Art

Litigation over the art potentially looted during the Second World War surged in the last two decades and continues to present courts with a simultaneously unique and largely consistent set of legal considerations. Plaintiffs wishing to recover art once taken by the Nazis and now in the hands of museums and other well-respected purchasers must establish ownership rights and a cause of action for the return of that art.

The legal viability of these claims in American courts—ignoring all equitable arguments and international agreements championing restitution—turns first on the art's often-colorful provenance.[52] In the United States, title to property never transfers, even to innocent good-faith purchasers, when that property was stolen.[53] A thief simply cannot pass title.[54] This American common law title rule is distinct from that of civil law countries throughout Europe where title can rightfully transfer to a good-faith purchaser.[55] As scholars have recognized, "absent other considerations an artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that she was buying stolen goods."[56]

Heirs with a viable ownership claim—often aided by the Internet provenance databases established in recent years[57]—must assert one of two

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[52] *See* Graefe, *supra* note 9, at 479-80 (discussing how heirs can establish rightful ownership claims).
[53] Restatement (Second) of Torts § 229 (1965).
[54] Michelle I. Turner, *The Innocent Buyer of Art Looted During World War II*, 32 VAND. J. TRANSNAT'L L. 1511, 1534 (1999).
[55] *Id.*
[56] Bakalar v. Vavra, 619 F.3d 136, 141 (2nd Cir. 2010), *remanded to* 819 F.Supp.2d 293 (S.D.N.Y. 2011), *aff'd*, 500 Fed.App. 6 (2nd Cir. 2012) (citing Turner, *supra* note 54).
[57] *See supra* Part I.A.

causes of action in the courts of the United States: replevin or conversion. Replevin is a state common law "action by which the original owner of goods may recover the goods from someone who has wrongfully taken or wrongfully retained possession of the goods."[58] The Ninth Circuit issued a significant ruling that these replevin actions in Nazi-looted art cases are not judicially barred by the political question doctrine.[59] For a sustainable replevin claim, the plaintiff heir must generally establish "his title or right to possession, that the property is unlawfully detained, and that the defendant wrongfully holds possession."[60]

In lieu of replevin claims, heirs can also bring claims for conversion of the disputed works. Conversion claims differ from replevin in one key respect: a replevin action seeks return of the stolen property while conversion claims seek damages—not return—for such illegal possession by the defendant.[61] Scholars recognize that the vast majority of Nazi-looted art litigation is based in replevin actions.[62] As some note, conversion claims simply fail to return the actual work: "[t]he objects are symbols of a terrible crime; recovering them is an equally symbolic form of justice."[63]

Whether in replevin or conversion, legal avenues exist for individuals to litigate over their rightful ownership of art once in the hands of the Third Reich. As Nazi-confiscated art continues to gain traction in the pop culture arena,[64] so does the prevalence of the litigation surrounding it.

B. Securitized Mortgage Foreclosures

The securitization of mortgages—a significant stimulus to the early-2000s real estate boom—has been and continues to be at the center of much foreclosure litigation nationwide.[65] The mortgage-backed security trust became commonplace in the years preceding the Great Recession.[66] Today, claimants repeatedly challenge the legal validity of Great Recession foreclosures based on

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[58] Brian Bengs, *Dead on Arrival? A Comparison of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 503, 517-18 (1996). *See A*utocephalous Greek-Orthodox Church of Cyprus and the Republic of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F.Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

[59] Alperin v. Vatican Bank, 410 F.3d 532, 552 (9th Cir. 2005).

[60] *Autocephalous Greek-Orthodox Church*, 917 F.2d at 290.

[61] Skinner, *supra* note 6, at 683.

[62] *Id.* at 682-83; Graefe, *supra* note 9, at 479-80.

[63] Skinner, *supra* note 6, at 683.

[64] *See* ROBERT K. WITTMAN, PRICELESS (2010); LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1995).

[65] *See* Glaski v. Bank of Am., Nat'l Ass'n, 218 Cal. App. 4th 1079, 1102 (1082 n. 1) (2013), *reh'g denied* (Aug. 29, 2013).

[66] Renuart, *supra* note 39, at 562-63.

alleged procedural violations in the securitization of now-delinquent mortgages.[67]

Securitization is a complex process through which financial institutions create mortgage-backed securities.[68] This process separates the traditional mortgage relationship between lender and borrower by bundling multiple mortgages—already sold off by the original lender on the secondary market—into securities purchased by unrelated third parties.[69] Securitization effectively proceeded as follows:

> Using this device, securities underwriters set up investment trusts, each having a trustee. Lenders would issue loans to homeowners, secured by a deed of trust that made the lender the "beneficiary" and thus able to enforce the deed through a power of sale. In turn, the lenders would transfer the loans into the investment trust, which would sell bonds to investors. The trust used mortgage payments from borrowers to pay income to investors. The trust was governed by a Pooling and Servicing Agreement or PSA, which typically required that each loan in the pool be transferred into the trust by a specific cutoff date. This cutoff date existed because it was required by Internal Revenue Service statutes and regulations. Failure to transfer the loan into the trust by the cutoff date jeopardized the tax benefits the investment trust might receive.[70]

This procedure created the "mortgage-backed" security.

Many foreclosure cases turn on the procedural intricacies of the mortgage-backed security device that ostensibly had never before arisen with any regularity in the foreclosure law context. Just as heirs to Nazi-looted art seek to assert title to the works held by museums and other collectors, homeowners and other third parties often claim that errors in the securitization of a given

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[67] *See* Morlock, LLC v. Bank of N.Y. as Trustee of the Certificate Holders of Cwabs, Inc., Asset-Backed Certificates, Series 2004-13, 448 S.W.3d 514 (Tex. App. 2014); Eric A. Zacks & Dustin A. Zacks, *Not a Party: Challenging Mortgage Assignments*, 59 ST. LOUIS UNIV. L.J. 175, 176 (2014) ("lenders were able to securitize loans more easily and inexpensively, which ostensibly lowered mortgage costs and increased home ownership during the rise of the American real estate market in the 2000s").

[68] Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 13 (2011) ("a mortgage securitization transaction is extremely complex").

[69] *Id.*

[70] Appellant's Opening Brief on the Merits at 11, Mendoza v. JP Morgan Chase Bank, 2014 WL 5420814 (Cal. 2014) (No. S220675) (citing Glaski v. Bank of Am., Nat'l Ass'n, 218 Cal. App. 4th 1079, 1102 (Cal. Dist. Ct. App. 2013), *reh'g denied* (Aug. 29, 2013)), *available at* https://livinglies.files.wordpress.com/2015/03/yvanova2014-opening-brief.pdf (last visited Apr. 10, 2015).

mortgage prevented the foreclosing entity from exercising its right and, therefore, rendered the entity incapable of either acquiring or subsequently passing title.[71] The basic foundation of this claim is that "[t]he mortgage becomes useless in the hands of one who does not also hold the obligation because only the holder of the obligation can foreclose."[72] This legal principle created the well-analyzed "show-me-the-note" defense for homeowners facing foreclosure and third-party claimants similarly seeking to void a foreclosure—if the *right* to enforce the mortgage, evidenced by possession of the note, was not also transferred with the mortgage on the secondary market, homeowners argued that the assignee had no ability to actually effectuate a foreclosure sale upon a subsequent default.[73]

Recent litigation on behalf of foreclosed homeowners nationwide has built upon these basic tenants of property law. In a specific segment of cases disputing the securitization of mortgages, homeowners, third-party purchasers, and their attorneys formulated a contract law argument alleging that violations of the Pooling and Servicing Agreements (PSAs) central in the securitization process prevented the foreclosure.[74] Here, the claim is straightforward: the securitized trust never acquired the note and mortgage—necessary for the foreclosure—because the transfer was not done in accordance with the PSA that governed the trust.[75] The violations can vary from not accepting the mortgage until after the trust's closing date, to failing to comply with the contract's endorsement requirements.[76] Accordingly, the claimant seeks title to the property—or damages for wrongful foreclosure—because "the Trust never acquired a possessory interest . . . and therefore has no legal authority to collect upon plaintiff's mortgage debt obligations" through foreclosure.[77]

With dual routes to recovery, either restitution of the property or compensatory damages, those seeking to assert ownership claims to art or real property through litigation find their cases based in a fundamentally analogous doctrine. In both situations, the Nazi-looted art or real estate foreclosed by the holder of a securitized mortgage is allegedly in the hands of someone without legal title to the property.

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[71] *See Morlock, supra* note 67.
[72] Restatement (Third) of Property: Mortgages § 5.4 reporters' note (1997).
[73] *See* Whitman, *supra* note 3.
[74] *See* Berezovskaya v. Deutsche Bank Nat'l Trust Co., 2014 WL 4471560 (E.D. N.Y. 2014); *Morlock, supra* note 67; Wells Fargo Bank, N.A. v. Erobobo, 972 N.Y.S.2d 147 (N.Y. Sup. Ct. 2013).
[75] *Berezovskaya*, 2014 WL 4471560 at *2.
[76] *Id.*
[77] *Id.*

IV. TECHNICAL DEFENSES

The technical defenses standing to bar claims from heirs and improper foreclosure claimants represent a further intersection of these art cases and securitized mortgage litigation. The technical defenses available in each case—statute of limitations or laches in art disputes and standing in foreclosure cases—serve an identical purpose: grounds upon which the art and foreclosure litigation is dismissed absent consideration of the claims' merits.

A. Statute of Limitations and Laches

The statute of limitations and laches defenses may end the litigation of art misappropriated by the Nazi Regime before it ever begins. Both provide a defense that serves to eliminate any future consideration of the case merits simply because any such claims already expired.

1. Statute of Limitations

The statute of limitations defense in art litigation presumably offers great opportunity for success given the protracted nature of claims based in the Nazi's looting of Europe between the 1930s and 40s, and the only recent surge in litigation decades later. Contrary to this potential benefit for defendants—or plaintiffs taking an offensive approach in title disputes—the confines of this defense vary by jurisdiction and "American courts provide broad exceptions that allow claimants to toll the statute of limitations."[78] States augment the time at which the statute of limitations begins to run against good-faith purchasers under two alternative theories: New York's demand and refusal rule, or the much more common discovery rule.

New York jurisprudence highlights the demand and refusal rule as an "axiom of New York law."[79] The rule is inapplicable to bad-faith purchasers, against whom the statute of limitations begins to run when the property is purchased.[80] The statute of limitations for any good-faith purchaser "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."[81] Since the 1966

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[78] Leila Amineddoleh, *The Extension of Statutes of Limitations for the Restitution of Nazi-Looted Art*, 31 ENT. & SPORTS LAW. 23, 24 (2014).
[79] Grosz v. Museum of Modern Art, 772 F. Supp. 2d 473, 482 (S.D.N.Y.) *aff'd*, 403 F. App'x 575 (2d Cir. 2010) (citing Menzel v. List, 267 N.Y.S.2d 804 (N.Y.Sup.Ct.1966)).
[80] *Grosz*, 772 F. Supp. 2d at 482.
[81] Menzel v. List, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966) *modified*, 279 N.Y.S.2d 608 (1967) *rev'd*, 246 N.E.2d 742 (1969) (citing Cohen v. M. Keizer, Inc., 285 N.Y.S. 488 (1st Dept. 1936) [replevin]; Gillet v. Roberts, 57 N.Y. 28 (1874) [conversion]).

articulation of this rule in *Menzel v. List*, the question of when the heirs made such a demand for Nazi-plundered works and received a refusal is often raised in the course of litigation.[82] Recent case law critiques the possible use of this rule to allow a plaintiff to delay an action by simply failing to make a demand.[83]

The discovery rule also imposes an affirmative duty, but allows the statute of limitations to begin running when the plaintiff knew or reasonably should have known the whereabouts of the work. Under Indiana's version of the discovery rule, "the statute of limitations commences to run from the date plaintiff knew or should have discovered that she suffered an injury or impingement, and that it was caused by the product or act of another."[84] The benefits of the discovery rule, however, cut both ways. As the Second World War becomes increasingly distant history, heirs who will eventually hold the entirety of Nazi-looted art claims may base those claims upon their potentially recent discovery of the work. These presumably new discoveries are bolstered by the decades and multiple generations separating twenty-first century heirs and the relatives from whom the works were stolen. Good-faith purchasers, however, succeed on statute of limitations defenses against these heirs when the original owner—the ancestor of the now plaintiff heirs—is deemed to have previously discovered or had the reasonable opportunity to discover the work.[85] The statute of limitations defense bars the claims of the heirs upon whom this discovery is imputed.[86] Depending on the jurisdiction's applicable rule, heirs asserting claims to Nazi-looted art, whether valid or not, may have no means of recovery if the statute of limitations has already run.

2. Laches Doctrine

The judge-made equitable doctrine of laches affords good-faith purchasers an additional defense even when the statute of limitations has yet to run under either the demand and refusal or the discovery rule. The laches defense allows courts to reject otherwise timely claims if "the opposing party unreasonably delayed bringing the claim to the prejudice of the defendant."[87] This too comes with an important caveat: when heirs present an "actual hindrance or

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[82] *See Menzel*, 267 N.Y.S.2d at 809; O'Keeffe v. Snyder, 416 A.2d 862, 868 (N.J. 1991); Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618 (1990) *aff'd*, 569 N.E.2d 426 (1991); *Grosz*, 772 F. Supp. 2d at 482.
[83] *Grosz*, 772 F. Supp. 2d at 482.
[84] *Autocephalous Greek-Orthodox Church*, 917 F.2d at 288.
[85] Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 807 (N.D. Ohio 2006).
[86] *Id.*
[87] Mari-Claudia Jiménez, *Whose Art is it Anyways? Issues Concerning Provenance and Good Title When Buying Art*, 20130521P NYCBAR 157 (2013).

impediment caused by the fraud or concealment of the party in possession," courts may excuse the heirs' delay in bringing their claim.[88]

Scholars diverge on the applicability of laches to these cases, but many assert that this doctrine is unsuitable for these disputes.[89] The primary argument in opposition to court's use of laches is based on the doctrine's prejudice requirement.[90] To be prejudiced, the good-faith purchaser must have lost a potentially viable claim, but such purchasers can never have any claim to stolen art since the thief preceding any purchaser was incapable of passing legal title.[91] Despite this criticism, the laches doctrine is raised in this art litigation and offers good-faith purchasers an additional route for dismissing the claims of heirs on a simple technicality regardless of how colorful and questionable the work's provenance may be.

B. Standing

Homeowners and improper foreclosure claimants similarly may or may not have standing to pursue quite title actions—thus barring their claim—if their challenge to a foreclosure's validity is grounded in the PSA of a securitized trust to which they were never a party. In the non-homeowner claimant context, purchasing entities or individuals fall on both sides of the litigation. The purchaser of a foreclosed property may risk a quite title action brought against it by parties asserting that the transferor failed to pass legal title to said purchaser. A purchaser may also bring claims, particularly when that purchaser received title from the homeowner or mortgagor, seeking to assert its right to title absent any remaining mortgage encumbrance.

Courts disagree on whether or not the standing defense is available to foreclosing entities and good-faith purchasers of these foreclosures based on this fundamental lack of privity. Successfully asserting a lack of standing defense against the homeowner eliminates his or her foreclosure challenge, at least as it relates to the PSA. Standing rests on one essential question: whether a violation of the PSA in the assignment of the foreclosure rights renders the PSA merely voidable between the parties in privity, denying standing to the claimant, or void in its entirety, giving the claimant standing. Since the vast majority of PSAs executed at the height of the subprime mortgage boom included New York choice of law provisions, this analysis is based on the opposing interpretations of New York law in courts around the country.

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[88] Simon J. Frankel & Ethan Forrest, *Museums' Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-Era Art Restitution Claims-A Defense*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 279, 305 (2013).
[89] *See, e.g.*, Frankel, *supra* note 88, at 305-06; Dowd, *supra* note 26, at 547.
[90] Dowd, *supra* note 26, at 547.
[91] *Id.*

The rationale for finding the PSA voidable is based on New York courts having determined that "beneficiaries may in fact consent to and ratify acts that violate the terms of the PSA."[92] Courts concede that the New York Estate Powers & Trusts Law specifically provides "every act in contravention of the Trust is void."[93] The parties in privity under the PSA, however, are those who determine if such a contravention renders the trust void, not a third party, such as claimants later challenging the foreclosure of a mortgage held in that trust.[94] The ability of the parties in privity to ratify these contraventions "make[s] such actions voidable, not void, and consequently a non-party to a PSA does not have standing to dispute such transactions."[95] When courts find the alleged violations merely voidable—even assuming they actually occurred—the claimant is not a party in privity with the ability to render the PSA void. The claimant has no standing to bring a wrongful foreclosure claim under the voidable, but not void PSA.

The alternative rationale for finding the PSA void, which eliminates the technical standing defense, is based on what courts call a literal reading of the New York law.[96] Interpreting the exact same provision of the Estate Powers & Trusts Law, courts ignore the issue of privity and find plainly that acts in contravention of the trust render it void.[97] Therefore, "[t]ransfers that violate the terms of the trust instrument are void under New York trust law, and borrowers have standing to challenge void assignments of their loans even though they are not a party to, or a third party beneficiary of, the assignment agreement."[98]

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[92] *Berezovskaya*, 2014 WL 4471560 at *6 (citing Rajamin v. Deutsche Bank Nat'l Trust Co., 757 F.3d 79 (2nd Cir. 2014) (concluding that "as unauthorized acts of a trustee may be ratified by the trust's beneficiaries, such acts are not void but voidable"); Anh Nguyet Tran v. Bank of New York, 2014 WL 1225575, *3-5 (S.D.N.Y. Mar. 24, 2014); Mooney v. Madden, 193 A.D.2d 933, 933-34 (N.Y. App. Div. 1993) (finding that "[a] trustee may bind the trust to an otherwise invalid act or agreement which is outside the scope of the trustee's power when the beneficiary or beneficiaries consent or ratify the trustee's *ultra vires* act or agreement); *but cf. In re* Dana, 119 Misc.2d 815, 819–20, 465 N.Y.S.2d 102, 105 (N.Y.Sup.Ct.1982) (holding that if the trustees had engaged in self-dealing under the Internal Revenue Code, 26 U.S.C. § 4941(d), "the potential consequences of these acts would not cause this court to set aside the trust ... it would cause the court to invoke EPTL § 7–2.4 to void the transaction"); Dye v. Lewis, 67 Misc.2d 426, 427, 324 N.Y.S.2d 172, 175 (N.Y.Sup.Ct.1971) (holding that "every act [by a trustee] in contravention of the trust is void," and thus finding that the trustees' act of discharging a "mortgage without any provision for payment or substitution of security ... in contravention of the trust indenture," was void).

[93] *Id.* (citing EST. Powers & Trusts § 7.24; Calderon v. Bank of Am. N.A., 941 F.Supp.2d 753, 766 (W.D. Tex. 2013).

[94] *Id.* at *6-7.

[95] *Berezovskaya*, 2014 WL 4471560 at *8 (citations omitted).

[96] *Glaski*, 218 Cal. App. 4th at 1096.

[97] *Id.* at 1096-97 (citing Wells Fargo Bank, N.A. v. Erobobo, 972 N.Y.S.2d 147 (N.Y. Sup. Ct. 2013); Levitin, *supra* note 68; *In re* Saldivar, 2013 WL 2452699 *4 (Bankr. S.D. Tex. Jun. 5, 2013)).

[98] *Glaski*, 218 Cal. App. 4th at 1083.

Despite the arguments for returning all art and reversing the foreclosure of all allegedly improperly securitized mortgages, the trajectory of both Nazi-stolen art and foreclosure litigation depends largely on the applicability of these technical defenses. If the statute of limitations has run or the laches doctrine applies, there is simply no claim to the art. Similarly, some interpretations of New York law deny claimants standing to challenge securitization contracts to which they were never a party.

V. CONCLUSION

As cases poised to examine the merits of Nazi-looted art and potentially improper foreclosure claims continue reaching American courts across the country, the assertion of these technical defenses has the ability to halt the litigation in its proverbial tracks. As a social matter, the pillaging campaign orchestrated in conjunction with Hitler's continental genocide is wholly different from the Great Recession's foreclosure crisis. The recent litigation spurred by these two periods, however, is very much comparable. The relocation of vast art collections and the reorganization of American real estate ownership similarly gave rise to title disputes and strong opinions from legal scholars. These remarkably analogous cases often present courts with one question before the merits of any interested parties' claims are ever considered: is the suit barred entirely on grounds of an applicable technical defense? With the statute of limitations and doctrine of laches commonly raised in Nazi-looted art litigation and standing, or lack thereof, in challenges to securitized mortgage foreclosures, courts faced with seemingly disparate controversies are fundamentally asked to decide the cases on fairly similar technical defenses. Contemporary art and real estate litigation notably intersect with the availability of these technical defenses and more broadly in the development of the twenty-first century property jurisprudence.