

HOLOCAUST RESTITUTION LITIGATION IN THE UNITED STATES: AN UPDATE

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I. INTRODUCTION

The two previous editions of this Newsletter summarized the lawsuits filed in the United States seeking financial restitution from European and American corporations for their Holocaust-era financial activities. As a result of the Holocaust-era litigation, approximately \$8 billion was either collected or pledged to elderly Holocaust survivors by the latter half of 2001.

In 2003, the first Holocaust restitution case reached the United States Supreme Court. In that case, the Holocaust claimants lost.

A consortium of insurance companies brought the case, *American Insurance Association v. Garamendi*,¹ seeking to block a California state law from forcing European insurance companies, who do business in the state, to disclose their prewar and wartime insurance records. The aim of the law was to provide information to Holocaust survivors and heirs about their families' prewar insurance policies. The Supreme Court, in a 5-4 decision, found the California law unconstitutional on the ground that it unduly interfered with the federal government's power to conduct foreign affairs.²

In 2004, a second Holocaust restitution case reached the United States Supreme Court, attesting the Supreme Court's scrutiny of the important issues raised in Holocaust restitution litigation. In this case, the interests of the claimants prevailed.

The lawsuit, *Republic of Austria v. Altmann*,³ involved Nazi-looted art. Its

consequences, however, go beyond mere litigation over ownership of art stolen during World War II.

Section II of this Newsletter will discuss the impact of the 2003 *Garamendi* Supreme Court case on the recent dismissal of the restitution lawsuit against an Italian insurance company. Section III will explore the 2004 *Altmann* Supreme Court decision. Section IV will discuss the impact of the *Altmann* decision on two cases presently before the Second Circuit. Section V will briefly set out a slew of decisions issued by Judge Edward R. Korman of the Eastern District of New York since publication of the last Newsletter, impacting the \$1.25 billion settlement with the Swiss banks. Section VI will return to the subject of Nazi-looted art and look at two recent high-stake lawsuits. Finally, Section VII will focus on recent Nazi-looted art disputes settled without litigation.

II. THE END OF HOLOCAUST INSURANCE LITIGATION IN U.S. COURTS AFTER THE GARAMENDI DECISION.

1. The *Generali Holocaust Insurance Litigation*

Plaintiffs in twenty consolidated actions sued the Italian insurance company, Generali S.p.A. (Generali), seeking damages for non-payment of insurance proceeds to beneficiaries of policies purchased by Holocaust victims before the end of World War II. Generali moved to dismiss the case on grounds of *forum non conveniens* and contractual forum selection. It argued the International Commission on Holocaust Era Insurance Claims (ICHEIC)⁴ was a more adequate forum to litigate the plaintiffs' claims. The Manhattan federal district judge Michael B. Mukasey disagreed. In September 2002, Judge Mukasey denied the defendant's motion to dismiss, finding the ICHEIC was an inadequate alternative forum for this case.⁵

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2. The District Court's Dismissal after *Garamendi*

Two years later, on October 14, 2004, Judge Mukasey reversed himself and this time dismissed the *Generali* case in light of the 2003 *Garamendi* Supreme Court decision. The court held the announced policy of the Executive favoring voluntary resolution of Holocaust-era insurance claims through the ICHEIC preempted state and customary international laws supporting litigation in U.S. courtrooms.⁶

3. The Impact of the *Garamendi* Supreme Court Decision

In *Garamendi*, the United States Supreme Court held the Executive branch's foreign policy to settle Holocaust-era insurance claims through ICHEIC preempted a California state statute that sought for the European insurers doing business in the state to reveal their Holocaust-era insurance records.⁷ The Court majority found this attempt by California to force insurance companies to provide prewar insurance data reduced the President's economic and diplomatic leverage to negotiate Holocaust-era insurance settlements.⁸ In effect, the Supreme Court expanded the Executive's power to settle claims against foreign governments to also include Holocaust claims brought against all foreign insurance companies.⁹

Judge Mukasey extended the dispositive force of *Garamendi*'s ruling to apply to Holocaust claims, regardless of the theory of recovery, against insurance companies that arise under generally applicable state statutes and common law as well as customary international law.¹⁰

Mukasey rejected the plaintiffs' contention that this case is distinguishable to *Garamendi*. Plaintiffs argued: (1) *Garamendi* never addressed private litigation against an insurance company, and (2) unlike the U.S. and Germany, the U.S. and Italy never entered into an Executive agreement to resolve Holocaust

restitution claims. The judge reasoned the Executive policy, favoring Holocaust resolution through the ICHEIC, applied to *Generali*, even though there was no formal treaty with Italy, because the *Garamendi* opinion referred generally to "European insurers" and because *Generali* played a significant role in Holocaust-era litigation, including the *Garamendi* case.¹¹ In result, Mukasey read *Garamendi* to strongly imply an Executive policy does not need to be embodied in an Executive agreement in order for it to have juridical effect.¹²

In addition, Mukasey dismissed plaintiffs' ancillary claims of *Generali*'s "bad faith" conduct. He found these claims did not assert an independent injury but were rather brought to support the plaintiffs' primary demand for benefit payments and should, therefore, be resolved through the ICHEIC.¹³

Musakey's decision is a significant setback to the efforts of Holocaust victims and their heirs trying to recover benefits of Holocaust-era insurance policies. Denied the alternative of litigation to resolve their claims, the claimants are left with only the inefficient ICHEIC process to bring closure to these over half-century-old claims.

As an upcoming article, summarizing the work of the ICHEIC, points out:

The International Commission of Holocaust Era Insurance Claims (ICHEIC) failed to meet its promises to Holocaust victims and their heirs to compensate in speedy fashion policies that remained unpaid for some 60 years. When the claims process has been completed only about 3 percent of the value of unpaid life insurance Holocaust era claims will have been paid, no unpaid non-life policies will have been considered, and the process will

have taken some nine years instead of the two or so originally anticipated.

The chief reasons for this failure are inept governance and poor management. Governance became akin to secret diplomacy in which ICHEIC's Chairman and his immediate subordinates relied heavily on dealing only with those who favored their views while making promises to others that were never fulfilled or too long delayed. ICHEIC management mainly ignored the numerous studies pinpointing the serious problems with the claims process.

To make matters worse, insurance companies did not honor their initial pledges, and political pressure on ICHEIC to initiate reforms faded. Most Jewish and US regulators participating in ICHEIC came to believe that there was no alternative to ICHEIC, having been worn down by the inflexible stance of ICHEIC's leadership.

Sidney Zabłudoff, "ICHEIC: Excellent Concept But Inept Implementation," 17 Jewish Political Studies Review ___, nos. 1 & 2 (Spring 2005).

III. THE 2004 SUPREME COURT DECISION: *REPUBLIC OF AUSTRIA v. ALTMANN*

1. Background

This high-profile lawsuit involves six paintings of Austrian painter Gustav Klimt,

presently valued at approximately \$150 million. The claimant is Maria Altmann, in her late eighties and living in Los Angeles. Altmann is the niece and sole heir of Adele and Ferdinand Bloch-Bauer, the original owners of the Klimt paintings.

The six paintings are now hanging in the Austrian National Gallery in Vienna. One of the reasons why litigation over these paintings has been so bitter is the paintings are considered to be one of the most significant works of art in the Gallery's collection. According to Austria, "the paintings . . . are national treasures and part of the cultural heritage of the Republic [of Austria]."¹⁴ All but one of the paintings have been hanging in the Gallery for over fifty years.

Adele Bloch-Bauer died in 1925. In her will, executed two years earlier, she named four of the Klimt paintings in dispute and asked her husband Ferdinand to donate them to the Gallery upon his death. In 1938, the Nazis invaded Austria (the Anschluss) and enacted anti-Jewish laws and regulations. Businesses and property belonging to Jews were "Aryanized," in effect stolen and turned over to Nazi loyalists. In the aftermath of the Anschluss, Ferdinand fled Austria to England and Altmann fled to Holland. In 1942, Altmann arrived as a Jewish refugee in Los Angeles and became an American citizen three years later.

After Ferdinand fled Austria, the Nazis stole all of his possessions, including the Klimt paintings, which were sent to the Gallery and other Austrian museums. After the war, Ferdinand hired Dr. Gustav Rinesch, an Austrian lawyer and family friend, to locate and recover his family property seized by the Nazis.

Ferdinand died in 1945, a few months after the war. In his will, he did not make any bequests to the Gallery or to any other Austrian institution. This was not surprising, considering how his native country treated him. Ferdinand left all of his possessions to Maria Altmann and her siblings.

In 1948, unbeknownst to Altmann, Dr. Rinesch negotiated a deal with the Austrian Gallery, whereby the Bloch-Bauer heirs “donated” the Klimt paintings mentioned in Adele’s will to the Gallery in exchange for receiving an export license to bring other family artworks to the United States. According to Adele, she was not aware of this deal. She always mistakenly believed her aunt and uncle donated the paintings to the Gallery before the war.

Fast forward fifty years later. In 1998, the Austrian government opened up the Gallery’s archives to confirm Austria did not possess wartime-looted artworks. It also enacted a new Austrian restitution law aimed to return artworks that had been “donated” to Austrian museums after the war under the coercive policy of withholding export permits. An Austrian journalist, Hubertus Czernin, discovered surprising facts that Ferdinand Bloch-Bauer did not legitimately donate the Klimt paintings.

In December 1998, Maria Altmann, now the sole remaining Bloch-Bauer heir, filed a claim with the Austrian government for the return of the Klimt paintings that were kept by the postwar government under the coercion program. In June 1999, the Austrian Advisory Board, reviewing claims under the anti-coercion law, rejected Altmann’s claim because the Board decided the Klimt paintings were not coerced from the Bloch-Bauer family. According to Altmann, “the entire commission proceeding was a sham and the outcome was politically pre-ordained.”¹⁵

After Austria declined to resolve the matter by private arbitration, Altmann filed suit in Austria. However, a major practical problem arose. Under Austrian law, as in many other countries, a party filing a lawsuit is required to deposit with the court a filing fee amounting to a percentage of the amount sued (one reason why the United States remains the forum of choice for Holocaust restitution suits). In Altmann’s case, she was required to deposit a filing fee of

\$1.8 million with the court to have her lawsuit heard. Unable to do so, the Austrian court granted her a partial waiver, but the reduced fee, \$200,000, was still an amount the elderly Altmann could not pay. As a result, Altmann dropped her lawsuit in Austria and, in August 2000, filed her suit in federal court in Los Angeles.

The Austrian government’s position to the lawsuit was straightforward. In their own words, they “maintain[ed], as they have for over 50 years, that, under Austrian law, the [1923] Will [of Adele] and Ferdinand’s subsequent conduct gave the Republic [of Austria] ownership of the paintings.”¹⁶

The case was assigned to the Los Angeles federal judge Florence-Marie Cooper. Rather than have the case heard on its merits, Austria asked Judge Cooper to dismiss the lawsuit on the ground that she lacks jurisdiction to hear it under the Foreign Sovereign Immunities Act of 1976 (FSIA). Altmann asserted, however, Austria is not entitled to immunity because the “expropriation exception” to the FSIA, 28 U.S.C. § 1605(a)(3)¹⁷, applies. The exception expressly exempts from immunity certain cases involving “rights in property taken in violation of international law.”¹⁸

Austria’s motion to dismiss set out two arguments. First, in 1948, when much of their alleged wrongdoing took place, pre-FSIA law gave the Austrian government absolute sovereign immunity from suit in the United States courts. Second, nothing in the FSIA retroactively divests Austria of its immunity.

In May 2001, Judge Cooper denied Austria’s motion to dismiss.¹⁹ Judge Cooper found the FSIA did apply retroactively to Austria’s conduct fifty years before and jurisdiction could be established under the “expropriation exception.”²⁰

Judge Cooper found all three requirements of the “expropriation exception” were met. First, the taking of the paintings (the “property” in question under the FSIA) by the

Nazis solely because of Ferdinand's Jewish heritage was a clear violation of international law. Judge Cooper also found a second taking in violation of international law, "when the paintings were 'donated' to the Gallery in 1948 in order to secure export licenses for other works of art."²¹ Second, the paintings are "owned or operated" by the Gallery, an "agency or instrumentality" of Austria. Last, the Gallery is engaged in commercial activity in the United States. The U.S. commercial activity nexus existed, the court found, because the Gallery published a book in the U.S. featuring the Klimt paintings, sold a guidebook in the U.S. displaying the paintings, and advertised its exhibitions in the U.S., including exhibitions of Klimt art. Judge Cooper found all these to be commercial activities conducted by the Gallery in the United States.²²

Judge Cooper also rejected Austria's procedural argument that Altmann's suit should be pursued in an Austrian court because it has a better understanding of Austrian law. As she held, "Austrian courts provide an inadequate forum for resolution of [p]laintiff's claim"²³ because not only does Austrian law require Altmann to file a fee, which she cannot afford (according to Judge Cooper, the "filing fee . . . approximates the sum total of her liquid assets"²⁴), but also "Austria ha[d] appealed the reduction in filing fees [granted to her by an Austrian judge], and contends that [p]laintiff should be required to pay an even greater amount."²⁵ Moreover, even if an Austrian court heard the case, Judge Cooper found Altmann's suit would be time-barred under Austria's thirty-year limitations period. Austria, therefore, according to Judge Cooper, does not provide an adequate forum for her claim.²⁶ In the United States, on the other hand, Judge Cooper found the applicable limitations period only started to run when plaintiff in 1999 discovered the true facts about the scheme of how the Gallery obtained the paintings.²⁷

2. The United States Supreme Court Decision

After the Ninth Circuit affirmed Judge Cooper's decision, Austria appealed to the U.S. Supreme Court, and the Court granted certiorari.²⁸

In June 2004, the Court affirmed the Ninth Circuit. In a 6-3 decision, Justice Stevens held the FSIA indeed should be applied retroactively.²⁹ The Court majority found clear evidence that Congress intended the Act to apply retroactively. First, the majority noted the FSIA's preamble that states "[c]laims of foreign states to immunity should *henceforth* be decided by courts of the United States in conformity with the principles set forth in this chapter."³⁰ According to the Court, the preamble suggests Congress intended the Act to apply to all assertions of immunity and relevant conduct, regardless of when that conduct occurred. Second, the Court found the Act's structure supports this conclusion. There is no expressed statutory language in the FSIA and there is nothing in the circumstances surrounding its enactment that suggest any one of its provisions like the expropriation exception solely applies prospectively. Last, the Court found many of the Act's provisions apply to conduct that occurred before its enactment in 1976 and the provisions also apply to all pending cases. Under these findings, to hold the FSIA was not retroactive, the Court found, would be inconsistent with the Act's overall structure and underlying principles, which are (1) clarifying the rules that judges should apply in resolving sovereign immunity claims, and (2) eliminating political participation in the resolution of such claims.³¹

Justice Stevens emphasized the *Altmann* holding was narrow, dealing only with the Act's retroactivity, and, on remand, Austria could still raise other defenses not yet considered by the Court.³² The Court did not review Judge Cooper's determination that the "expropriation exception" applied in this case. The issue

decided before the Court only focused on the scope of the FSIA.³³

The *Altmann* decision is significant and not only because it conclusively determined the FSIA could be applied retroactively, an issue widely litigated in the lower courts. For the first time, a foreign entity is being forced to go to trial in an American court on a Holocaust restitution claim. The decision is also another important example of how American courts remain the *only* viable forum for the resolution of long-neglected Holocaust restitution claims.

3. The Altmann Case On Remand

The *Altmann* case is now back in federal district court. On September 10, 2004, Judge Cooper rejected Austria's second motion to dismiss the case for lack of subject matter jurisdiction.³⁴ "This was their last-ditch effort to try and derail this case on jurisdictional grounds," said Mrs. Altmann's lawyer, E. Randol Schoenberg.³⁵

Trial is now set for November 1, 2005. Mrs. Altmann, now 88 years old, sought an earlier trial date, but Austria claimed it needed more time to prepare its case and conclude discovery. Austria indicated it intends to depose as many as thirty-seven witnesses, including many in Austria who are employees of various government agencies.

IV. THE ALTMANN DECISION'S IMPACT ON SECOND CIRCUIT CASES

The Supreme Court's *Altmann* decision has already impacted other Holocaust restitution suits filed against foreign sovereigns. At the time of the *Altmann* decision, two other Holocaust lawsuits were pending before the Second Circuit awaiting the outcome of *Altmann*: *Garb v. Republic of Poland* and *Abrams v. Société Nationale des Chemins de Fer Français*.

1. Garb v. Republic of Poland

*Garb v. Republic of Poland*³⁶ is a class action filed in a U.S. federal court in Brooklyn by Polish survivors seeking compensation from Poland for failure to return real estate lost by Jews in Poland during the Holocaust.

Nearly half of all Jews murdered by the Nazis came from Poland, and the victim's material losses are estimated (in today's dollars) to be in excess of \$10 billion. Poland, however, has one of the worst records on restitution of property. Currently, there is no Polish legislation for the return of Nazi-looted property, and no claim has yet succeeded in a Polish court.

The majority of the Jews who escaped Poland during the Holocaust sought refuge in the Soviet Union and returned after the war to find Poland "in a state of chaos and ruin."³⁷ Much of their real property in Poland was adversely possessed during the war, and property disputes sparked a renewal of violence against the Jews. During the first two years after the war, more than 1,000 Jews were murdered.³⁸ As a result of this post-war anti-Semitic violence, the vast majority of the few remaining Jews in Poland chose to emigrate and leave behind their property and possessions.³⁹

With the advent of Communism, much land was nationalized in Poland. The government granted ownership to an original owner (or successor) if, by December 31, 1948, they claimed title to real property that was either confiscated by the Nazis or was subject to a forced sale during the war. The Polish Treasury claimed title over any other property deemed "abandoned" by the Nazis or German citizens.⁴⁰

The plaintiffs in this case allege most of the true owners of this "abandoned property" were actually Jews, and the Polish government purposefully labeled it as such to legitimize the taking of that property.⁴¹

Brooklyn federal chief judge Edward R. Korman (who also handled the Swiss banks case and is supervising its settlement) initially dismissed this case on the ground that Poland was immune to the lawsuit under the FSIA. Korman held the FSIA was not retroactive, and, therefore, Poland enjoyed full immunity for its pre-FSIA actions.⁴²

In August 2003, the Second Circuit reversed and remanded the case back to Judge Korman to determine whether Poland would have enjoyed sovereign immunity in the immediate postwar years when the property was nationalized. The appeals panel directed the district judge to conduct an unprecedented investigation to determine: (1) what the U.S. Department of State's position was on Poland's sovereign immunity after World War II; and (2) whether a court would have sided with the plaintiffs had their suit been filed sixty years ago, before the enactment of the FSIA.⁴³

The appeals panel also sent back an Austrian real estate Holocaust restitution case, *Whiteman v. Republic of Austria*,⁴⁴ to federal district court for the same purpose. In *Whiteman*, former Jewish residents of Austria who lost property under the Nazi regime from 1938 to 1945 brought this suit against the Austrian government. The appeals panel directed Korman and Judge Shirley Wohl Kramm, presiding over the *Whiteman* case, to "coordinate their proceedings as much as possible."⁴⁵

However, the United States Supreme Court interrupted this movement when it granted Poland's petition for writ of certiorari.⁴⁶

On June 14, 2004, the United States Supreme Court vacated judgment and remanded the case to the Second Circuit for further consideration in light of *Altmann*.⁴⁷ The *Altmann* decision appears to be helpful to the plaintiffs in *Garb v. Republic of Poland* since the Supreme Court seems to have opened federal courts to Holocaust-era expropriation suits against foreign sovereigns when it decided the FSIA did apply retroactively.⁴⁸

Garb v. Republic of Poland is currently on remand from the Supreme Court. The Second Circuit must now determine if one of the exceptions to the FSIA applies in this case to establish jurisdiction. The same applies to *Whiteman v. Republic of Austria*.

2. *Abrams v. Société Nationale des Chemins de Fer Français (SNCF)*

*Abrams v. SNCF*⁴⁹ was another Holocaust restitution case before the Second Circuit awaiting the *Altmann* decision. The class action case was filed against the French national railroad (SNCF) for its transportation of Jews from France to death camps during World War II.

During the Nazi occupation of France, the railroad remained under civilian control and preserved its independence by accommodating Nazi transportation needs. Today, it operates as a separate legal entity wholly-owned by the French government.⁵⁰

In March 1942, SNCF began to operate trains deporting Jews and other "undesirables" from France to Nazi concentration camps. In exchange, the railroad was paid and allowed to continue its operations. The conditions inside the deportation trains were inhumane and frequently fatal to passengers, who were often carried in cattle cars. By the time Nazi occupation of France was over, SNCF had taken 75,000 Jews and tens of thousands of others to concentration camps. Fewer than three percent of those deported survived.⁵¹

The plaintiffs include the survivors of those deportations and the victims' heirs. They allege SNCF committed war crimes and crimes against humanity. The complaint sought compensatory and punitive damages as well as disgorgement of wrongfully obtained profits.⁵²

The railroad moved to dismiss the complaint on two grounds: (1) the federal courts in the United States have no subject matter jurisdiction; and (2) SNCF was entitled to

sovereign immunity as an “agency or instrumentality”⁵³ of France both under the FSIA and under the U.S. law that was in effect during World War II.⁵⁴

Interestingly, because SNCF was not a government entity during the war, plaintiffs did not want the FSIA to be applied retroactively. Instead, it was France, the foreign sovereign and owner of SNCF, which argued the Act was retroactive. Under the FSIA, an “agency or instrumentality” of a foreign state enjoys immunity, but prior to the Act’s enactment, agencies or instrumentality such as SNCF did not enjoy immunity.

In November 2001, Brooklyn federal judge David Trager dismissed the case. The court held: (1) the railroad is an agent of the French government under FSIA § 1603(b)⁵⁵; (2) the FSIA applies to actions commenced after its enactment in 1976 regardless of when the underlying conduct occurred; and (3) there is no FSIA jurisdiction over plaintiffs’ causes of action because none of the FSIA exceptions negate the railroad’s immunity.⁵⁶

On appeal, the Second Circuit reversed. As with *Garb*, the appellate court remanded the case to explore whether the Act would retroactively apply to the plaintiffs’ cause of action.⁵⁷

The United States Supreme Court granted SNCF’s petition for writ of certiorari on the same day it granted certiorari in *Garb*. Following the *Altmann* ruling, the Court remanded *Abrams* in light of *Altmann*.⁵⁸

Unlike its effect in *Garb* and *Whiteman*, the *Altmann* Supreme Court decision may have a negative impact on the French railroad because, under the FSIA, the railroad possesses immunity. Plaintiffs are now seeking to distinguish *Altmann* from their case.⁵⁹

Currently, it is unknown what the Second Circuit will do with the case since the Supreme Court remanded it in June 2004. According to NYU law professor Andreas F. Lowenfield, representing the railroad, the appellate court could send the case back to the

district court, ask for additional briefs and arguments, or “simply say that we were wrong to reverse and Judge Trager was right all along.”⁶⁰

V. THE SWISS BANKS LITIGATION

The modern era of Holocaust asset litigation began in 1996-1997 with the filing of three class action lawsuits against the Swiss banks in federal district court in federal court in Brooklyn.⁶¹ In August 1998, the banks settled the class actions for \$1.25 billion. The settlement was finalized in July 2000, with the largest portion-\$800 million-allocated to Holocaust survivors or their heirs with claims to long dormant Swiss bank accounts opened prior to or during World War II. The remaining \$425 million was allocated to Jewish and non-Jewish slave laborers, Jewish refugees turned away at the Swiss border, and needy survivors worldwide.

By April 2004, almost six years after the settlement, approximately \$485 million has been distributed out of the \$1.25 billion initial settlement.⁶² It now appears the funds allocated for dormant accounts will not be fully distributed, and Judge E. Korman, the federal judge presiding over the settlement, will have to decide how to allocate the available funds. This has led to some controversy. Some believe the funds should only go to actual Holocaust survivors to help take care of their needs in old age (regardless of whether those survivors had any connection to the Swiss banks), while others believe the funds should be used for Holocaust education and remembrance.⁶³

Recognizing the fund is “ever-diminishing,”⁶⁴ Judge Korman adopted the Special Master’s Interim Report, which recommended any excess funds from the Swiss settlement should be used to assist the “neediest of the needy” Holocaust survivors. According to the Special Master, these are primarily Holocaust survivors in the former Soviet Union (FSU).⁶⁵

Groups of Holocaust survivors in the United States and the State of Israel challenged the Special Master's recommendation to distribute the bulk of funds, allocated to needy survivors, to those living in the FSU. The objectors argue the distribution of funds to needy survivors should instead be allocated on a *pro rata* basis, based on the population of survivors in each region.⁶⁶

In 2004, Judge Korman issued seven opinions, all published, which aim to "provide guidance to the Special Master in formulating his recommendation[s]"⁶⁷ about settlement distribution.

- (1) On February 19, 2004, Korman rejected the Swiss banks' objections to the Interim Report because the banks have no role in the settlement distribution process.⁶⁸ In that decision, the judge also castigated the Swiss banks for failing to acknowledge its theft of Nazi-era bank accounts. Korman issued a corrected version of this same opinion on June 1, 2004.⁶⁹
- (2) On March 9, 2004, Korman rejected the request of the Holocaust Survivors Foundation-USA (HSF-USA) to allocate a larger sum of the "excess funds" to survivors living in the U.S. instead of distributing the bulk of it to the most needy Nazi victims, the majority living FSU.⁷⁰
- (3) On March 31, 2004, Korman held an attorney for HSF-USA did not deserve compensation for attorney's fees from the settlement fund, although the attorney may have expended considerable time in connection

with the case because those efforts did not benefit the class of claimants.⁷¹

- (4) On April 2, 2004, Korman rejected two separate proposals from the Pink Triangle Coalition and the Disability Rights Advocates (DRA) to use the settlement funds to fund research and education on discrimination against homosexuals and the disabled, two groups persecuted by the Nazis. Korman held in the event there are any unclaimed residual funds, they should instead be allocated to humanitarian assistance programs serving the life-threatening needs of Holocaust survivors.⁷²
- (5) On April 21, 2004, Korman again rejected the DRA's request that additional funds be allocated to the disabled survivors. Although Korman sympathized with their hideous stories of persecution, he held the disturbing facts have no bearing on the question in this litigation: how to distribute funds in a lawsuit primarily about returning money to those individuals from whom Swiss banks profited.⁷³
- (6) On April 22, 2004, Korman reiterated his March 9th opinion that the limited restitution funds must be used strictly for the "neediest of the needy" Holocaust survivors, primarily those in the FSU. He noted the survivors in the U.S. who are

“just managing” are nevertheless managing, while survivors in the FSU lack the bare necessities of life and can only survive through the distributions of the restitution settlement funds.⁷⁴

- (7) On June 17, 2004, following an April 2004 hearing on distribution of residual funds, Korman reiterated his previous orders by saying, “[a]ll individuals who survived the Holocaust bear scars, and all merit relief. We should not be engaged in comparing degrees of suffering among Holocaust survivors”⁷⁵

Korman’s opinions illustrate the difficult, equitable issues involved in the distribution of limited Holocaust restitution funds and the emotional component of attempting to compensate victims not only of the Holocaust, but of all genocides.

VI. CURRENT HIGH-STAKE LAWSUITS OVER NAZI-LOOTED ART

We end this year’s annual review of the Holocaust restitution litigation by returning to the subject of Nazi-looted art.

1. Litigation Over a Nazi-Looted Picasso

The battle over Pablo Picasso’s “Femme en Blanc” painting indicates a common element in litigation over Nazi-looted art. No matter how courts rule in this case, the initial injustice of the Nazi robbery will not be undone since the truly culpable person, the thief who stole the Picasso in the first place, will unlikely be punished. In the dispute, there are two victims:

The person who originally owned the art and the good faith purchaser.⁷⁶

In December 2002, Thomas Bennigson, a Boalt Hall law student, filed suit against Marilyn Alsdorf, an art collector from Chicago, seeking the return of the 1922 Picasso “Femme en Blanc,” worth approximately \$10 million. Bennigson learned of the Picasso’s existence and his claim of right to the painting after being contacted by the London-based Art Loss Register (ALR)⁷⁷. In 2001, the ALR was asked to investigate the painting’s ownership history—its “provenance”—and discovered the Picasso was a Nazi-stolen artwork.

In the 1940s, Carlotta Landsberg, Bennigson’s late German-born grandmother, entrusted the painting to an art dealer after fleeing Nazi Germany. The art dealer, who was also a German Jew, fled to Paris, which was thought to be a safe haven from the Nazis. However, after the German conquest of France, the dealer then fled to the United States and left the Picasso in Paris, where it was seized by the Nazis.⁷⁸

Although the painting was never found before her death in 1994, the French and German governments recognized Mrs. Landsberg’s claim for loss of the Picasso and agreed to preserve her right to recover it if it were ever found.⁷⁹

Marilyn Alsdorf, the defendant, purchased the Picasso with her husband in 1975 from an art gallery in Paris. After it hung in her home for almost thirty years, she decided to sell the painting and consigned it to a Los Angeles art gallery. In 2001, the gallery attempted to sell the painting to a European collector, and the collector contacted ALF to investigate the ownership history of the painting. After determining the painting was Nazi-looted art, the ALR notified both Alsdorf and Bennigson of its findings.⁸⁰

Bennigson filed a complaint in a Los Angeles Superior Court to recover the painting, claiming he inherited rightful ownership. Before the court could issue a temporary

restraining order to keep the Picasso in California, Alsdorf had the painting flown back to Chicago where she resides.⁸¹

In June 2003, the Los Angeles state judge quashed service of Bennigson's suit for lack of personal jurisdiction, holding the case should be transferred to Chicago.⁸² The California Court of Appeal affirmed, maintaining Alsdorf did not subject herself to California's jurisdiction by displaying the painting in a California gallery for eight months.⁸³ The California Supreme Court granted review. Its decision is currently pending. If the Court rules in Alsdorf's favor, the case will be litigated in Illinois.⁸⁴

On October 21, 2004, the United States government intervened in the dispute when agents of the FBI and the U.S. Marshals Office entered Mrs. Alsdorf's Chicago residence and seized the Picasso. The seizure came as a result of the U.S. Attorney in Los Angeles filing a forfeiture action in federal court in Los Angeles and the court issuing an arrest warrant authorizing the U.S. to take custody of the Picasso. The court issued the warrant based on the allegation that the painting was subject to U.S. forfeiture once Mrs. Alsdorf transported the painting from Los Angeles to Chicago. This interstate shipment is claimed to be unlawful because it was done with the knowledge that the painting was stolen by Nazi troops during the French occupation in World War II.⁸⁵

After thirty years, Mrs. Alsdorf no longer has possession of the painting. The Picasso is currently being held in federal custody in Chicago pending a forfeiture hearing to determine whether the forfeiture should be decreed.⁸⁶

2. The Holocaust Restitution Campaign Goes to Hollywood

Hollywood legend Elizabeth Taylor filed a lawsuit on May 2004 in Los Angeles federal court to make a preemptive declaration that she is the rightful owner of the 115-year-old

Van Gogh, "View of the Asylum and Chapel at Saint-Remy," valued at approximately \$10 million.⁸⁷ Canadian descendants of a German Jew, Margarete Mauthner, claim that Mauthner was forced to sell the Van Gogh to flee the Nazis in 1933 and are demanding Taylor return the painting to them.⁸⁸

Taylor disputes the claim, stating the Mauthner heirs "have not provided a shred of evidence that the painting ever fell into Nazi hands."⁸⁹ A German Jew, Alfred Wolf, who fled Nazi Germany, put the painting up at a Sotheby's auction in London in 1963.⁹⁰ At the auction, Taylor's father purchased the painting for \$257,000.⁹¹

The case is presently in the early stages of litigation. A symbol of the case's notoriety is a story of the dispute—including a photo of Taylor proudly displaying the painting—in *People* magazine.⁹²

VII. NAZI-LOOTED ART CASES RECENTLY SETTLED WITHOUT LITIGATION

Many more Holocaust looted art claims have settled without resorting to litigation. The lawsuits may dominate the headlines, but in the last seven years, quiet diplomacy and private negotiations have led to the return of some significant artworks to their rightful owners. Of course, while litigation may not have expressly led to the resolution of these claims both in the United States and abroad, the threat of American litigation remains a powerful incentive for possessors of Holocaust looted art—museums, art galleries, or private collectors—to find an out-of-court resolution. Since the Holocaust restitution campaign began in the mid-1990s, more than two thousand artworks have been returned to their rightful owners worldwide without litigation.

In 2004, there were three noteworthy settlements involving the return of valuable artworks to private individuals from: a German

museum, a U.S. art gallery, and the Czech government.

1. The German Museum Foundation's Private Settlement

In New York City, a German Museum Foundation, after it reached a private settlement in May 2004, returned a cherished heirloom to the family of the original owners, Sigmund and Erna Fein, who fled Nazi Germany during the Holocaust era. The Holocaust Claims Processing Office (HCPO) of New York State helped facilitate the negotiations with the Stiftung Preußischer Kulturbesitz (SPK), Berlin's Museum Foundation. The Fein family chose to donate the painting for exhibition to the Leo Baeck Institute in New York City, a research and lecture center dedicated to the study of German Jewish history.⁹³

The Fein heirs had been trying to recover the 1853 Anselm Feuerbach painting, entitled *Mädchenkopf* (Head of a Girl), since the end of the war in 1945. The market value of the painting is estimated to be close to \$20,000.⁹⁴ Instead of hiring an attorney or filing a suit, the Fein heirs filed an art claim in 2001 with the HCPO, which conducted extensive research to locate the painting and reached an amicable agreement between the Fein heirs and the SPK in Berlin.⁹⁵

2. United States Art Gallery's Quiet Restoration

In April 2004, the Utah Museum of Fine Arts quietly returned a small painting by François Boucher, "*Les Jeunes Amoureux*,"⁹⁶ to the daughter and daughter-in-law of the original owner, Andre Jean Seligmann. Seligmann was a Jewish art dealer who fled with his family to the United States during the war. He died in 1945.⁹⁷

After Mr. Seligmann fled the country, Hitler's aides, on the instructions of Hermann

Goering, confiscated over 400 paintings from his gallery, including the Boucher painting. Goering apparently visited the Seligmann gallery before the war and admired its collection. As Germany began to lose the war, Goering sent a trainload of art from his hunting lodge to safety in Bavaria. The train was abandoned en route and the contents looted. The Boucher painting disappeared. In 1967, it surfaced in a New York Gallery. In 1993, a collector, who had purchased the painting earlier, donated it to the Utah Museum of Fine Arts in Salt Lake City.⁹⁸

In 2003, an art researcher writing a book on Goering's stolen art collection traced the painting via the Internet to the Utah museum. Informed of the painting's checkered background, the museum conducted its own research. In April 2004, the museum voluntarily returned the painting to the Seligmann heirs.

3. The Czech Government's Private Negotiations

In March 2004, the Commission for Looted Art in Europe (ECLA) reached an agreement after two years with the Czech government and returned a collection of 150 drawings to the Israeli heirs of attorney Arthur Feldmann, an enthusiastic art collector, of former Czechoslovakia.⁹⁹

In 1939, the Nazis confiscated Mr. Feldmann's art collection, which included over 700 drawings. Mr. Feldmann and his wife perished during the Holocaust and were survived by their two sons who live in Israel. In the mid-1990s, the Feldmann sons turned to the Czech courts to recover their parents' artwork, but the courts rejected the lawsuit on the ground that the limitations period for bringing the lawsuit had expired.¹⁰⁰

In 2000, however, the Czech Republic passed a new law enabling the Feldmann sons to bring an action again. Instead of resorting to litigation, however, the sons turned this time to the ECLA to negotiate with the Czech

²⁹ *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2254 (2004).

³⁰ *Id.* at 2252 (quoting 28 U.S.C. § 1602 (2000)).

government and the gallery holding the drawings. In March 2004, the gallery agreed to return 150 drawings to the Feldmann sons.¹⁰¹
³² *Id.*

VIII. CONCLUSION

³³ *Id.*
As the above annual survey shows, the final chapter of Holocaust restitution litigation is far from completion. A number of cases are in various stages of litigation, and it may well be that the Supreme Court may, once again, take up another Holocaust restitution case. Important settlements of Holocaust restitution claims have also taken place outside of the litigation process. It will be interesting to see what developments the next year brings. We look forward to reporting them to you.
³⁴ *Id.* at 19.

Endnotes

¹ *Id.* at 17-18.

³⁵ *Id.* at 18, 396 (2003).

⁴⁰ *Id.* at 424-25, 427.

⁴¹ 124 S. Ct. 2240 (2004).

⁴² ICHECO is a private commission established to resolve unpaid Holocaust-era insurance claims. See *General European Insurance Companies v. Republic of Austria*, 2003 WL 21890843 at *3 (S.D.N.Y. 2003), *aff'd*, 317 F.3d 954 (9th Cir. 2002), *aff'd on other grounds sub nom. Republic of Austria v. Altmann*, 124 S. Ct. 2240 (2004). The U.S. government has supported ICHECO since its inception in 1986. See *General European Insurance Companies v. Republic of Austria*, 2003 WL 21890843 at *3 (S.D.N.Y. 2003), *aff'd*, 317 F.3d 954 (9th Cir. 2002), *aff'd on other grounds sub nom. Republic of Austria v. Altmann*, 124 S. Ct. 2240 (2004).
⁴³ *Id.* at 424-25, 427.

⁴⁵ *Garb*, 2003 WL 21890843 at *3.

⁶ *Generali*, 2004 WL 2311298 at *5 (S.D.N.Y. Oct. 14, 2004).

¹⁴ *Republic of Poland v. Garb*, 124 S. Ct. 2835 (2004).

⁷ *Garamendi*, 539 U.S. at 427.

⁴⁷ *Id.*

⁸ *Id.* at 424.

⁹ *Id.* at 420-421.

⁴⁸ *Mark Ham v. Republic of Austria*, 124 S. Ct. 2240 (2004).
⁴⁹ *Altmann v. Republic of Austria*, 124 S. Ct. 2240 (2004).

⁴² *Abrams v. Société Nationale des Chemins de Fer Français*, 175 F. Supp. 2d 423 (E.D.N.Y. 2001), *vacated sub nom. Société Nationale des Chemins de Fer Français v. Abrams*, 332 F.3d 173 (2d Cir. 2003), *vacated sub nom. Société Nationale des Chemins de Fer Français v. Abrams*, 332 F.3d 173 (2d Cir. 2003), *vacated sub nom. Société Nationale des Chemins de Fer Français v. Abrams*, 332 F.3d 173 (2d Cir. 2003).

⁵⁰ *Id.* at 425.

¹⁵ Appellee's Opposition Br. on Expedited App. at 8, *Altmann v. Republic of Austria*, 124 S. Ct. 2240 (2004).
¹⁶ *Id.* at 425.

⁵² 28 U.S.C. § 1605(a)(3) (2000).

³³ *Abrams*, 175 F. Supp. 2d at 426 (quoting 28 U.S.C. § 1603(b) (2000)).

¹⁹ *Altmann v. Republic of Austria*, 124 S. Ct. 2240 (2004).
¹⁸ *Id.* at 425.

³⁸ 28 U.S.C. § 1605(a)(3) (2000).

³⁷ *Altmann*, 124 S. Ct. 2240 (2004).

³³ *Abrams v. Société Nationale des Chemins de Fer Français*, 175 F. Supp. 2d 423 (E.D.N.Y. 2001), *vacated sub nom. Société Nationale des Chemins de Fer Français v. Abrams*, 332 F.3d 173 (2d Cir. 2003), *vacated sub nom. Société Nationale des Chemins de Fer Français v. Abrams*, 332 F.3d 173 (2d Cir. 2003).

²³ *Id.* at 1209-10.

⁵⁹ Hamblett, *supra* n. 48.

²⁴ Judge Cooper noted: "Plaintiff is not indigent. Nevertheless, the Court finds that the filing fee required by the Austrian courts is oppressively burdensome. Paying even the reduced amount would require the Plaintiff to expend a great majority, if not at all, of her liquid assets." *Altmann*, 124 S. Ct. 2240 (2004).

⁴⁹ See A. Dockser Marcus, *Aging and Ailing Generation Needs Care, but Some Have Other Goals*, 17 Wall St. J. (Jan. 15, 2003); Jane Eisner, *Learning from, Taking Care of Victims of Wretched Past*, 14 Phil. Inquirer (Apr. 27, 2003); Jeff Jacoby, *Help the Living Before the Dead*, B-5 Boston Globe (May 1,

2003).

⁶⁴ *In re: Holocaust Victim Assets Litigation*, 311 F. Supp. 2d 407, 419 (E.D.N.Y. Apr. 2, 2004).

⁶⁵ Special Master's Interim Report on Distribution and Recommendation for Allocation of Excess and Possible Unclaimed Residual Funds at 4 (Oct. 2, 2003).

⁶⁶ Adam Liptak, *For Holocaust Survivors: Law Versus Morality*, The N.Y. Times (Mar. 14, 2004).

⁶⁷ Special Master's Recommendations at 3.

⁶⁸ *In re: Holocaust Victim Assets Litigation*, 302 F. Supp. 2d 59 (E.D.N.Y. Feb. 19, 2004).

⁶⁹ *In re: Holocaust Victim Assets Litigation*, 319 F. Supp. 2d 301 (E.D.N.Y. June 1, 2004).

⁷⁰ *In re: Holocaust Victim Assets Litigation*, 302 F. Supp. 2d 89 (E.D.N.Y. Mar. 9, 2004).

⁷¹ *In re: Holocaust Victim Assets Litigation*, 311 F. Supp. 2d 363 (E.D.N.Y. Mar. 31, 2004).

⁷² *In re: Holocaust Victim Assets Litigation*, 311 F. Supp. 2d 407 (E.D.N.Y. Apr. 2, 2004).

⁷³ *In re: Holocaust Victim Assets Litigation*, 314 F. Supp. 2d 155 (E.D.N.Y. Apr. 21, 2004).

⁷⁴ *In re: Holocaust Victim Assets Litigation*, 314 F. Supp. 2d 169 (E.D.N.Y. Apr. 22, 2004).

⁷⁵ *In re: Holocaust Victim Assets Litigation*, 319 F. Supp. 2d 332 (E.D.N.Y. June 17, 2004).

⁷⁶ *Id.*

⁷⁷ The Art Loss Register in London, England, serves as a clearinghouse of historical information concerning Nazi-looted paintings and assists in negotiating the resolution of disputes concerning the ownership of art. Press Release, Federal Bureau of Investigation at the Los Angeles Field Office, *\$10 Million Picasso Painting Stolen by Nazis During World War II Seized by U.S.* (Oct. 26, 2004).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Karla Platoni, *The Ten Million Dollar Woman: She Fled Hitler to Paris, Got Stolen by the Reich, Disappeared, and Then Resurfaced in the State. Now She's in Court*, Eastbay Express (August 4, 2004).

⁸¹ *Id.*

⁸² *Bennigson v. Alsdorf*, No. BC287294 (L.A. County Super. Ct. June 2003).

⁸³ *Bennigson v. Alsdorf*, 2004 WL 803616 (Cal. App. 2 Dist. Apr. 15, 2004), *rev. granted*, (Cal. July 28, 2004).

⁸⁴ Platoni, *supra* n. 81.

⁸⁵ FBI Press Release, *supra* n.78.

⁸⁶ *Id.*

⁸⁷ Houston, *supra* n. 35.

⁸⁸ Bill Hutchinson, *Liz, Holocaust Kin Vie for Van Gogh*, N.Y. Daily News (May 27, 2004).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *The Puzzle of Liz Taylor's Van Gogh*, People (Nov. 1, 2004), 110.

⁹³ *Governor Announces Major Holocaust-Era Art Recovery*, Press Release of the Holocaust Claims Processing Office (May 7, 2004).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Painting Nazis Took Is Returned to Family*, The Associated Press (Apr. 4, 2004).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ David Rapp, *Stolen Treasure*,
<http://www.haaretz.com/hasen/spages/464046.html>
(accessed Oct. 26, 2004).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

