

2005

Reflections on Litigating Holocaust Stolen Art Cases

Donald S. Burris

E. R. Schoenberg

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Recommended Citation

Donald S. Burris and E. R. Schoenberg, Reflections on Litigating Holocaust Stolen Art Cases, 38 *Vanderbilt Law Review* 1041 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol38/iss4/5>

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Reflections on Litigating Holocaust Stolen Art Cases*

Donald S. Burris**
E. Randol Schoenberg***

Editors' Note: The Authors kindly submitted to the *Journal* a packet of newspaper clippings, court filings, and court orders relating to the cases described in the Article. While it was considered too difficult to print these materials, the *Journal* will keep them on file for parties interested in reviewing them.

TABLE OF CONTENTS

I.	GENERAL HISTORICAL OVERVIEW	1042
II.	ANALYSIS OF RECENT AND CURRENT LITIGATION MATTERS.....`	1043
	A. <i>The Altmann Case</i>	1044
	B. <i>The Bennigson Case</i>	1047
	C. <i>Other Holocaust Stolen Art Matters</i>	1049
III.	CONCLUSION	1049

* Presented by Donald S. Burris, Esq. and E. Randol Schoenberg, Esq., partners in Burris & Schoenberg LLP, whose law firm successfully argued the case of *Republic of Austria, et al. v. Altmann*, 541 U.S. 677 (2004) before the U.S. Supreme Court. Burris & Schoenberg LLP obtained the largest award (\$21 million) approved to date by the Swiss Bank Claims Resolution Tribunal in Brooklyn, New York, negotiated a number of successful settlement awards in other cases on behalf of the descendants of the original owners of the art works, and handled a number of Holocaust art cases as primary or local counsel in the California federal and state courts and elsewhere.

** Burris & Schoenberg, LLP, 12121 Wilshire Blvd., Suite 800, Los Angeles., CA 90025-1168 Tel: (310) 442-5559 Fax: (310) 442-0353, E-mail:don@bslaw.net Web: <http://www.bslaw.net>.

*** Burris & Schoenberg, LLP, 12121 Wilshire Blvd., Suite 800, Los Angeles, CA 90025-1168 Tel: (310) 442-5559 Fax: (310) 442-0353, E-mail:randols@bslaw.net Web: <http://www.bslaw.net>.

I. GENERAL HISTORICAL OVERVIEW

In this Article we have attempted to provide an overview of the Nazi-looted art cases in their historical context. We have based the discussion on our knowledge and experience in litigating art law cases, particularly cases involving Nazi art looting, post-war restitution, and recent developments in art law.

Any discussion of the legal implications of crimes committed by Nazi authorities during the Holocaust must begin with an obvious disclaimer. While bringing cases to recover artwork stolen by Nazi authorities is self-evidently a worthy pursuit, and while our firm is very proud to be intensively involved in this effort, we cannot even imagine the extent of the atrocities suffered by our clients' ancestors (and our own) as a result of the high crimes committed against them. It is nonetheless humbly gratifying to work in this area of the law and to think that, in some small way, we are bringing comfort to the victims and their families. In the case of Mrs. Altmann, a vibrant and fascinating 89-year-old woman who vividly recalls the specific location in her uncle and aunt's residence of each Klimt masterpiece she is seeking to recover, this sense of personal gratification is particularly high.

As will be obvious to even a casual reader, these cases often involve complicated legal scenarios, particularly in the well-publicized *Altmann* proceeding and the *Bennigson v. Alsdorf* "Picasso case" both of which this Article discusses at length.¹ Accordingly, the case filings are substantial; readers who wish to further investigate these materials are invited to contact the Authors. In the *Bennigson* case, for example, our firm filed three separate complaints and one cross-complaint; these filings required not only multiple appearances in the California courts, but also an out-of-state appearance in Illinois, the current situs of the painting, and a coordination of efforts with the U.S. Attorney's Office for the Central District of California, which filed one of the complaints in the form of a seizure action.²

Mrs. Altmann's landmark case was appealed all the way to the U.S. Supreme Court on the issue of sovereign immunity before the district court could even consider the substantive merits of the case. Our firm's opposition in presenting the case in the Supreme Court was not only private counsel representing the Austrian authorities but also a

1. *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001), *aff'd and remanding*, 317 F.3d 954, *aff'd on other grounds*, 541 U.S. 677 (2004), *remanded to 377 F.3d 1105* (9th Cir. 2004), *remanded to 335 F. Supp. 2d 1066* (C.D. Cal. 2004); *Bennigson v. Alsdorf*, No. B168200, 2004 WL 803616, at *1 (Cal. Ct. App. Apr. 15, 2004), *reh'g denied* (May 11, 2004), *review granted*, *Bennigson v. Alsdorf*, S124828 (Cal. July 28, 2004), available at http://appellatecases.courtinfo.ca.gov/search/maincasescreen/cfm?dist=0&doc_id=322295&rc=1; *Alsdorf v. Bennigson*, No. 04 C 5953, 2004 WL 2806301, at *1 (N.D. Ill. Dec. 3, 2004).

2. *Bennigson*, 2004 WL 803616; *Alsdorf*, 2004 WL 2806301.

representative of the Solicitor General's Office. In an effort to obtain expeditious justice, as described below, Mrs. Altmann, per our suggestion, ultimately agreed to yet another forum—a mandatory arbitration proceeding in Austria. In some of the more recently filed cases, we anticipate that such procedural battles have only just begun, and may prove to be equally challenging. Nonetheless, in the face of the incredibly difficult and often time-consuming processes involved in undertaking art theft cases, we remain cautiously optimistic about the potential to obtain some significant redress and a modicum of justice for the victims' families.

The pervasiveness of Nazi art looting has been well documented and includes the theft, storage, and cataloging of thousands of paintings, some of which ended up in the private collections of Adolf Hitler, Hermann Goering, and other lesser-known Nazi functionaries.³ The post-war governmental authorities in Germany, Austria, and, to a lesser extent, the formerly occupied European countries, developed post-war restitution programs that were implemented sporadically. In Mrs. Altmann's case, the Austrian authorities attempted to force the family representatives to waive claims to other potentially more valuable paintings to obtain the release of other paintings or properties.⁴ While these and other restitution programs were discussed at the Vanderbilt Symposium, this Article focuses on the litigation arena.

We and the small group of colleagues who have been litigating such art theft cases⁵ have based our civil actions on the following legal premise: under U.S. law, a thief cannot convey good title to a bona fide purchaser—good faith purchasers are required to return stolen property to their prior owners. This is obviously not a new rule.⁶ A second basic premise, expressed in numerous cases and statutes, is that the U.S. governmental institutions, state and federal, have a strong public policy interest in seeking the return of Nazi-looted art.

II. ANALYSIS OF RECENT AND CURRENT LITIGATION MATTERS

In this Section we analyze the background and procedural and substantive contexts of several of the major cases our firm has been handling on a worldwide basis for Holocaust stolen art claimants.

3. See *Altmann*, 142 F. Supp. 2d at 1193; see also *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002).

4. See *Altmann*, 317 F.3d at 960.

5. In this regard, the Authors would like to particularly recognize the achievements and assistance of Lawrence Kaye and Howard Spiegler, partners at the New York City firm of Herrick & Feinstein, LLP, with whom we have worked closely and who have been an inspiration to us.

6. See, e.g., *Hoffman v. Carow*, 1839 N.Y. Lexis 21 (N.Y. 1839) (action of trover against auction house for sale of stolen goods purchased in good faith).

A. *The Altmann Case*

The *Altmann* case, because it reached the Supreme Court and has a particularly interesting factual and procedural history, is the most well-known and well-published of our cases. The poignant facts were extensively summarized in the Complaint filed in the U.S. district court, and are excerpted below:

13. MARIA ALTMANN was born into the affluent Jewish Bloch-Bauer family in Vienna, Austria in 1916. Every Sunday she and her four older siblings would have brunch over at the beautiful home owned by her uncle Ferdinand and aunt Adele. Ferdinand was her father's brother; Adele was her mother's sister. Together, the two couples had combined their names to form the Bloch-Bauer family. Ferdinand's home, a large building on one of the finest streets in Vienna, was gorgeously decorated with fine artworks, tapestries, porcelain and furniture.
14. Ferdinand was a patron of Gustav Klimt and owned seven of his most important paintings, which are the paintings at issue in this case: *Adele Bloch-Bauer I*; *Adele Bloch-Bauer II*; *Beechwood*; *Schloss Kammer am Attersee III*; *Apple Tree I*; *Houses in Unterach am Attersee*; and *Amalie Zuckerkandl*. Reproductions of these paintings are attached hereto as Exhibit A.
15. Ferdinand was a citizen of Czechoslovakia with his principal residence (until 1938) in Vienna, Austria. The Klimt paintings were housed in his large home located at Elisabethstrasse 18 in Vienna.
16. When Adele died suddenly of meningitis on January 24, 1925, Ferdinand created a memorial room for her with the two full-length portraits of her and all four landscapes by Klimt. A seventh Klimt painting, the portrait of *Amalie Zuckerkandl*, was in Ferdinand's bedroom.
17. Adele was survived by her husband Ferdinand Bloch-Bauer, having designated him her sole heir in her will dated January 19, 1923. Adele's will asked, but did not require, that her husband consider donating the two portraits of her and the four landscapes to the AUSTRIAN GALLERY after his death. The entire will provided as follows (in translation):

My Last Will:

Of sound mind and subject to no outside influence, I dispose as follows in the event of my death:

I. I appoint my husband, Ferdinand Bloch-Bauer, as the sole heir to my entire estate.

II. If my husband predeceases me, my sole heir shall be my brother-in-law Dr. Gustav Bloch-Bauer or, if he predeceases me, his descendants . . .

I kindly ask my husband to bequeath my two portraits and the four landscapes by Gustav Klimt after his death to the Austrian State Gallery in Vienna, and to leave the Vienna and Jungfer, Brezan library, which belongs to me, to the Vienna People's and Workers' Library . . .

I have written and signed this last will and testament with my own hand.

Adele Bloch-Bauer

Vienna, 19th January 1923

I appoint my brother-in-law Dr Gustav Bloch-Bauer my executor.

18. In the probate proceedings for Adele Bloch-Bauer, ALTMANN's father Gustav Bloch-Bauer, "as the party assigned authority to handle the estate and proceedings" (i.e. Ferdinand Bloch-Bauer's representative) supplied the property affirmation in lieu of an oath, the verification of the estate, and the testamentary compliance confirmation, via the following declaration:

I hereby provide the testamentary compliance confirmation, as follows:

In Section I of her will dated 19th January 1923, the testatrix designates her husband Mr. Ferdinand Bloch-Bauer her sole heir.

To verify fulfillment thereof, I hereby refer to the statement of inheritance, which was issued unconditionally in his name and for him, relates to the entire estate, and is hereby accepted . . .

In the second and third paragraphs of item III the testatrix asks her husband several favors, which he promise duly to comply with even though they do not have the mandatory quality of a testamentary disposition.

It is important to note that the Klimt paintings are not the property of the testatrix, but rather of the testatrix's widower.

The nephews and nieces of the testatrix who are listed in Section III, Paragraph 3, have duly noted the contents of the will.⁷

Mrs. Altmann first filed suit in the Austrian courts on the theory that the paintings were located at the state-owned national gallery. The principal impediment to that suit was that Austrian law requires the payment of court filing fees in proportion to the amount in dispute.⁸ Thus, in Mrs. Altmann's case, filing fees would have reached the incredible sum of almost \$2 million, based on the paintings' values at the time of filing;⁹ this amount easily exceeded Mrs. Altmann's assets. We therefore applied to the Austrian court to reduce the required fees. The Austrian court partially granted this request, but required Mrs. Altmann to pay an amount equal to, but not in excess of, her available assets. Not content with this result, Austria filed an appeal seeking to raise the fee to the maximum level. At this early stage in litigation, we wrote to the Austrian authorities and asked if they would agree to

7. See Complaint at 7–9, *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001) (No. CV08913).

8. See *Altmann*, 142 F. Supp. 2d at 1209–10.

9. By all objective standards, the paintings have since risen significantly in value, both on an individual and collective basis.

resolve the cost issue and the other major procedural hurdle—the statute of limitations—by agreeing to reduce the court fees and waive the statute. The 1998 Austrian restitution law did not create a private right of action, but did provide that stolen artworks should be returned regardless of limitations periods.¹⁰ The Austrian authorities did not respond to these requests for many months. The final alternative was to file suit in the local U.S. district court based on Mrs. Altmann's residency in California.

The history of the Altmann proceedings and the legal issues raised by the case are well-documented in various published decisions by the district court, the Ninth Circuit Court of Appeals, and the Supreme Court.¹¹ Austria's U.S. counsel raised numerous procedural arguments in response to the complaint. The case was finally heard by the Supreme Court on February 25, 2004, on the last of such arguments—that the Foreign Sovereign Immunities Act of 1976 (FSIA) cannot be applied retroactively in cases concerning acts which took place during World War II, before the FSIA's enactment. The Solicitor General's Office, representing the U.S. government, weighed in on Austria's side.

At oral argument before the Supreme Court, a number of the Justices appeared to understand and accept our legal arguments, judging from the Court's questions and responses. We believed we had a fair chance of winning, but nevertheless had to wait over three months for the Court's ruling. On June 7, 2004 the Supreme Court ruled 6-3, in several opinions, that Mrs. Altmann's claims could proceed.¹² The Court held that *Republic of Austria v. Altmann*¹³, like the FSIA, could be applied to all actions, regardless of when the acts underlying the claim took place. The Ninth Circuit had already ruled that Mrs. Altmann's claims fell under the so-called "expropriation clause" of the FSIA because the case concerned rights in property taken in violation of international law, where that property was owned and operated by an agency of a foreign state that conducted business in the United States.¹⁴ Because the Austrian Gallery advertised its exhibits and sold books in the United States, the Ninth Circuit held that Austria could be sued under this exception even for property not located in the United States.¹⁵ The Supreme Court let these portions of the decision stand without review.¹⁶ So, after almost four years of litigation, Mrs. Altmann's case was

10. See *Altmann*, 317 F.3d at 973.

11. *Altmann*, 142 F. Supp. 2d at 1187.

12. *Altmann*, 541 U.S. at 688, 697 (holding that the FSIA could be applied to all actions, regardless of when the underlying acts took place).

13. *Id.*

14. 28 U.S.C. § 1605(a)(3) (2005).

15. *Altmann*, 317 F.3d at 967–69.

16. *Republic of Austria v. Altmann*, 539 U.S. 987 (2003).

remanded to the U.S. District Court for the Central District of California in Los Angeles.¹⁷

Earlier this year, after yet another round of procedural skirmishing on remand, including multiple interrogatories and a denied motion to dismiss for failure to exhaust Mrs. Altmann's administrative remedies, the case was scheduled for a settlement conference. In the course of that conference and further discussions, the parties and counsel agreed to a binding arbitration proceeding in Austria before three approved arbitrators who were to be chosen by a set process. As of the publication of this Article, the arbitrators had been designated and the matter argued in Vienna, Austria in September. We are awaiting the decision of the arbitration panel.

B. *The Bennigson Case*¹⁸

Mrs. Altmann's case is obviously one of the most prominent, but it is by no means the only complex stolen art case from the Holocaust era. For years our firm handled, and has only recently settled, a case involving a striking Picasso painting, *Femme en Blanc*.¹⁹ Marilyn Alsdorf, a prominent Chicago collector and philanthropist, is the current and past owner of the painting. Mrs. Alsdorf and her husband purchased the painting around 1975, allegedly unaware that it had been looted by the Nazis. The pre-war owner was Carlota Landsberg of Berlin, who had entrusted it to a reputable art dealer, Justin Thannhauser, in Paris. After the Nazis invaded France in 1940, the painting disappeared. In 2002, twenty-seven years after purchasing it, Mrs. Alsdorf consigned the painting to a Los Angeles-based art dealer, David Tunkl. Mr. Tunkl initially sent the painting to Switzerland to be viewed by a potential purchaser. The prospective buyer in turn contacted the Art Loss Register in London, with which our firm works closely. The Art Loss Register identified the painting as a work looted by the Nazis. After the painting was returned to Los Angeles, Carlota Landsberg's heir, Tom Bennigson, attempted to negotiate for its release or a settlement payment. We were retained by Mr. Bennigson on December 10, 2002 and immediately contacted the attorney representing Mrs. Alsdorf and Mr. Tunkl. Three days later, the attorney and his clients met in Chicago and decided that they would be better off if the painting were in Chicago.²⁰ The following

17. *Altmann*, 317 F.3d at 1105.

18. *Bennigson*, 2004 WL 803616.

19. See *Settlement Reached for Stolen Picasso*, CNN, August 10, 2004, available at <http://www.cnn.com/2005/LAW/08/10/looted.picasso.ap> (discussing the settlement of the Bennigson case and showing a picture of *Femme en Blanc*.)

20. On January 1, 2003 a new law took effect in California, extending the statute of limitations in claims against museums and galleries for Nazi-looted art to December 31, 2010. CAL. CIV. PROC. CODE § 354.3 (2005).

week opposing counsel informed us that the painting was “on its way to Chicago.”

We immediately filed a complaint and sought a temporary restraining order, but the Superior Court Judge assigned to the matter, David Yaffe, insisted that we give notice to the other side before he would grant the order. We dutifully gave notice and appeared the next day only to learn that the painting had been shipped on a plane to Chicago just hours before the hearing. The judge granted the restraining order, but it was too late. Mrs. Alsdorf then sought to have the case dismissed before the trial judge, Victor Person; she argued that because she had insufficient contacts with California, the California court had no jurisdiction over her. The trial court agreed, somewhat shockingly, and granted the motion.²¹ We appealed. Coincidentally or not, this was yet another Holocaust art theft case caught in a seemingly endless debate over jurisdiction, albeit with a much younger claimant than Mrs. Altmann.

On April 15, 2004, the California Court of Appeal affirmed the trial court, finding again that the court had no personal jurisdiction over Mrs. Alsdorf.²² The court called the eight month presence of the painting in Los Angeles “fleeting, but fortuitous.”²³ The Court further held, seemingly contrary to applicable principles of personal jurisdiction, that Mrs. Alsdorf did not purposefully avail herself of the California jurisdiction when she entrusted her painting to be sold by a California dealer.²⁴ Further, the court believed that the action for recovery of the painting concerned the taking by the Nazis in France, and therefore the cause of action against Mrs. Alsdorf did not arise from her contacts with California.²⁵ The court also found that it would not be fair or just to force Mrs. Alsdorf to submit to a court in California in this matter. In a final disappointing decision, the court ruled that the opinion would not be published.²⁶

We petitioned the California Supreme Court to review the decision, and on July 28, 2004, that petition was unanimously granted—a highly unusual occurrence in a civil matter.²⁷ On September 10, 2004, after the California Supreme Court granted review, Mrs. Alsdorf’s counsel commenced a declaratory relief action against Mr. Bennigson in Chicago in the U.S. District Court for the Northern District of Illinois.²⁸ The action sought to quiet title in the painting and was allowed to remain

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

22. *Bennigson*, 2004 WL 803616, at *5.

23. *Id.* at *8.

24. *Id.* at *5.

25. *Id.* at *6.

26. *Id.* at *7.

27. *Bennigson v. Alsdorf*, S124828 (Cal. July 28, 2004), available at <http://appellatecases.courtinfo.ca.gov>.

28. *Bennigson*, 2004 WL 2806301.

inactive in Illinois pending review by the California Supreme Court. We were forced, however, to appear periodically to report on the status of the California proceedings.

Settlement negotiations with regard to the *Bennigson* case were, to use an understatement, arduous. Finally however, the case was recently amicably settled, on a favorable basis to our client, with the able assistance of a Los Angeles-based federal magistrate.

C. Other Holocaust Stolen Art Matters

While *Altmann* and *Bennigson* represent our firm's two most highly publicized and procedurally complicated cases, we have also had occasion to become involved in other Holocaust-related actions in the past several years. We have represented Holocaust survivors and their families, including members of Mr. Schoenberg's own family, and served as representatives for dozens of other Austrian-Jewish families who contacted our firm. In August 2000, Mr. Schoenberg was invited by the U.S. Department of State to take part in the Austrian property negotiations, and was the only U.S.-based attorney involved in the negotiations with a personal connection to the claimants. Indeed, the story of the negotiations deserves an essay or book of its own; Stuart Eizenstat's book *Imperfect Justice* barely scratches the surface.²⁹ We have also taken part in lectures and group presentations dealing with the issues arising in these cases. While some of our other cases were marked by formal filings, such as the *Cassirer* case which was filed in Santa Barbara as an offshoot to the *Bennigson* case, many others have remained in the negotiations phase for years. In such negotiations, we aim to convince the defendant gallery, individual, or even nation, of the value of settling without having to endure the cost and negative publicity of being sued as the holders of Holocaust Art and as the possessors of stolen property seized at the behest of the Nazi authorities. In our most recent success story, we were able to work closely with the representatives of a French museum to work out an equitable settlement whereby the museum authorities bought out our clients' in a Canaletto painting.

III. CONCLUSION

We thank the editors of the *Journal* for inviting us to participate in the Symposium and for inviting us to co-author this Article. We hope to report additionally successes and our continued record for justice on behalf of the relatives of Holocaust victims.

29. STUART EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* (2003).
