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## "Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc".: Entrenchment of the Due Diligence Requirement in Replevin Actions for Stolen Art

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# RECENT DEVELOPMENT

## *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*: Entrenchment of the Due Diligence Requirement in Replevin Actions for Stolen Art

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### I. INTRODUCTION

Art prices are reaching spectacular heights. Current estimates place annual worldwide retail sales between ten billion and forty billion dollars;<sup>1</sup> each auction season, bidders smash previous price records. For example, at a May 9, 1989 Sotheby's auction, a buyer paid 47.9 million

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1. See Lee, *Greed Is Not Just for Profit*, FORBES, Apr. 18, 1988, at 65, 68.

dollars for Picasso's self-portrait "Yo-Picasso"; Gauguin's "Mata Mau (In Olden Times)" sold for 24.2 million dollars.<sup>2</sup> The next day at Christie's, an investor purchased a Monet for 14.3 million dollars, twice its estimated value.<sup>3</sup> The inflated prices have inspired people without a prior interest in art to conceive a sudden passion for collecting by any available means.<sup>4</sup> As a potentially lucrative, multibillion dollar business, art collecting has attracted a full range of unscrupulous individuals.<sup>5</sup>

Although it is difficult to assemble accurate art theft statistics, experts estimate that approximately 53,000<sup>6</sup> worldwide thefts occur annually, with losses valued at between five billion and ten billion dollars.<sup>7</sup> The increasing magnitude of art theft has raised concerns with regard to the difficulty of locating stolen art; experts estimate that recoveries are as low as two percent.<sup>8</sup> An international passion for acquiring potentially valuable artworks contributes to the problem of recovering stolen art.<sup>9</sup> Buyers in the high demand market rarely probe the origins of desirable pieces.<sup>10</sup> Thieves frequently smuggle and trade stolen art internationally through organized rings of brokers and middlemen.<sup>11</sup> Smuggled pieces eventually filter into otherwise legitimate markets.<sup>12</sup> A cooling off period after the theft may complicate recovery attempts further.<sup>13</sup> Not surprisingly, locating and recovering a particular piece of stolen art in this environment may require several years.<sup>14</sup>

2. Dickey, *Missing Masterpieces*, NEWSWEEK, May 29, 1989, at 65.

3. *Id.*

4. *Id.*

5. DeGraw, *Art Theft in Perspective*, 31 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 1 (1987).

6. *Id.* at 3.

7. *Heisting Buyers on Their Own Petards*, U.S. NEWS & WORLD REP., May 15, 1989, at 16.

8. The International Association of Art Security has estimated that recoveries of stolen art are approximately 2%, while the publication *Art Gallery* has estimated 5% recovery, and the International Foundation of Art Research has estimated 13% recovery. DeGraw, *supra* note 5, at 4.

9. Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1124 (1980).

10. *Id.*

11. See Note, *DeWeerth v. Baldinger: Making New York a Haven for Stolen Art?*, 64 N.Y.U. L. REV. 909, 910-11 (1989).

12. *Id.* at 910. Police for some time have speculated the existence of large international stolen art networks capable of transferring works among several continents through complex channels. The ease with which valuable artworks find their way to legitimate markets supports this proposition. For example, Roman coins and Byzantine ivories valued in excess of \$1 million originally stolen from an Italian museum passed through at least four art dealers before their arrival in a New York auction gallery. Similarly, paintings housed in Holland museums were stolen in 1978, and made available to unsuspecting dealers in Los Angeles less than 24 hours later. See Comment, *supra* note 9, at 1124 n.9.

13. See Dickey, *supra* note 2, at 68 (stating that canvases may be stolen by criminal organizations that withhold works from the market for 100 years if necessary, provided that the networks have no immediate need for cash).

14. See Comment, *supra* note 9, at 1124 n.12 (observing that the lack of a cohesive interna-

The delays inherent in the process of locating and identifying stolen art not only hinder recovery efforts by victims of theft, but also plague innocent art purchasers. In a market in which the origin of a particular piece of work is difficult to determine, the statute of limitations historically has been the good faith purchaser's primary shield against liability.<sup>15</sup> Unfortunately, inconsistent judicial interpretations of when limitations periods begin to run have generated considerable uncertainty regarding the rights of both good faith purchasers and true owners.<sup>16</sup> No consistent guidelines instruct good faith purchasers on when their legal rights to property vest or true owners on their requisite legal obligations in replevin actions.<sup>17</sup>

This Recent Development examines the emerging duty of due diligence that some jurisdictions impose on owners of lost or stolen art in replevin actions.<sup>18</sup> In jurisdictions that apply the due diligence requirement, the limitations period begins to run when the true owner, through diligent search, locates or reasonably should have located the artwork or its possessor.<sup>19</sup> This Recent Development concludes that the recent district court decision in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*<sup>20</sup> properly places the onus of due diligence on the true owner of stolen art. Finally, this Recent Development proposes that the *Goldberg* rationale should entrench firmly the due diligence requirement in stolen art cases, and that continued judicial application of this duty will provide long-needed uniformity in this area of the law.<sup>21</sup>

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tional enforcement effort, as well as a fragmented network available for reporting art thefts, are primary causes for such delays).

15. The delays owners of stolen art face in locating their property often push this event beyond the running of relatively short limitations periods. See Comment, *supra* note 9, at 1125. Typically, expiration of the limitations period not only extinguishes the owner's right to sue, but divests the owner of title in the property, vesting good title in the innocent purchaser. *Id.*

16. See *id.* at 1126.

17. The common-law action of replevin allowed owners to recover specific lost or stolen personal property. In some states this form of action is known as either replevin, detinue, claim and delivery, bail, or sequestration, but "replevin" is used as a generic label for all actions to recover the property itself. In contrast, the owner seeks monetary damages for unlawful possession of personal property in "conversion" actions. See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 5.13, at 399, § 5.14, at 403 (1973).

18. See *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), *rev'g* 658 F. Supp. 688 (S.D.N.Y.), *cert. denied*, 486 U.S. 1056 (1988); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989).

Courts have justified imposing a due diligence requirement only on owners of stolen art as opposed to any owners of stolen property because art owners are uniquely situated to mount an effective search. See *DeWeerth*, 836 F.2d at 109 (stating that owners of stolen art have a better chance of recovering lost items than most owners of stolen property).

19. See *Goldberg*, 717 F. Supp. at 1387-88.

20. *Id.* at 1374.

21. In replevin actions for stolen art, the law of the state having the most contacts to the

## II. STATUTES OF LIMITATIONS IN REPLEVIN ACTIONS

### A. Background

Statutes of limitations originated from the belief that certain time constraints are necessary to make prosecution of a claim both fair and efficient.<sup>22</sup> The punitive concept underlying limitations periods is that parties should be deprived of the right to legal redress if they fail to bring their claims to court promptly.<sup>23</sup> Statutes of limitations implicitly condemn unnecessary delay in the filing of an action as an undue burden on defendants.<sup>24</sup>

Consistent with many civil actions, claimants must file their suits to reclaim stolen property within the applicable statute of limitations period.<sup>25</sup> All statutes dictate when the limitations period begins to run; typically the period initiates upon the accrual of the cause of action.<sup>26</sup> Determining when accrual occurs in replevin actions, however, presents some difficulties. Most statutes are disturbingly vague about accrual and implicitly delegate the determination of this issue to the courts.<sup>27</sup>

As a result, two distinct judicial interpretations of accrual have de-

artwork's subsequent purchase will govern. Because artwork often is transported among several states or nations, the owner's replevin action may be controlled by the unfamiliar laws of a foreign jurisdiction. See *supra* note 179 and accompanying text.

22. One commentator stated: "A defendant who does not imagine that any claim may be brought against him is not only likely to have parted with evidence that he at one time had but is also likely to have lost track of evidence which at one time he could have obtained." Williams, *Limitation Periods on Personal Injury Claims*, 48 NOTRE DAME LAW. 881, 884 (1973).

23. Comment, *supra* note 9, at 1127.

24. See *id.* As one New Jersey court has stated:

Statutes of limitations embody important public policy considerations in that they stimulate activity and punish negligence and promote repose by giving security and stability to human affairs. They are intended to run against those who are neglectful of their rights and who fail to use reasonable and proper diligence in the enforcement thereof.

*Leake v. Bullock*, 104 N.J. Super. 309, 313, 250 A.2d 27, 29 (App. Div. 1969) (citation omitted). The United States Supreme Court also has noted: "[Statutes of limitations] are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist." *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 390 (1868).

25. See Comment, *supra* note 9, at 1125.

26. See *United States v. Wurts*, 303 U.S. 414, 418 (1938); *Grayson v. Harris*, 279 U.S. 300, 304 (1929); *Merritt v. Economy Dep't Store*, 125 Ind. App. 560, 128 N.E.2d 279 (App. Ct. 1955).

27. See, e.g., *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961); CAL. CIV. PROC. CODE § 312 (West 1982); IND. CODE ANN. § 34-1-2-1 (Burns 1986); IOWA CODE ANN. § 614.1 (West Supp. 1990); MINN. STAT. ANN. § 541.01 (West 1988). Commenting on legislative deference in this regard, the New Jersey Supreme Court in *Fernandi* stated: "[T]he legislatures have not at all expressed themselves on the matter, preferring to leave to judicial interpretation and application the rather obscure statutory phraseology that the plaintiff's proceeding shall be instituted within a stated period after his cause of action 'shall have accrued.'" *Fernandi*, 35 N.J. at 439, 173 A.2d at 279 (quoting N.J. STAT. ANN. § 2A:14-1 (West 1960)).

veloped in replevin actions brought against good faith purchasers.<sup>28</sup> Some courts have held that accrual occurs at the time the innocent purchaser takes wrongful possession.<sup>29</sup> Other jurisdictions maintain that accrual does not occur until the owner makes a demand for return of the property.<sup>30</sup> The determination of when the cause of action accrued—and the limitations period consequently began to run—frequently determines the outcome in a suit for the recovery of stolen art. Therefore, courts should evaluate carefully the consequences and the rationale of selecting one point of accrual over another.

### B. Accrual upon Wrongful Possession

Many states regard acquisition of property by a bona fide purchaser as an assertion of an adverse claim so detrimental to the owner's dominion that demand for the property's return is not a prerequisite for commencement of the limitations period.<sup>31</sup> In these jurisdictions, the limitations period begins to run upon wrongful possession.<sup>32</sup> While this rule, which considers the good faith purchaser to be in unlawful possession upon receipt of the property<sup>33</sup> rather than upon demand and refusal,<sup>34</sup> seems to favor the true owner, the rule actually benefits the good faith purchaser in replevin actions.

The purpose of statutes of limitations is to afford the good faith

28. Compare *Bozeman Mortuary Ass'n v. Fairchild*, 253 Ky. 74, 81, 68 S.W.2d 756, 759 (1934); *Galvin v. Bacon*, 11 Me. 28, 29-31 (1831); *Trudo v. Anderson*, 10 Mich. 357, 368-70 (1862); *Adams v. Coon*, 36 Okla. 644, 646, 129 P. 851, 852 (1913); and *Riesinger's Jewelers, Inc. v. Roherson*, 582 P.2d 409, 412 (Okla. Ct. App. 1978) (all stating that accrual occurs upon wrongful possession) with *Butler v. Wolf Sussman, Inc.*, 221 Ind. 47, 50, 46 N.E.2d 243, 244 (1943); *Torian v. McClure*, 83 Ind. 310, 312 (1882); and *Menzel v. List*, 22 A.D.2d 647, 253 N.Y.S. 2d 43, 44 (App. Div. 1964) (all stating that accrual occurs upon demand for return of property rather than upon wrongful possession).

29. See *infra* notes 31-37 and accompanying text.

30. See *infra* notes 38-43 and accompanying text.

31. See *Bozeman Mortuary Ass'n*, 253 Ky. at 74, 68 S.W.2d at 756; *Galvin*, 11 Me. at 28.

32. These jurisdictions rationalize that because an innocent purchaser obtains possession from a wrongdoer, the purchaser's possession is tortious. See, e.g., *Bozeman Mortuary Ass'n*, 253 Ky. at 74, 68 S.W.2d at 756; *Galvin*, 11 Me. at 28; *Velsian v. Lewis*, 15 Or. 539, 16 P. 631 (1888).

33. Under the majority rule, the good faith purchaser is liable to the original owner in tort immediately upon conversion. RESTATEMENT (SECOND) OF TORTS § 229 (1965). The highly technical tort of conversion is so complicated that it seems to defy definition. Courts generally have described the tort as "the unlawful and wrongful exercise of dominion, ownership, or control by one person over property of another, to the exclusion of the exercise of the same rights by the owner, either permanently or for an indefinite time." *Pugh v. Hassell*, 206 Okla. 290, 291, 242 P.2d 701, 702 (1952) (quoting *Griffith v. McBride*, 188 Okla. 227, 228, 108 P.2d 109, 110 (1940)). Generally, replevin and conversion are alternative actions for a wrongful possession of property, differing only in the relief sought. In replevin the plaintiff seeks return of the property itself, while in conversion actions the plaintiff seeks monetary damages in lieu of the property. See *Pearson v. Dodd*, 410 F.2d 701, 706-07 (D.C. Cir.), cert. denied, 395 U.S. 947 (1969).

34. See *infra* notes 38-43 and accompanying text.

purchaser security against stale claims.<sup>35</sup> Because the time period during which a true owner may bring an action against the purchaser commences when the cause of action accrues,<sup>36</sup> the purchaser wants accrual to occur as soon as possible. Early accrual not only expedites the point at which the innocent purchaser can be secure in possession, but also accelerates the time that such purchaser can be assured of legal title to the property.<sup>37</sup> Consequently, in jurisdictions in which demand and refusal are unnecessary to begin the running of the limitations period, good faith purchasers effectively are favored over true owners in replevin actions for stolen art, despite the legal characterization of the innocent purchaser as a wrongdoer.

### C. Demand Requirement

Other jurisdictions require that an owner's demand for return of the property be refused before an owner may bring a replevin action against a good faith purchaser.<sup>38</sup> The asserted justification for the demand requirement is that an innocent purchaser for value and without knowledge of the theft cannot, without a demand, be deemed a wrongdoer merely by acquiring property.<sup>39</sup> This legal principle not only shields bona fide purchasers from liability for conversion, but also prevents real owners from bringing replevin actions unless they first give the holder an opportunity to return the property.<sup>40</sup>

The good faith purchaser's protection, however, is illusory.<sup>41</sup> Practically, the demand requirement in a replevin action prolongs the duration of an owner's right to sue a good faith purchaser; the statute of limitations commences only after the real owner has located the stolen

35. See *supra* notes 22-24 and accompanying text.

36. See *supra* note 26 and accompanying text.

37. As one commentator has stated:

While in form these statutes merely limit the right of the owner to bring legal proceedings to repossess his property or to recover its value in case of conversion, all but universally in the United States the expiration of the statutory period has the effect, not only of barring the legal remedy, but also of extinguishing the owner's title and of transferring it to the adverse possessor or possessors.

R. BROWN, *THE LAW OF PERSONAL PROPERTY* § 4.1, at 33 (3d ed. 1975) (footnotes omitted).

38. See *supra* notes 28, 30 and accompanying text.

39. See *Atlas Assurance Co. v. Gibbs*, 121 Conn. 188, 194, 183 A. 690, 693 (1936); *Butler v. Wolf Sussman, Inc.*, 221 Ind. 47, 50, 46 N.E.2d 243, 244 (1943); *Gillett v. Roberts*, 47 N.Y. 28, 34 (1874).

40. Presumptively, individuals who have come into possession of property lawfully, which they are not entitled to retain, will surrender it upon proper demand and should be afforded the opportunity to do so without being subjected to a lawsuit. *Butler*, 221 Ind. at 50, 46 N.E.2d at 243.

41. As the court noted in *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988): "Until demand and refusal, the purchaser in good faith is not considered a wrongdoer, even though this rule somewhat anomalously affords the owner more time to sue a good-faith purchaser than a thief." 836 F.2d at 106 (citation omitted).

art and demanded its return.<sup>42</sup> Although the purpose of the demand requirement is to protect innocent purchasers, this rule actually favors true owners in suits to recover stolen art.<sup>43</sup>

### III. EMERGENCE OF THE DUE DILIGENCE REQUIREMENT

If a state does not impose a demand requirement, an individual who innocently purchases stolen art is implicated in tortious behavior.<sup>44</sup> Alternatively, states that require demand view the purchaser as truly innocent.<sup>45</sup> Despite conflicting policy rationales underlying the legal status of a good faith purchaser, judicial recognition of the unique circumstances in stolen art cases has led to careful scrutiny of the effect of limitations periods in replevin actions for stolen art.<sup>46</sup> New York, as a major international art center and an adherent to the demand requirement in replevin actions,<sup>47</sup> frequently has been the site for legal disputes over the ownership of stolen art.<sup>48</sup> The Second Circuit, in applying New York's demand requirement, has been at the forefront in developing this area of the law.<sup>49</sup>

New York is the center of art trade in the United States, with over five hundred private art dealers and auction houses in New York City alone.<sup>50</sup> Sotheby's and Christie's, the world's two largest international art houses, have their American headquarters in New York City.<sup>51</sup> Not surprisingly, the sheer magnitude of art transactions occurring in New York<sup>52</sup> has required this state to cultivate legal principles unique to recovery actions for stolen art.<sup>53</sup> As a result, New York has departed from

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42. *Id.*

43. *See Note, supra* note 11, at 916 n.54 (stating that the demand requirement works primarily to the advantage of original owner-plaintiffs, not defendants in stolen art cases).

44. *See supra* notes 31-37 and accompanying text.

45. *See supra* notes 38-43 and accompanying text.

46. *See, e.g., DeWeerth*, 836 F.2d at 103.

47. In New York accrual occurs only upon demand and refusal. This rule is known as the "substantive demand requirement." *See Note, supra* note 11, at 916. New York also has a procedural demand rule that applies when demand is not a substantive element of the cause of action. *Id.* at 916 n.56. The procedural demand rule has very limited application in New York. *See Kunst-sammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1161 (2d Cir. 1982) (citing J. WEINSTEIN, H. KORN & A. MILLER, *NEW YORK CIVIL PRACTICE* ¶ 206.01, at 2-159 (1980)).

48. *See infra* notes 57-107 and accompanying text.

49. *See infra* notes 65-107 and accompanying text.

50. *See Note, supra* note 11, at 909 (citing *Art Now Gallery Guide*, Dec. 1988, at 25-78, which lists 541 art dealers and auction houses in Manhattan alone).

51. *See Lee, supra* note 1, at 68.

52. Sotheby's and Christie's alone had combined sales in excess of \$2.2 billion in art sales in 1987. *Id.*

53. In addition to demand, true owners now must show due diligence in locating and claiming their artworks before they can successfully recover stolen pieces. *See infra* notes 99-101 and accompanying text.



its traditional demand requirement by adopting a duty of due diligence in these cases.<sup>54</sup> New York's due diligence requirement recently has commanded the attention of at least one other jurisdiction, perhaps serving as the foundation for a more uniform interpretation of accrual issues in stolen art cases.<sup>55</sup> An examination of New York case law provides insight into the emergence of the due diligence requirement and its potential application in other jurisdictions.<sup>56</sup>

### A. New York

#### 1. *Menzel v. List*<sup>57</sup>

The leading case applying New York's traditional demand requirement to an action for the recovery of stolen artwork is *Menzel v. List*.<sup>58</sup> Erna Menzel, the owner of a Chagall painting, left the work in Belgium when he fled during the 1940 German invasion.<sup>59</sup> The whereabouts of the painting remained a mystery until it resurfaced in New York twenty years later.<sup>60</sup> In 1962 Menzel noticed a reproduction of the Chagall in an art book and sued to recover the painting from Albert List, who had purchased the piece in good faith from a New York art gallery.<sup>61</sup>

The New York Appellate Division rejected List's contention that the suit was untimely and held that the statute of limitations begins to run only after the original owner locates the artwork, demands its return from the bona fide purchaser, and is refused.<sup>62</sup> Because of the demand requirement, a twenty-year lapse of time between the art theft and relocation of the painting did not bar the suit.<sup>63</sup> In effect, *Menzel* established a precedent favoring the original owners of lost artwork despite the assertion that the demand requirement protects good faith purchasers.<sup>64</sup>

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54. See *infra* notes 57-107 and accompanying text.

55. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989).

56. For a detailed account of the development of the due diligence requirement in New York, see Note, *supra* note 11.

57. 22 A.D.2d 647, 253 N.Y.S.2d 43 (App. Div. 1964) (affirming trial court's denial of defendant's motion to dismiss). The facts and procedural history of the case as it proceeded following this affirmance are recorded in *Menzel v. List*, 49 Misc. 2d 300, 267 N.Y.S.2d 979 (Sup. Ct. 1966), *modified*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (App. Div. 1967), *modification rev'd*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).

58. 22 A.D.2d at 647, 253 N.Y.S.2d at 43.

59. *Menzel*, 24 N.Y.2d at 93, 246 N.E.2d at 743, 298 N.Y.S.2d at 980.

60. *Id.*

61. *Id.* at 94, 246 N.E.2d at 743, 298 N.Y.S.2d at 980.

62. *Menzel*, 22 A.D.2d at 647, 253 N.Y.S.2d at 44.

63. *Id.*

64. See *supra* notes 38-43 and accompanying text.

2. *Kunstsammlungen zu Weimar v. Elicofon*<sup>65</sup>

Two Second Circuit decisions<sup>66</sup> recently have limited the protection granted to original owners in *Menzel*. In *Kunstsammlungen zu Weimar v. Elicofon*,<sup>67</sup> the first of those cases, a German art museum sought to recover two Albrecht Dürer paintings that disappeared during World War II.<sup>68</sup> The paintings had been on exhibit at the museum until 1943, but were moved to a nearby castle for safekeeping during the War.<sup>69</sup> The paintings disappeared during American occupation of the castle in 1945.<sup>70</sup> The director of the museum reported the disappearance and immediately began to search for the paintings.<sup>71</sup>

Edward Elicofon purchased the Dürer paintings in 1946 from an ex-serviceman who claimed he had purchased the artwork while in Germany.<sup>72</sup> In 1966 Elicofon discovered that the paintings were listed in a book describing various stolen artworks, and he subsequently made public his possession of the Dürers.<sup>73</sup> The German museum sued to recover the paintings when it learned that they were in Elicofon's possession.<sup>74</sup>

The district court rejected Elicofon's assertion that the cause of action accrued in 1946, upon Elicofon's purchase, and that the suit, therefore, was untimely.<sup>75</sup> The district court instead held that the statute of limitations commenced only after a demand had been made and refused—in this case, in 1966.<sup>76</sup> The district court cautioned, however, that a party may not delay making a demand unreasonably to postpone commencement of the limitations period.<sup>77</sup> Elicofon claimed that absent a diligent search for the paintings, the museum had delayed its demand unreasonably, implying that the museum must satisfy a due diligence requirement.<sup>78</sup> Although the district court stated that the museum

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65. 678 F.2d 1150 (2d Cir. 1982), *aff'g* 536 F. Supp. 829 (E.D.N.Y. 1981).

66. See *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), *rev'g* 658 F. Supp. 688 (S.D.N.Y.), *cert. denied*, 486 U.S. 1056 (1988); *Elicofon*, 678 F.2d at 1150.

67. 678 F.2d at 1150.

68. *Id.* at 1152.

69. *Id.* at 1155.

70. *Id.* at 1155-56.

71. *Id.* at 1156.

72. *Id.*

73. *Id.* Apparently, Elicofon had the paintings framed and hung in his home where they remained until 1966. *Id.*

74. *Id.*

75. *Elicofon*, 536 F. Supp. at 848.

76. *Id.*

77. *Id.* at 849 (citing *Heide v. Glidden Buick Corp.*, 188 Misc. 198, 67 N.Y.S.2d 905 (App. Term 1947) (holding that a demand cannot be postponed by a plaintiff indefinitely because of the requirement that it be made within a reasonable time)).

78. *Id.*

made a diligent, but fruitless, effort to locate the paintings,<sup>79</sup> it side-stepped the issue of whether New York law might require due diligence on the part of the true owner.

On appeal, the Second Circuit affirmed and explicitly rejected the argument that New York's demand requirement implied a duty of due diligence.<sup>80</sup> The Second Circuit followed *Menzel's* strict interpretation of the demand requirement and reiterated New York's implicit practice of favoring original owners in actions to recover stolen property.<sup>81</sup> Five years later, in *DeWeerth v. Baldinger*,<sup>82</sup> the Second Circuit re-examined the *Elicofon* district court's implication that a true owner of stolen art has a duty to search diligently for the property.

### 3. *DeWeerth v. Baldinger*<sup>83</sup>

In *DeWeerth v. Baldinger* the owner of a Monet painting, Gerada DeWeerth, shipped the artwork to southern Germany for safekeeping during World War II.<sup>84</sup> The painting disappeared following the quartering of American soldiers in the home during 1945.<sup>85</sup> DeWeerth reported the loss to the military government in 1946.<sup>86</sup> During subsequent years, she made inquiries of an art expert and her attorney concerning the theft. In 1957 DeWeerth reported the loss of the Monet to the Bundeskriminalamt, the West German federal bureau of investigation. These efforts to find the painting were unsuccessful and search efforts effectively were abandoned after 1957.<sup>87</sup>

In the meantime, the Monet had reappeared in the international art market.<sup>88</sup> In 1956 the Wildenstein art gallery of New York acquired the Monet on consignment from an art dealer in Geneva.<sup>89</sup> In 1957 the

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79. *Id.* at 849-50. In 1945 the museum reported the Dürers missing to the Land Office of Education. In the same year, the government submitted information to the Kaiser Freidrich Museum, which in turn informed United States military authorities of the looting. Between 1946 and 1948, the director of the Kunstsammlungen also contacted the Bavarian National Museum and Soviet Military Administration. During the early 1950s the United States State Department was informed of the loss and disseminated information to various international agencies. *Id.* at 850. The district court concluded that the efforts to locate the paintings, following many channels in the face of insurmountable obstacles, reflected a continuous and diligent search. *Id.* at 852.

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

81. *Id.*

82. 836 F.2d 103 (2d Cir. 1987), *rev'g* 658 F. Supp. 688 (S.D.N.Y.), *cert. denied*, 486 U.S. 1056 (1988).

83. 836 F.2d at 103.

84. *DeWeerth*, 658 F. Supp. at 690.

85. *Id.*

86. *Id.* at 691.

87. *Id.*

88. *Id.*

89. *Id.* In December of 1956 the New York City art gallery of Wildenstein & Co. acquired the Monet from Francois Reichenbach, an art dealer in Geneva, Switzerland. From December 1956

gallery sold the painting to defendant Baldinger.<sup>90</sup> Baldinger twice loaned the painting for public display in New York.<sup>91</sup> Four published references to the painting accompanied these displays.<sup>92</sup> The publicity enabled DeWeerth to trace the stolen Monet to Baldinger in December 1982.<sup>93</sup> After Baldinger refused DeWeerth's demand for return of the painting, DeWeerth filed suit for its recovery in February 1983.<sup>94</sup>

Baldinger claimed that DeWeerth's lack of diligence in locating and claiming the painting and the unreasonableness of the delay in commencing the action barred the suit.<sup>95</sup> The district court, relying on *Elicofon*, did not decide whether the original owner had a duty of due diligence as a prerequisite to a demand for the return of the painting.<sup>96</sup> Instead, the court focused on the reasonableness of the delay and determined that timeliness grounds did not bar DeWeerth's action.<sup>97</sup> The court concluded that, despite the passage of time, DeWeerth's efforts were substantial and the delay was reasonable.<sup>98</sup>

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until June 1957 the painting was in the possession of Wildenstein where it was presented to prospective buyers. *Id.*

90. *Id.* Edith Marks Baldinger purchased the Monet in June 1957 for \$30,900 in good faith and without knowledge of any adverse claim. *DeWeerth*, 836 F.2d at 105. At the time of the lawsuit, the painting was estimated to be worth over \$500,000. *Id.* at 104.

91. *DeWeerth*, 658 F. Supp. at 691. Baldinger exhibited the Monet at a benefit held in the Waldorf-Astoria Hotel in New York City, from October 29 to November 1, 1957. *Id.* The painting again was displayed during a Wildenstein art gallery exhibition entitled "One Hundred Years of Impressionism" held April 2 to May 9, 1970, also in New York City. *Id.*

92. *Id.* The published works in which references appeared are: (1) R. WALTER, S. CRUSSARD & FOUNDATION WILDENSTEIN, 1 CLAUDE MONET: BIBLIOGRAPHIE ET CATALOGUE RAISONNE, 1840-1881 (1974); (2) WILDENSTEIN GALLERY, ONE HUNDRED YEARS OF IMPRESSIONISM, A TRIBUTE TO DURAND-RUEL, A LOAN EXHIBITION (1970); (3) D. WILDENSTEIN, MONET: IMPRESSIONS (1967); (4) WALDORF-ASTORIA HOTEL, FESTIVAL OF ART (1957). *Id.*

93. *DeWeerth*, 836 F.2d at 105. *Catalogue Raisonne* indicated that Wildenstein sold the Monet in 1957 and exhibited the painting in 1970. *Id.*

In 1982 DeWeerth requested that Wildenstein identify the current owner. Wildenstein refused, resulting in a lawsuit brought under N.Y. Civ. PRAC. L. & R. § 3102(c) (McKinney 1970) for "disclosure to aid in bringing an action." *DeWeerth*, 836 F.2d at 106. In December 1982 the court ruled in favor of DeWeerth, compelling Wildenstein to identify Baldinger. *Id.*

94. *DeWeerth*, 836 F.2d at 106. DeWeerth demanded return of the Monet by letter dated December 27, 1982. By letter dated February 1, 1983, Baldinger refused to cooperate. DeWeerth filed a recovery action on February 16, 1983. *Id.*

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

96. *Id.*

97. *Id.* at 694-95.

98. *Id.* The district court favorably viewed the efforts taken by DeWeerth to locate the painting following World War II. *See supra* text accompanying notes 86-87. Finding these endeavors "fruitless" although "diligent," the district court concluded that DeWeerth's failure to pursue the Monet beyond 1957, until discovery of the whereabouts of the painting in a 1981 publication, was reasonable. Contributing to the district court's characterization was the sympathetic image of DeWeerth as an elderly individual, without the resources, knowledge, or experience of an institutional collector, such as the government-owned art museum in *Elicofon*. Consequently, the district court noted that DeWeerth did not have the means to muster a more credible search for the missing painting. *DeWeerth*, 658 F. Supp. at 694-95.

On appeal, the Second Circuit reversed on the issue of due diligence, holding that an owner's obligation to make a demand without unreasonable delay implies an obligation to pursue the stolen property diligently.<sup>99</sup> The ostensible purpose of New York's demand requirement—to protect the good faith purchaser—persuaded the Second Circuit that the law implied such a duty.<sup>100</sup> The court reasoned that the due diligence requirement was necessary in order to allow a good faith purchaser some security in ownership.<sup>101</sup>

The Second Circuit consequently re-evaluated DeWeerth's efforts to locate the Monet under the newly articulated standard.<sup>102</sup> Whereas the district court found DeWeerth's search to be substantial,<sup>103</sup> the Second Circuit characterized her attempts as minimal.<sup>104</sup> The Second Circuit found particularly troublesome the owner's failure to conduct any search for twenty-four years.<sup>105</sup> Although the court implied that the due diligence standard may require less substantial efforts by an individual than an institutional owner, it observed that DeWeerth, a wealthy and sophisticated art collector, could have mounted a more extensive investigation.<sup>106</sup> Finding that DeWeerth did not satisfy her duty of due diligence, the Second Circuit ruled that the statute of limitations barred her claim to ownership of the artwork.<sup>107</sup>

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99. *DeWeerth*, 836 F.2d at 108. The Second Circuit gave three reasons for applying the due diligence rule in stolen art cases: (1) New York's (alleged) policy of protecting the good faith purchaser; (2) the general policies of repose and fairness to defendants favored a duty of due diligence; and (3) the duty of due diligence was especially appropriate for stolen art, which is not likely to be found by chance, but rather only by investigation. *See Note, supra* note 11, at 930-31.

100. *DeWeerth*, 836 F.2d at 108-09. The court departed from the principle enunciated in *Menzel v. List*, 22 A.D.2d 647, 253 N.Y.S.2d 43 (App. Div. 1964), which had protected true owners in replevin actions for other property. The court apparently realized the need for a rule tailored to the unique circumstances in stolen art cases.

101. In view of the policy of protecting good faith purchasers, the court stated: "A construction of the rule requiring due diligence in making a demand to include an obligation to make a reasonable effort to locate the property will prevent unnecessary hardship to the good-faith purchaser, the party intended to be protected." *DeWeerth*, 836 F.2d at 109.

102. *Id.* at 110.

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

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

105. *Id.* at 112.

106. *Id.*

107. *Id.* The court contrasted this long period of inaction to the "continuous and diligent search" following "many channels" in *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982). *Id.* at 111 (quoting *Elicofon*, 536 F. Supp. at 852).

B. *Indiana: Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*<sup>108</sup>

After the Second Circuit implied a duty of due diligence under New York law, Indiana also adopted this requirement.<sup>109</sup> During the highly publicized case of *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*,<sup>110</sup> the art world anxiously awaited a federal district court's interpretation of Indiana law on this issue. Art experts anticipated that the outcome of this case would establish important precedent by delineating the rights of both owners and buyers of stolen artworks.<sup>111</sup>

*Goldberg* concerned a controversy surrounding the ownership of four Byzantine mosaics originally affixed to a church in the village of Lythrankomi, Cyprus, in 530 A.D.<sup>112</sup> In 1974 Turkish troops invaded Cyprus and gained control of the northern regions of the island where the mosaics were located.<sup>113</sup> Sometime between 1976 and 1979 someone removed the mosaics from the church.<sup>114</sup> Neither the Republic of Cyprus nor the church authorized the removal or sale of the mosaics.<sup>115</sup>

Upon learning that the mosaics were missing, the Republic of Cyprus contacted the United Nations Educational, Scientific, and Cultural Organization (UNESCO), informed it of the significance of the lost art, and sought UNESCO's assistance in recovering the pieces.<sup>116</sup> The Republic of Cyprus also sought the assistance of several artistic and historical associations for the purpose of disseminating information about the missing mosaics.<sup>117</sup> In addition, Cyprus's Embassy in Washington, D.C. routinely sent press releases and mailed information concerning the general loss of Cyprus's cultural property and specifically the missing mosaics.<sup>118</sup> As a result of these efforts, the Republic of Cyprus recovered some minor antiquities and, more importantly, traced the

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108. 717 F. Supp. 1374 (S.D. Ind. 1989).

109. *See id.*

110. *Id.*

111. N.Y. Times, June 2, 1989, at C26, col. 5.

112. *Goldberg*, 717 F. Supp. at 1377.

113. *Id.* at 1378. As a result of the invasion, many villages, including Lythrankomi, were vacated as citizens sought refuge in the southern regions still controlled by the Republic of Cyprus. Since the invasion, citizens in the southern region generally have been denied access to occupied northern Cyprus. Since that time, however, they have received reports that several churches and national monuments in the occupied territory have been looted and destroyed. *Id.* at 1379.

114. *Id.* at 1379.

115. *Id.*

116. *Id.* at 1380.

117. Some of these organizations included the International Council of Museums, the International Council of Museums and Sites, and other European and American museums. *Id.*

118. *Id.*

missing mosaics to Peg Goldberg, an Indianapolis art dealer.<sup>119</sup>

Goldberg purchased the early Christian mosaics from an Amsterdam art dealer in July 1988.<sup>120</sup> The mosaics were transported to Geneva, Switzerland, to be delivered to Goldberg.<sup>121</sup> Goldberg testified that prior to consummation of the purchase, she inquired whether the mosaics had been reported as stolen or missing and whether any applicable treaties might prevent them from being imported into the United States.<sup>122</sup> She further testified that she placed inquiries with the International Foundation for Art Research in New York and UNESCO's office in Geneva.<sup>123</sup> In addition, Goldberg claimed she telephoned customs offices in the United States, Germany, Switzerland, and Turkey regarding the proposed importation.<sup>124</sup> Satisfied that she would be able to take legal possession of the mosaics, Goldberg finalized financing arrangements and returned to the United States with the artwork in July 1988.<sup>125</sup>

In the fall of 1988 Goldberg contacted several prospective buyers.<sup>126</sup> As a result of these contacts, the Republic of Cyprus learned that the mosaics were in Goldberg's possession in Indianapolis.<sup>127</sup> Upon demand for return of the artwork and Goldberg's refusal, the Republic of Cyprus, in 1988, filed suit in Indiana's federal district court for the mosaics' return.<sup>128</sup>

The timeliness of the action was one of the primary issues before the court.<sup>129</sup> Applying Indiana law, the *Goldberg* court observed that

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119. *Id.*

120. In June 1988 Goldberg was in Amsterdam inspecting a Modigliani painting for a prospective purchaser. When the deal fell through, the seller mentioned to Goldberg that he was aware of four early Christian mosaics that were for sale. He told Goldberg that an archaeologist found the mosaics in the rubble of an extinct church in northern Cyprus. Goldberg was impressed by photographs of the mosaics and expressed her interest in purchasing the art. Goldberg claimed she relied on export documentation that appeared to be in order, believed the mosaics had been exported properly from Cyprus, and subsequently agreed to purchase the pieces for \$1,080,000. *Id.* at 1381-82.

121. *Id.* at 1382.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1383.

126. *Id.* at 1384.

127. *Id.* at 1385. In the fall of 1988 Goldberg contacted Dr. Geza von Habsburg, an art dealer operating out of Geneva and New York, in an attempt to sell the mosaics. Dr. von Habsburg subsequently contacted the Getty Museum in California to discuss whether the Getty would be interested in the mosaics. The Getty explained that it did not collect Byzantine art and told von Habsburg that because of its close working relationship with the Republic of Cyprus, it would be notifying that country about the mosaics. Consequently, the Republic of Cyprus learned that the mosaics were in Goldberg's possession in Indianapolis. *Id.* at 1384-85.

128. *Id.* at 1385.

129. *Id.*

the applicable statute of limitations required the owner to commence an action for recovery of stolen property within six years of accrual.<sup>130</sup> Goldberg claimed that the action accrued in 1979, when church and government officials learned that the mosaics were missing, and thus was barred by the six-year limitations period.<sup>131</sup>

Finding no Indiana case controlling the issues of when the statute of limitations begins to run and whether it has been tolled in an action for replevin of valuable artwork, the *Goldberg* court predicted how an Indiana court would resolve these issues.<sup>132</sup> In making this determination, the district court stated that it was unnecessary to inquire whether Goldberg was a bona fide purchaser.<sup>133</sup> The court apparently overlooked precedent that emphasizes the importance of this distinction in Indiana.<sup>134</sup> Indiana clearly requires demand of the innocent purchaser by the true owner in replevin actions for personal property.<sup>135</sup>

The Indiana Supreme Court squarely confronted this issue in *Wood v. Cohen*.<sup>136</sup> In *Wood* the plaintiff sought recovery of a horse from a bona fide purchaser who had acquired the horse from an alleged thief.<sup>137</sup> The supreme court noted that although a thief would be liable upon conversion, the owner could not maintain an action to recover the property against a good faith purchaser until the owner first demanded the property's return.<sup>138</sup> Consistent with this demand requirement, the Indiana Supreme Court later held in *Torian v. McClure*<sup>139</sup> that the statute of limitations does not begin to run in a replevin action until the true owner has demanded return of the property.<sup>140</sup> Indiana courts consistently have adhered to the demand requirement established in

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130. *Id.* The Indiana Code provides, in relevant part: "The following actions shall be commenced within six [6] years after the cause of action has accrued, and not afterwards. . . . [F]or recovering possession of personal property." IND. CODE ANN. § 34-1-2-1 (Burns 1986).

131. *Goldberg*, 717 F. Supp. at 1385.

132. *Id.* at 1388.

133. *Id.* at 1399 n.22.

134. *See, e.g., Wood v. Cohen*, 6 Ind. 455 (1855).

135. *See id.* at 456.

136. *Id.* at 455.

137. *Id.* at 455-56.

138. *Id.* at 456.

139. 83 Ind. 310 (1882).

140. In *Torian* the plaintiff sought recovery of a piano that he had rented to one Marsailles in June 1871. Marsailles, without the plaintiff's knowledge or consent, sold the piano in May 1872 to an innocent purchaser who claimed it as his own. The defendant-purchaser paid valuable consideration, without any notice of defective title, and retained possession of the piano for over six years. Holding that Indiana's six-year statute of limitations did not bar the plaintiff's action, which commenced in November 1878, the court declared that the limitations period does not begin to run against a bona fide purchaser in replevin actions until the true owner has demanded return of the property. *Id.* at 311.



Wood.<sup>141</sup> By contrast, Indiana follows the majority view that demand is unnecessary when possession is obtained wrongfully.<sup>142</sup>

The *Goldberg* court sidestepped the distinction between innocent purchaser and wrongful possessor by reasoning that because even a bona fide purchaser cannot acquire title to stolen goods, Goldberg's possession was inherently wrongful.<sup>143</sup> The district court perceived a bona fide purchaser's alleged wrongful possession as the linchpin in the accrual determination.<sup>144</sup> This inference departs from the Indiana Supreme Court's presumption that an innocent purchaser should be given the opportunity to surrender possession of illegally obtained merchandise without first being subjected to a lawsuit.<sup>145</sup>

In the district court's defense, the tenor of its opinion suggests that if it had perceived a bona fide purchase inquiry necessary for an accrual determination, then the court may have found that the suspicious circumstances surrounding the sale precluded Goldberg from attaining innocent purchaser status.<sup>146</sup> Under these circumstances the court's implicit assumption that wrongful possession is sufficient to trigger the running of the limitations period would be appropriate.

Nevertheless, the *Goldberg* court ignored this distinction and speculated how an Indiana court would determine what it perceived as a case of first impression.<sup>147</sup> In attempting to determine when an action

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141. See, e.g., *Butler v. Wolf Sussman, Inc.*, 221 Ind. 47, 46 N.E.2d 243 (1942); *Conner v. Comstock*, 17 Ind. 90 (1861); *Sherry v. Picken*, 10 Ind. 375 (1858); *Ledbetter v. Embree*, 12 Ind. App. 617, 40 N.E. 928 (App. Ct. 1895).

142. See, e.g., *Jones v. Smith*, 123 Ind. 585, 24 N.E. 368 (1889); *Parrish v. Thurston*, 87 Ind. 437 (1882); *Robinson v. Shatzley*, 75 Ind. 461 (1881) (all stating that demand is unnecessary when possession is fraudulent or otherwise wrongful); see also *Haffner v. Barnard*, 123 Ind. 429, 24 N.E. 152 (1889) (stating that it is only in cases in which one has lawful possession that a demand is necessary to maintain replevin action); 51 AM. JUR. 2D *Limitation of Actions* § 124 (1970) (stating general rule that statute of limitations begins to run against owner of lost or stolen property at the time of wrongful possession).

143. *Goldberg*, 717 F. Supp. at 1398-99. Interestingly, the district court bolstered this conclusion of law by quoting text from the *Torian* opinion, stating that the thief, "at the time he sold the piano to the defendant, had no title thereto, and could confer none on the defendant, and that the plaintiff is the owner thereof." *Id.* at 1398 (quoting *Torian*, 83 Ind. at 311). Yet, the *Goldberg* court overlooked the language immediately following this quotation, stating that "the statute of limitations, which bars an action for the recovery of personal property, did not begin to run against the plaintiff until a demand was made on the defendant for the return of the property, which was refused by the defendant." *Torian*, 83 Ind. at 311.

144. *Goldberg*, 717 F. Supp. at 1398.

145. The Indiana Supreme Court has stated that when an innocent purchaser has purchased property from a thief, "the law indulges that [he] will, upon demand, surrender it to the person entitled thereto and that he ought to be afforded an opportunity so to do without being subjected to the inconvenience and expense of a lawsuit." *Butler*, 221 Ind. at 50, 46 N.E.2d at 244.

146. Indeed, the *Goldberg* court reached this conclusion in a separate section of the opinion by applying Swiss law, despite the Swiss presumption that a purchaser acts in good faith. *Goldberg*, 717 F. Supp. at 1400-04.

147. *Id.* at 1388.

to recover personal property accrues, the *Goldberg* court noted Indiana's strong policy in favor of statutes of limitations.<sup>148</sup> The *Goldberg* court also addressed the effect of the discovery rule on the Indiana statute of limitations.<sup>149</sup> Under the discovery rule, a cause of action in tort cases accrues upon discovery of the injury by the plaintiff.<sup>150</sup> Relying on another supreme court decision, the *Goldberg* court noted that Indiana had applied the discovery rule in a suit brought by a patient who discovered an injury caused by a contraceptive device several years after insertion.<sup>151</sup> The Indiana Supreme Court, in *Barnes v. A.H. Robbins Co.*,<sup>152</sup> held that the discovery rule applied, and the statute of limitations commences on the date the plaintiff knew or should have discovered that she suffered an injury caused by an act of another.<sup>153</sup> The *Goldberg* court determined that Indiana's adoption of the discovery rule in *Barnes* and the stated policies supporting the rule indicated Indiana's willingness to extend it to other circumstances.<sup>154</sup>

In attempting to predict how Indiana would determine this issue, the *Goldberg* court also was influenced heavily by a New Jersey decision addressing a similar dispute.<sup>155</sup> In *O'Keeffe v. Snyder*<sup>156</sup> painter Georgia O'Keeffe filed suit to recover several pieces of her work. O'Keeffe claimed the paintings were stolen in 1946, but that she did not learn of their location until 1976, whereupon she filed suit to recover the artwork.<sup>157</sup> The defendant contended that a six-year statute of limitations barred O'Keeffe's action.<sup>158</sup> In determining whether O'Keeffe filed the action in a timely manner, the New Jersey Supreme Court reviewed its applications of the discovery rule. The *O'Keeffe* court noted

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148. Specifically, the Indiana Supreme Court has stated, "the judicial attitude is in favor of statutes of limitations . . . since they are considered as statutes of repose and as affording security against stale claims. . . . They are enacted upon the presumption that one having a well-founded claim will not delay in enforcing it." *Id.* at 1385 (citing *Shideler v. Dwyer*, 275 Ind. 270, 273, 417 N.E.2d 281, 283 (1981)).

149. *Id.* at 1386-88.

150. *Id.* at 1386.

151. *Id.* (citing *Barnes v. A. H. Robbins Co.*, 476 N.E.2d 84, 85 (Ind. 1985)).

152. 476 N.E.2d 84 (Ind. 1985).

153. *Id.* at 87-88.

154. *Goldberg*, 717 F. Supp. at 1387. In *Barnes* the Indiana Supreme Court stated:

Many jurisdictions have responded to the problems presented by this type of case by adopting a "discovery rule." The discovery rule provides that the statute of limitations in this type of cause runs from the date the negligence was or should have been discovered. The rule is based on the reasoning that it is inconsistent with our system of jurisprudence to require a claimant to bring his cause of action in a limited period in which, even with due diligence, he could not be aware a cause of action exists.

*Barnes*, 476 N.E.2d at 86.

155. *Goldberg*, 717 F. Supp. at 1388.

156. 83 N.J. 478, 416 A.2d 862 (1980).

157. *Id.* at 486, 416 A.2d at 866.

158. *Id.* at 483, 416 A.2d at 864-65.

that it had adopted the rule in the area of medical malpractice and then extended it to other contexts.<sup>159</sup> To mitigate unjust results, the *O'Keeffe* court concluded that the discovery rule likewise should apply to replevin actions involving stolen art.<sup>160</sup> Therefore, the court held that *O'Keeffe's* action accrued when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings.<sup>161</sup>

The *Goldberg* court was persuaded that Indiana would likewise extend the discovery rule in actions to recover stolen artwork.<sup>162</sup> The court stated that the discovery rule prevents the statute of limitations from commencing in situations in which the owner, using due diligence, cannot bring a suit because the location of the stolen artwork is unknown.<sup>163</sup> Citing *DeWeerth v. Baldinger*<sup>164</sup> the district court concluded that an owner who seeks protection under the discovery rule has a duty to use reasonable diligence to locate the stolen artwork.<sup>165</sup>

Implicitly, the district court assumed that, absent adoption of the discovery rule, the statute of limitations in Indiana would begin to run against the true owner upon a subsequent purchaser's possession of stolen property. The *Goldberg* court believed that the Republic of Cyprus actually would benefit by a postponement of the running of the limitations period under the discovery rule.<sup>166</sup> Had the district court concluded properly that the limitations period would not begin to run against a bona fide purchaser until the true owner demanded return of the artwork, extension of the discovery rule may have been unnecessary. Indeed, if the court had deemed *Goldberg* to be an innocent purchaser, the due diligence requirement would have had the unintended effect of expediting accrual, a result that otherwise would not have occurred until the owner demanded return of the stolen art. Acting under the district court's assumption that demand is categorically unnecessary in Indiana, the practical effect of the *Goldberg* decision is to illustrate how the due diligence requirement would apply in those states in which

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159. *Id.* at 491, 416 A.2d at 869.

160. *Id.* at 493, 416 A.2d at 870.

161. *Id.*

162. *Goldberg*, 717 F. Supp. at 1388.

163. *Id.* at 1389.

164. 658 F. Supp. 688 (S.D.N.Y.), *rev'd*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988).

165. *Goldberg*, 717 F. Supp. at 1389.

166. *See id.* at 1388 (declaring that statute of limitations would not commence until "the plaintiffs knew or reasonably should have known who possessed the mosaics"). As discussed previously, had the district court recognized the importance of this distinction, it may have concluded that *Goldberg* was not in fact a bona fide purchaser. In that event, the discovery rule properly would postpone accrual against the Republic of Cyprus. *See supra* notes 162-65 and accompanying text.

accrual ordinarily would occur upon wrongful possession by innocent purchasers as well as wrongful possessors.

In applying its newly formulated rule, the *Goldberg* court regarded the determination of due diligence as fact sensitive, requiring a case-by-case application.<sup>167</sup> After reviewing the search efforts taken by the Republic of Cyprus,<sup>168</sup> the court concluded that Cyprus had satisfied the due diligence requirement in its efforts to locate the missing mosaics.<sup>169</sup> Therefore, the district court found that the action did not accrue in this case, until late 1988, when the Republic of Cyprus knew or should have known the identity of the possessor of the mosaics.<sup>170</sup> Indiana's six-year limitations period accordingly did not bar the action.<sup>171</sup>

#### IV. ANALYSIS OF THE DUE DILIGENCE REQUIREMENT

Historically, two opposing judicial policies have rationalized conflicting accrual interpretations in replevin actions brought against good faith purchasers.<sup>172</sup> The emergence of the due diligence requirement should narrow this gap in stolen art cases. The *Goldberg* decision illustrates how the due diligence requirement should modify current accrual determinations in states that do not require demand. In these jurisdictions, the due diligence requirement embodied in the discovery rule should give true owners of stolen artwork more protection by delaying accrual of a cause of action that otherwise would occur upon the good faith purchaser's possession. Instead, accrual should not occur until the original owner, using due diligence, locates, or reasonably should have located, the possessor of the artwork.<sup>173</sup> Thus, the due diligence requirement will extend the period during which an original owner may bring a replevin action. This interpretation of the date of accrual is consistent with the view in these states that a good faith purchaser's status is that of a wrongdoer.<sup>174</sup>

The due diligence requirement has the opposite effect in demand jurisdictions, generating additional burdens on original owners of stolen art. Rather than accruing upon actual demand and refusal, an owner's action will accrue when he, through diligent search, reasonably should have located the possessor and made a demand for return of the prop-

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167. *Goldberg*, 717 F. Supp. at 1389.

168. See *supra* notes 116-19 and accompanying text.

169. *Goldberg*, 717 F. Supp. at 1389.

170. *Id.* at 1391.

171. *Id.*

172. See *supra* notes 35-43 and accompanying text.

173. See *Goldberg*, 717 F. Supp. at 1388 (employing the due diligence approach).

174. See *supra* note 33 and accompanying text.

erty.<sup>175</sup> Thus, if the law imposes a duty of diligent search on the true owner, accrual is accelerated. Whereas an actual demand previously was required before the limitations period could commence, failure to exercise due diligence also may cause the limitations period to run. The court now may impute demand and thereby reduce the period during which the original owner may bring a replevin action. This accrual determination is consonant with the underlying judicial policy in these states that a good faith purchaser is an innocent party.<sup>176</sup>

Consequently, the due diligence standard should represent a median, protecting both the innocent purchaser and the true owner and thereby develop a more uniform accrual construction. On a practical level, this development should provide a clearer guide to owners of stolen art in replevin actions. The owner must exercise due diligence in effecting a search for the stolen art.

At least one commentator has criticized the due diligence rule because of the potential for inconsistent application.<sup>177</sup> This appraisal focuses on the context of stolen art. It anticipates divergent judicial application of the rule in cases involving large, institutional plaintiffs and suits brought by small, individual plaintiffs, as each class of owner faces varying, often unreliable, avenues of investigation.<sup>178</sup> The due diligence rule arguably compels courts to make value judgments in an array of unfamiliar factual settings.<sup>179</sup> These criticisms, however, miss their mark.

The concern for inconsistent application of the due diligence standard in varying factual settings seems less disturbing than inconsistent rules of law that historically have faced both original owners and good faith purchasers of stolen art. Prior to the extension of the due diligence requirement an owner's obligations were unknown and often determined by the laws of a distant jurisdiction.<sup>180</sup> Uniform adoption of the due diligence requirement would provide some degree of consistency to this dilemma.

Moreover, the due diligence requirement, like all legal standards,

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175. See *DeWeerth v. Baldinger*, 836 F.2d 103, 108-10, (2d Cir. 1987) (applying the due diligence standard), *cert. denied*, 486 U.S. 1056 (1988).

176. See *supra* note 39 and accompanying text.

177. See, e.g., Note, *supra* note 11, at 938 (stating that inconsistency may result from applying a rigid standard of due diligence despite practical distinctions between institutional and individual plaintiff-owners).

178. See *id.* at 939.

179. See Wertheimer, *The Implications of the O'Keeffe Case*, 6 ART & THE LAW 44, 46 (1981); Note, *supra* note 11, at 938-42.

180. See *Goldberg*, 717 F. Supp. at 1393-94 (stating that the law of Indiana and not Swiss law determined accrual because Indiana had the most significant contacts with the mosaic's purchase).

turns on the particular facts of each case. Factual settings vary and will differ dramatically in stolen art cases.<sup>181</sup> Yet attacking the due diligence requirement because it arises in unfamiliar circumstances is in reality an assault on the competency of courts to apply a legal standard. Naturally, application of any legal standard requires judicial sensitivity to ensure fairness and equity in the adjudication of claims. Arguably, the courts are capable of answering this charge.<sup>182</sup>

Other commentators disapprove of the imposition of the due diligence requirement on innocent owners without demanding a similar level of care from buyers.<sup>183</sup> This evaluation suggests that courts should require a reciprocal duty of buyers to ensure that they are not purchasing stolen artwork.<sup>184</sup> Moreover, this objection implies that courts do not compel buyers to investigate the origins of potential purchases.

In fact, buyers generally are not relieved of taking reasonable precautions to verify title or the proper authority of the seller.<sup>185</sup> Courts usually require such efforts as a prerequisite to attaining good faith purchaser status.<sup>186</sup> Recently, courts have recognized that the unique nature of art warrants owners to effect a diligent investigation into the whereabouts of stolen pieces.<sup>187</sup> As the *DeWeerth* court noted, art is commonly kept in private collections, unadvertised and unavailable to the public.<sup>188</sup> As a result, locating stolen art usually is attributable to

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181. See generally *DeWeerth*, 836 F.2d at 103; *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982), *aff'd* 536 F. Supp. 829 (E.D.N.Y. 1981); *Goldberg*, 717 F. Supp. at 1374; *O'Keeffe*, 83 N.J. at 478, 416 A.2d at 862.

182. For example, in negligence actions courts define the requisite standard of care as that care which an ordinary person should have exercised under the circumstances. See *Sturdivant v. Polk*, 140 Ga. App. 152, 230 S.E.2d 115 (Ct. App. 1976). Presumably, courts are well-equipped to apply the due diligence standard in the same fashion.

183. See, e.g., *Wertheimer*, *supra* note 179, at 46.

184. *Id.*

185. See Horton, *How to Improve Standing as Good-Faith Art Buyer*, N.Y.L.J., Apr. 13, 1990, at 5, col. 1.

186. See *id.* (citing *Taborsky v. Maroney*, No. 83-2533 (7th Cir. Sept. 7, 1984); *Porter v. Wertz*, 68 A.D.2d 141, 416 N.Y.S.2d 254 (App. Div. 1979), *aff'd*, 53 N.Y.2d 696, 421 N.E.2d 500, 439 N.Y.S.2d 105 (1981)). Good faith status is critical when artwork is purchased from a seller who has voidable title, i.e., the seller is in lawful possession but unauthorized to sell the artwork. See *id.* In this situation, by achieving good faith status a purchaser may defeat an owner's claim to the artwork. *Id.* Under the Uniform Commercial Code, buyer-dealers must inquire about the nature of the seller's authority and history of the artwork to achieve good faith status. See *id.* (citing U.C.C. §§ 1-201(9), 2-403(2) (1990)).

By contrast, a thief has void title and cannot pass title, good or voidable, even to a good faith purchaser. *Id.* In this instance, a purchaser can be assured of legal title only upon expiration of the owner's right to recovery. See *supra* note 37 and accompanying text. Therefore, even in stolen art cases, good faith status may be important because this distinction affects accrual determinations in some jurisdictions. See *supra* notes 31-43 and accompanying text.

187. See, e.g., *DeWeerth*, 836 F.2d at 109.

188. See *id.*

investigation rather than to chance.<sup>189</sup> Moreover, valuable works of art, unlike fungible personal goods, tend to be unique and memorable. While investigative efforts may prove fruitless nonetheless, the duty of due diligence properly is placed on the owner who, with internal knowledge of the theft, can mount the most efficient search.

The importance of limitations statutes in stolen art cases also supports the due diligence requirement. Even a good faith purchaser typically cannot be assured of legal title until the expiration of the owner's right to recovery.<sup>190</sup> Because a primary purpose of statutes of limitations is to punish dilatory behavior, imposition of the due diligence burden on the owner is particularly appropriate. By adopting the due diligence requirement, courts send an effective message to owners of stolen art: the right to maintain a recovery action is circumscribed by the duty to act prudently.

## V. CONCLUSION

In adopting the due diligence requirement in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*,<sup>191</sup> the Southern District of Indiana has strengthened the hold of this obligation in stolen art cases. As a result, owners of lost art will benefit from a clearer understanding of their legal obligations in replevin actions for stolen artworks. Owners of stolen art simply must exercise due diligence in effecting a search to locate and recover their property.<sup>192</sup> Good faith purchasers likewise will benefit from the due diligence requirement, directing courts to a more consistent interpretation of the buyer's primary defense in these actions: the statute of limitations. While determination of due diligence is fact sensitive and must be made on a case-by-case basis,<sup>193</sup> uniform application of this obligation will be aided by judicial appreciation for the circumstances unique to each owner-plaintiff in these replevin actions.

This Recent Development suggests that the *Goldberg* decision creates important precedent for other jurisdictions by defining the due diligence obligation of owners of lost art. The due diligence requirement is compelling particularly in the context of stolen art because original owners are uniquely situated to mount an effective search. Although the *Goldberg* court may have misinterpreted Indiana law, the opinion recognizes that the due diligence requirement properly allocates investiga-

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189. *Id.*

190. *See supra* note 186.

191. 717 F. Supp. at 1374.

192. *See id.* at 1389.

193. *Id.*

tive costs to the one who possesses the right to initiate legal proceedings to recover stolen art: the true owner.

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