Dismissing Provenance: the Use of Procedural Defenses to Bar Claims in Nazi-Looted Art and Securitized Mortgage Litigation

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INTRODUCTION

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

Art and real estate represent major assets, property that is often deeply important to its owner. The parallel extends beyond there. Art with questionable provenance and real estate with uncertain transfers of title present strikingly analogous challenges for museums or individuals with this art in their collections and the financial institutions or good-faith purchasers acquiring title to real estate at foreclosure sales.

The provenance of fine art ushers a unique set of legal concerns when that art was one of the 650,000 works looted by the Nazis during the Second World War.¹ The 7 million pieces of real estate foreclosed in the wake of the subprime mortgage collapse present similarly unsettled provenance and face title disputes of equal significance.² Just as art represents a comparatively minor casualty of the Holocaust, the legal ramifications of the Great Recession may have initially appeared rather inconsequential given that real property law has been well established and fairly unwavering since the dawn of the American Republic.³ As recent art and real-estate-related litigation jointly display, title disputes in response to these respective eras stand to drastically affect two of America’s major property markets.⁴

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

As a point of clarification, this Article neither seeks to nor equates the atrocities committed by the Nazis during the Second World War with the banking practices in twenty-first century America. To the contrary, this Article draws a parallel between the potential legal challenges and litigation facing American banks, title insurance companies, and homeowners in

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³ See Dale A. Whitman & Drew Milner, What We Have Learned From the Mortgage Crisis About Transferring Mortgage Loans, 49 REAL PROP. TR. & EST. L.J. 1, 3 (2014).
⁴ See infra Parts II & III.
the coming years with the decades of litigation between either museums or private collectors and the heirs to Nazi-looted art. This Article proceeds in three parts. Part I revisits the historical context of the legal issues discussed herein by exploring the broad federal responses to both the Second World War and the Great Recession. Part II examines the title disputes over Nazi-looted art and securitized mortgage foreclosures as a result of these decisive periods. Part III builds on these discussions to present the similar availability of technical defenses that swiftly bar ownership claims in both art and real estate title litigation.

I. FEDERAL RESPONSES

In understanding the present legal ramifications of Nazi-looted art and securitized mortgage foreclosures, it is worth revisiting the history of these pivotal eras. The depth with which the United States felt the impact of the Second World War and the Great Recession nearly 80 years later, as well as the federal government’s response to these key moments in history, necessitates this reconsideration. The United States government reacted to both the Nazi’s mass displacement of art and America’s own foreclosure crisis through legislative and policy initiatives on national and international platforms.

A. The Second World War

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

The Nazi’s systematic destruction of European art collections is well-charted territory in historical and legal scholarship. As a recognized policy of the Nazi regime, the “art confiscation program is considered the greatest displacement of art in human history.” 7 The Nazis succeeded in looting and relocating between one-fourth and one-third of the art in continental Europe. 8 “This wholesale plunder” served a two-fold purpose: rid Hitler’s ideal nation of degenerate works—primarily modern pieces by artists like Picasso and Klimt—and secure the works of Old

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7 Spiegler, supra note 6, at 6.
Masters and other worthy art for the Führermuseum’s unparalleled collection in Linz, Austria that never came to fruition.9

At the conclusion of the war, the Allies and Western nations encountered the tremendous challenge of locating, cataloguing and repatriating vast quantities of stolen art. Countless meetings of the Allies failed to ever reach a unified policy for handling the art.10 The United States tasked its Officers of the Monuments, Fine Arts and Archive Services unit—originally established during the war—to locate Nazi art repositories, fortify them, and return the works to their rightful owners.11 In an attempt to avoid handling individual claims, it was the United States and British restitution policy to return art to the government of the countries from which it was looted.12 Other governments also established post-war restitution commissions to handle claims,13 and when the Allies’ art collecting points closed in 1951, millions of works had been processed.14

While the Allies focused restitution on returning art to governments, international law developed to grant rights for individual claimants. The 1907 Hague Convention prohibited the systematic looting orchestrated by the Nazis, but provided no prohibition on looting against the individual.15 After the Second World War, international law began acknowledging individual rights as a partial result of the Nuremberg Tribunal Charter.16 The Charter included multiple Nazi art policies amongst the prohibited war crimes.17 During the Nuremberg Trials, former Nazi leaders were prosecuted for organized pillaging and thefts, including art.18 Multiple rulings found “the looting and destruction of art and other cultural property constituted ‘systematic plunder of public or private property,’ in violation of Nuremberg Charter Article 6(b) and that these actions constituted ‘war crimes’ under international law.”19 International efforts followed the Trials with

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12 Nicholas, supra note 10, at 449-50; Spiegler, supra note 6, at 6-7.
13 Nicholas, supra note 10, at 449-50.
14 Pell, supra note 11, at 37.
15 Pell, supra note 11, at 38-39 (citing Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 631, C.T.I.A. Num. 8425.000, 1910 WL 4483 at *15 (Articles 46 & 47 prohibiting seizure by a state of private property during war)).
16 Pell, supra note 11, at 39.
17 Id.
18 Id. (citing Judgment of the International Military Tribunal (Sept. 30, 1946) in 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411-14, 481-86 (1948) (‘Article 6 of the Nuremberg Charter lists among the ‘war crimes’ the “plunder of public or private property” or ‘devastation not justified by military necessity.’’)).
19 Pell, supra note 11.
increased sanctions for the export of stolen art under the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership in Cultural Property.20

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

Just as much of the stolen art once sat in European repositories for Allied forces to sort, Internet databases created in the last twenty years provide unprecedented access into the current resting places of these works. The Art Loss Register in particular operates “the world’s largest private database of lost and stolen art, antiques and collectables.”24 Many American museums have contributed to the effort—even openly recognizing “that many works of art . . . ha[ve] not been returned to their rightful owners or their heirs.”25 As art law attorney Raymond Dowd identifies, the “museums have set up Provenance Research Projects on their websites, detailing the importance of checking provenance of artwork that changed hands from the 1933-1945 time period.”26

21 Graefe, supra note 9, at 476.
23 See Spiegler, supra note 6, at 7-8; Graefe, supra note 9, at 476.
The federal government offered its own tri-partite response to this increase in interest since the late 1990s. First, the government enacted the Holocaust Victims Redress Act in 1998. Following the directive of the 1907 Hague Convention, the Act required that “all governments should undertake good faith efforts to facilitate the return of Nazi-confiscated property.”

Second, Congress also enacted the U.S. Holocaust Assets Commission Act of 1998, establishing the Presidential Commission on Holocaust Assets. The Commission analyzed the persisting issues surrounding restitution and published a final report that stressed “an organized Federal role in implementing these initiatives must be maintained, although it is equally of the belief that the Federal government should not, and cannot, accomplish these goals by itself.” To date, the government has yet to implement any of these suggestions or formulate specific legislation guiding the restitution of Nazi-looted art.

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

While these responses and agreements call for proactive initiatives, the recent resolutions are not binding and art conflicts in the United States still fall upon the courts.

B. The Great Recession

More than seven years after the subprime mortgage market began showing signs of impending catastrophe, the United States continues grappling with the effects of the foreclosure...
The statistics speak for themselves. Since the peak of homeownership, America has lost 7 million homes to foreclosure. At the onset of the crash, a proliferation of legal scholarship began to espouse the subject and reported drastic increases in nationwide delinquency. 2.23% of American homeowners were seriously delinquent on their mortgages when the crisis emerged in late 2007. Fast forward to the height of the so-called “meltdown” and 9.67%—almost 4.3 million homes—were delinquent.

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

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

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37 Id.
40 Id. at 562 (citing Mortgage Bankers Association, National Delinquency Survey, Q1 2007 at 4, Q4 2009 at 4).
41 Id.
43 Id.
45 Id. at 3.
46 Id. at 5.
47 Id. at 3.
As a supplement to the MORE initiative, a joint effort of banking regulators—the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), and the Board of Governors of the Federal Reserve System (FRB)—also established the Independent Foreclosure Review. The review focused principally on “determin[ing] whether eligible homeowners suffered financial injury because of errors or other problems during their home foreclosure process between January 1, 2009 and December 31, 2010.”

Legislative and review initiatives gradually made way to litigation against many of the country’s financial institutions. In recent years, the federal government reached three prominent settlements with the banks and other entities accused of illegal lending practices: the National Mortgage Settlement, the Ocwen National Servicing Settlement, and the SunTrust Settlement. As “the largest consumer financial protection settlement in U.S. history,” the National Mortgage Settlement provided over $50 billion in relief.

The Second World War and the Great Recession were vastly different, yet each left lasting impacts in its wake. As eras of unquestioned significance for society, the success of federal government initiatives to curb the periods’ respective effects met both praise and criticism. Legal repercussions were, therefore, nothing short of inevitable.

II. TITLE DISPUTE LITIGATION

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

A. Nazi-Looted Art

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

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

Heirs with a successful ownership claim—often aided by the Internet provenance databases established in recent years—must also bring one of two claims in U.S. courts: replevin or conversion. Replevin is a state common law “action by which the original owner of goods may recover the goods from someone who has wrongfully taken or wrongfully retained possession of the goods.” The Ninth Circuit significantly ruled that these replevin actions in Nazi-looted art cases are not judicially barred by the political question doctrine. For a sustainable replevin claim, the plaintiff heirs must generally establish “his title or right to possession, that the property is unlawfully detained, and that the defendant wrongfully holds possession.”

In lieu of replevin claims, heirs can also bring claims for conversion of the disputed works. Conversion claims differ from replevin in one key respect: a replevin action seeks return of the stolen property while conversion claims seek damages—not return—for such illegal possession by the defendant. Scholars recognize that the vast majority of Nazi-looted art

52 See generally Graefe, supra note 9, at 479-80 (discussing how heirs can establish rightful ownership claims).
53 Restatement (Second) of Torts § 229 (1965).
55 Id.
57 See supra Part I.A.
59 Alperin v. Vatican Bank, 410 F.3d 532, 552 (9th Cir. 2005).
60 Autocephalous Greek-Orthodox Church, 917 F.2d at 290.
61 Skinner, supra note 6, at 683.
litigation is based in replevin actions. As some note, conversion claims simply fail to return the actual work: “‘[t]he objects are symbols of a terrible crime; recovering them is an equally symbolic form of justice.’”

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

B. Securitized Mortgage Foreclosures

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

Securitization is a complex process through which financial institutions created mortgage-backed securities. This process separated the traditional mortgage relationship between lender and borrower by bundling multiple mortgages—already sold off by the original lender on the secondary market—into securities purchased by additional third parties.

Using this device, securities underwriters set up investment trusts, each having a trustee. Lenders would issue loans to homeowners, secured by a deed of trust that made the lender the “beneficiary” and thus able to enforce the deed through a

62 Id. at 682-83; Graefe, supra note 9, at 479-80.
66 Renuart, supra note 39, at 562-63.
67 See Morlock, LLC v. Bank of N.Y. as Trustee of the Certificate Holders of Cwabs, Inc., Asset-Backed Certificates, Series 2004-13, 448 S.W.3d 514 (Tex. App. 2014); Eric A. Zacks & Dustin A. Zacks, Not a Party: Challenging Mortgage Assignments, 59 ST. LOUIS UNIV. L.J. 175, 176 (2014) (“lenders were able to securitize loans more easily and inexpensively, which ostensibly lowered mortgage costs and increased home ownership during the rise of the American real estate market in the 2000s”).
68 Adam J. Levitin & Tara Twomey, Mortgage Servicing, 28 YALE J. ON REG. 1, 13 (2011) (“a mortgage securitization transaction is extremely complex”).
69 Id.
power of sale. In turn, the lenders would transfer the loans into the investment trust, which would sell bonds to investors. The trust used mortgage payments from borrowers to pay income to investors. The trust was governed by a Pooling and Servicing Agreement or PSA, which typically required that each loan in the pool be transferred into the trust by a specific cutoff date. This cutoff date existed because it was required by Internal Revenue Service statutes and regulations. Failure to transfer the loan into the trust by the cutoff date jeopardized the tax benefits the investment trust might receive. 70

Thus created the “mortgage-backed” security. Between 2005 and 2006, banks originated over $960 billion in these mortgage-backed securities.

Many foreclosure cases turn on the procedural intricacies of the mortgage-backed security device that ostensibly had never before arisen with any regularity in the foreclosure law context. Just as heirs to Nazi-looted art seek to assert title to the works held by museums and other collectors, foreclosed homeowners often claim that errors in the securitization of their mortgage prevented the foreclosing entity to exercise its right and therefore made the entity incapable of acquiring title or passing it to a third party. 71 The basic foundation of this claim is that “[t]he mortgage becomes useless in the hands of one who does not also hold the obligation because only the holder of the obligation can foreclose.” 72 This legal principle created the well-analyzed “show-me-the-note” defense for homeowners facing foreclosure—if the right to enforce the mortgage, evidenced by possession of the note, was not also transferred with the mortgage on the secondary market, homeowners argued that assignee had no ability to actually effectuate a foreclosure sale upon a subsequent default. 73

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

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

III. TECHNICAL DEFENSES

The technical defenses standing to bar claims from heirs and homeowners represent a further intersection of Nazi-looted art and securitized mortgage litigation. The technical defenses available in each case—statute of limitations or laches in art disputes and standing in foreclosure cases—serve an identical purpose: grounds upon which the art and foreclosure litigation is dismissed.

A. Statute of Limitations and Laches

Statute of limitations and laches defenses may figuratively end Nazi-looted art litigation before it ever begins. Both provide a defense that serves to eliminate any future consideration of the case merits simply because those claims have expired.

1. Statute of Limitations

The statute of limitations defense in art litigation presumably offers great opportunity for success given the protracted nature of claims based in the Nazi’s looting of Europe from 1937 to 1945 and the only recent surge in litigation decades later. Contrary to this potential benefit for defendants or plaintiffs taking an offensive approach in title disputes, the confines of this defense vary by jurisdiction and “American courts provide broad exceptions that allow claimants to toll the statute of limitations.” States augment the time at which the statute of limitations begins to run against good faith purchasers under two alternative theories: New York’s demand and refusal rule or the much more common discovery rule.

75 Berezovskaya, 2014 WL 4471560 at *2.
76 Id.
77 Id.
New York jurisprudence highlights the demand and refusal rule as an “axiom of New York law.” The rule is inapplicable to bad faith purchasers, against whom the statute of limitations begins to run when the property is purchased. The statute of limitations for any good faith purchaser “who lawfully comes by a chattel arises, not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel upon demand.” Since the 1966 articulation of this rule in *Menzel v. List*, the question of when the heirs made such a demand for Nazi-looted works and received a refusal is often raised in the course of litigation. Recent case law critiques the possible use of this rule to allow a plaintiff to delay an action by simply failing to make a demand.

The discovery rule also imposes an affirmative duty, but allows the statute of limitation to begin running when the plaintiff knew or reasonably should have known the whereabouts of the work. Under Indiana’s version of the discovery rule, “the statute of limitations commences to run from the date plaintiff knew or should have discovered that she suffered an injury or impingement, and that it was caused by the product or act of another.” The benefits of the discovery rule, however, cut both ways. As the Second World War becomes increasingly distant history, heirs who will eventually hold the entirety of Nazi-looted art claims may base their claims upon recent discovery of the work since they are heirs to the art, not the individuals from whom it was stolen. Good faith purchasers, however, succeed on statute of limitations defenses when the original owner—the ancestor of the now plaintiff heirs—is deemed to have previously discovered or had the reasonable opportunity to discover the work. The statute of limitations defense bars the claims of the heirs upon whom this discovery is imputed. Depending on the jurisdiction’s applicable rule, heirs asserting claims to Nazi-looted art, whether valid or not, may have no means of recovery if the statute of limitations has already run.

2. *Laches Doctrine*

The judge-made equitable doctrine of laches affords good faith purchasers an additional defense even when the statute of limitations has yet to run under either the demand and refusal or the discovery rule. The laches defense allows courts to reject otherwise timely claims if “the
opposing party unreasonably delayed bringing the claim to the prejudice of the defendant.”

This too comes with an important caveat: when heirs present an “actual hindrance or impediment caused by the fraud or concealment of the party in possession,” courts may excuse the heirs’ delay in bringing their claim.

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

B. Standing

Homeowners may or may not have standing to pursue quite title actions—and thus barring their claim—if their challenge to a foreclosure’s validity is grounded in the Pooling and Servicing Agreement of a securitized trust to which they were never a party. Courts disagree on whether or not the standing defense is available to foreclosing entities and good faith purchasers of these foreclosures based on this fundamental lack of privity. Successfully asserting a lack of standing defense against the homeowner eliminates his/her foreclosure challenge—at least as it relates to the PSA. Standing rests on one essential question: whether a violation of the PSA in the assignment of the foreclosure rights renders the PSA merely voidable between the parties in privity, denying standing to the homeowner, or void in its entirety, giving the homeowner standing. Since the vast majority of PSAs executed at the height of the subprime mortgage boom included New York choice of law provisions, this analysis is based on the opposing interpretations of New York law in courts around the country.

The rationale for finding the PSA voidable is based on New York courts having determined that “beneficiaries may in fact consent to and ratify acts that violate the terms of the PSA.” Courts concede that New York Estate Powers & Trusts Law specifically provides

89 See, e.g., Frankel, supra note 88, at 305-06; Dowd, supra note 26, at 547.
90 Dowd, supra note 26, at 547.
91 Id.
“every act in contravention of the Trust is void.” The parties in privity under the PSA, however, are those who determine if such a contravention renders the trust void, not a third party, such as homeowners later challenging the foreclosure of a mortgage held in that trust. The ability of the parties in privity to ratify these contraventions “make[s] such actions voidable, not void, and consequently a non-party to a PSA does not have standing to dispute such transactions.” When courts find the alleged violations merely voidable—even assuming they actually occurred—the homeowner is not a party in privity with the ability to render the PSA void. The homeowner has no standing to bring a wrongful foreclosure claim under the voidable, but not void PSA.

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

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

act or agreement which is outside the scope of the trustee’s power when the beneficiary or beneficiaries consent or ratify the trustee’s ultra vires act or agreement; but c.f. In re Dana, 119 Misc.2d 815, 819–20, 465 N.Y.S.2d 102, 105 (N.Y.Sup.Ct.1982) (holding that if the trustees had engaged in self-dealing under the Internal Revenue Code, 26 U.S.C. § 4941(d), “the potential consequences of these acts would not cause this court to set aside the trust ... it would cause the court to invoke EPTL § 7–2.4 to void the transaction”); Dye v. Lewis, 67 Misc.2d 426, 427, 324 N.Y.S.2d 172, 175 (N.Y.Sup.Ct.1971) (holding that “every act [by a trustee] in contravention of the trust is void,” and thus finding that the trustees' act of discharging a “mortgage without any provision for payment or substitution of security ... in contravention of the trust indenture,” was void)).

94 Id. at *6–7.
95 Berezovskaya, 2014 WL 4471560 at *8 (citations omitted).
96 Glaski, 218 Cal. App. 4th at 1096.
98 Glaski, 218 Cal. App. 4th at 1083.
CONCLUSION

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