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2020

Recovering Stolen Art and Antiquities Under the Forfeiture Laws: Who is Entitled to the Property When There are Conflicting Claims

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Recovering Stolen Art and Antiquities Under the Forfeiture Laws: Who is Entitled to the Property When There are Conflicting Claims

By Stefan D. Cassella[†1]

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I. Introduction

When stolen artwork or antiquities are found in the United States, the government typically attempts to recover the property and restore it to its rightful owners under the asset forfeiture laws. If the government is able to bring a criminal case against the thief, smuggler, or other wrongdoer, it can recover the property under the criminal forfeiture laws as part of the defendant's sentence. But more typically, when there is no possibility of a criminal case because the wrongdoer is unknown, dead, a fugitive, or beyond the jurisdiction of the U.S. courts—or if the statute of limitations has run on the criminal offense—the government will still be able to recover the property under the civil forfeiture laws. In either case, the government's objective is to obtain clear title to the property so that it can then be restored to the person, entity, or country to whom it belongs.

There are many examples of how the government has used asset forfeiture successfully to recover artwork and antiquities, including paintings stolen by the Nazis during the Holocaust, antiquities looted from archaeological sites in Europe and Asia, and items stolen or looted from museums in the developed world or in war zones.[2] Nevertheless, an unintended consequence of one of the

2 *See generally* Karin Orenstein, *Risking Criminal Liability in Cultural Property Transactions*, 45 N.C. J. INT'L L. 527 (2020) (discussing the intersection of civil forfeiture, laws governing looted art, and American criminal law); Leila Amineddoleh, *The Politicizing of Cultural Heritage*, 45 N.C. J. INT'L L. 333 (2020) (discussing the

provisions of the forfeiture laws poses an obstacle to the effective use of this tool.[3]

Concerned with the effect the forfeiture laws might have on so-called "innocent owners" of forfeitable property, Congress included a provision in both the criminal and civil forfeiture statutes that protects the interest of "bona fide purchasers for value."[4] That is, if a third party shows that he acquired the property in exchange for something of value without reason to believe that the property was involved in a crime, the third party's interest would trump the interest of the government in recovering it under the forfeiture laws.[5] This provision was meant to protect a third-party who, for example, purchased a car without reason to know that it had been used by a drug dealer to distribute illegal drugs, or who sold merchandise to a racketeer without reason to know that he was being paid with racketeering proceeds.[6]

But how does this protection apply when a third party has unwittingly paid for stolen artwork or a looted antiquity? Does the

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repatriation of cultural heritage, some of which was seized through civil forfeiture actions). For a discussion of how the government has recovered looted archaeological artifacts, see generally Patty Gerstenblith, *Provenience & Provenance Intersecting with International Law in the Market for Antiquities*, 45 N.C. J. INT'L L. 457 (2020) (discussing the application of international laws and U.S. domestic laws on looted art to the context of plundered archaeological artifacts). This paper discusses several cases involving Nazi looted art; for an overview of Nazi plunder and individual attempts to recover looted artwork, see generally Donald S. Burris, *Restoration of a Culture: A California Lawyer's Lengthy Quest to Restitute Nazi-Looted Art*, 45 N.C. J. INT'L L. 277 (2020) (providing an overview of Nazi looting and a chronology of American legal cases pertaining thereto); see also generally Marc Masurovsky, *A Comparative Look at Nazi Plundered Art, Looted Antiquities, & Stolen Indigenous Objects*, 45 N.C. J. INT'L L. 497 (2020) (discussing looted indigenous art and Nazi plunder, as well as the sociological implications thereof); Simon J. Frankel, *The HEAR Act & Laches After Three Years*, 45 N.C. J. INT'L L. 441 (2020) (discussing conflicting court decisions relating to Holocaust-era looted art, the 2016 HEAR Act, and the equitable doctrine of latches).

3 *See* Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture*, 89 KY. L.J. 653, 670–709 (2000) (describing the "innocent owner defense" as codified at 18 U.S.C. § 983(d)); *see also* 18 U.S.C. § 983(d).

4 *See* Cassella, *The Uniform Innocent Owner*, *supra* note 3, at 656–67 (describing the various concerns and legal developments that led to the proposal of 18 U.S.C. § 983(d)).

5 *Id*. at 691–96.

6 *Id*. at 658. *See generally* Cassella, ASSET FORFEITURE LAW IN THE UNITED STATES, *supra* note 1 at § 12-6 (discussing the bona fide purchaser defense in civil cases under § 983(d)(3)) and § 23-16 (same for criminal cases).

collector or museum that acquired the property take priority under the bona fide purchaser provision over the Government or over the rightful owner? Asset forfeiture laws seemingly contain no exception to the bona fide purchaser rule to deal with this situation, and courts have accordingly struggled to explain why the government should be able to use the forfeiture laws to recover property for the benefit of victims in this situation.[7]

This Article explains how the criminal and civil forfeiture laws work, provides a number of examples of their successful application to the recovery of cultural property, and then discusses the conflict between the government's effort to recover property for the benefit of the rightful owner and the statutory right of third parties with competing interests to intervene and prevent the government from succeeding. It concludes with a recommendation for a "legislative fix" that would limit the ability of third parties, other than the victim of the unlawful taking of the property, to block the government's effort to recover the property under the forfeiture laws.

II. Overview of Forfeiture Law

A. What is the Government's Interest?

While private parties may bring their own actions to recover artwork and antiquities that have been wrongfully acquired, the government generally takes the lead in such cases, applying the tools and resources of law enforcement to recover property and, where appropriate, see that it is returned to its rightful owner. There are many reasons for this: trafficking in valuable works of art—stolen or legitimately acquired—is a favored method by which criminals engaged in other illegal activity launder their money or "park it" in a safe place,[8] and the government has an obvious interest in suppressing such activity. Even more importantly, terrorist organizations such as the Islamic State in Iraq and Syria (ISIS) use artifacts looted from archaeological sites and museums in war zones

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7 *But see* 18 U.S.C. § 983(i)(2)(A) (exempting from CAFRA all forfeiture statutes related to U.S. customs law); United States v. Davis, 648 F.3d 84, 93–95 (2d Cir. 2011) (holding that CAFRA's innocent owner defense does not apply to forfeitures under Title 19 of the United States Code, which governs customs duties).

8 *See* Peter D. Hardy, *Art and Money Laundering: Why the Global Art Market Needs Regulation*, ARTLYST (Mar. 20, 2019), https://www.artlyst.com/news/art-money-laundering-global-art-market-needsregulation/ [https://perma.cc/HE3A-LGJ5].

to raise money to finance their terrorist activity,[9] and the government places the highest priority in taking whatever steps are necessary to make sure that that does not happen. But by far the most common reason why the government intervenes in cases involving stolen works of art is to relieve victims and other private parties of the need to expend their own resources to recover the works because the government possesses both the resources and the legal tools to do so.

In a criminal case involving the recovery of the money derived from a series of armed robberies, the Court of Appeals for the Fourth Circuit said the following regarding the use of the forfeiture laws to aid the victims of crime: "The government's ability to collect on a [forfeiture] judgment often far surpasses that of an untutored or impecunious victim of crime . . . . Realistically, a victim's hope of getting paid may rest on the government's superior ability to collect and liquidate a defendant's assets."[10]

The same reasoning applies to the recovery of the stolen property itself: it is the government's ability to seize stolen property under the forfeiture laws and preserve it while conflicting claims are sorted out in accordance with a structured and well-defined procedure, and to restore it to its rightful owner when the judicial process is complete, that makes it possible for many victims to recover property that was lost due to theft, fraud, or other wrongdoing.

B. Criminal and Civil Forfeiture

When recovering property under the forfeiture laws, the government has two options. It can bring a criminal prosecution against the wrongdoer and, if it obtains a conviction, take title to the property as part of the wrongdoer's sentence.[11] Or it can name the

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9 *See* Press Release, U.S. Dep't of Justice, United States Seeks Warrant to Seize Ring Trafficked by ISIS (Dec. 6, 2017), https://www.justice.gov/usao-dc/pr/united-states-seeks-warrant-seize-ring-trafficked-islamic-state-iraq-and-syria-isis [https://perma.cc/A3E9-YGFF]; Motion for Issuance of Warrant *in rem*, United States v. One Gold Ring with Carved Gemstone, Civ. No. 1:16-02442 (TFH) (D.D.C. Dec. 6, 2017).

10 United States v. Blackman, 746 F.3d 137, 143 (4th Cir. 2014); *see also* Kaley v. United States, 571 U.S. 320, 323 n.1 (2014) (citing statistics on the Government's use of forfeiture to compensate victims).

11 *See* Stefan D. Cassella, *Criminal Forfeiture Procedure: An Analysis of Developments in the Law Regarding the Inclusion of a Forfeiture Judgment in the Sentence*

property in a civil complaint, litigate the competing interests in the property, and obtain a forfeiture judgment conveying title to the property to the government when the process is complete.[12] The former is called criminal forfeiture, and the latter is called civil, or non-conviction-based, forfeiture. In either case, once the government obtains clear title to the property, it can restore it to its rightful owner.[13]

1. Criminal forfeiture

Because criminal forfeiture is part of the defendant's sentence in a criminal case, there can be no forfeiture unless there is a criminal conviction for an offense for which forfeiture is authorized by statute.[14] If the defendant is acquitted, if his sentence is overturned on appeal, or if he is convicted only of an offense unrelated to the property in question or for which Congress has not authorized forfeiture, the government cannot recover the property in the criminal case.[15]

Most importantly, if no criminal case is possible—because the defendant is unknown, is a fugitive or is otherwise beyond the jurisdiction of the United States, is dead or incompetent to stand trial, or if the statute of limitations has run on the criminal offense

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Imposed in a Criminal Case, 32 AM. J. CRIM. L. 55, 57 (2004) ("It is well-established that criminal forfeiture is part of the sentence imposed on a defendant in a criminal case. There is no sentence, of course, unless the defendant is convicted of an offense. Thus, it is fundamental that there can be no forfeiture order in a criminal case unless the defendant is convicted of an offense, and that the property to be forfeited must be connected in some way to the offense for which the defendant is convicted.").

12 *See generally* 18 U.S.C. § 983 (2016).

13 *See* 21 U.S.C. § 853(i)(1) (2018) (authorizing the Attorney General to restore criminally forfeited property to victims); 28 U.S.C. § 2461(c) (2018) (making the provisions of § 853 applicable to all criminal forfeiture cases); 18 U.S.C. § 981(e)(6) (2018) (authorizing the Attorney General to restore civilly forfeited property to victims).

14 Libretti v. United States, 516 U.S. 29, 39 (1995) ("[C]riminal forfeiture is an aspect of punishment imposed following conviction of a substantive criminal offense.").

15 *See* United States v. Lake, 472 F.3d 1247, 1250–51 (10th Cir. 2007) (explaining that because the underlying fraud and money laundering convictions were reversed on appeal, forfeiture had to be vacated as well); United States v. Messino, 382 F.3d 704, 714 (7th Cir. 2004) (holding that "[t]here must be a connection between [property subject to forfeiture and] . . . the underlying criminal activity on which the conviction rests"); United States v. Simon, 2010 WL 5359708, at *1 (N.D. Ind. Dec. 21, 2010) (holding that the Court cannot order forfeiture based on defendant's conviction for fraud involving federal financial aid because Congress has not authorized forfeiture for that offense).

giving rise to the forfeiture—there will be no criminal conviction, and hence no possibility of recovering the property through criminal forfeiture. Not surprisingly, these obstacles to criminal forfeiture are quite common in cases involving artwork and antiquities stolen in foreign countries and later found in the United States, often decades after the theft occurred.

2. Civil forfeiture

In contrast, a civil forfeiture action is an *in rem* action in which the property is named in the caption of the case, and persons with an interest in the property are invited to contest the forfeiture by filing claims.[16] The idea is to bring everyone with a potential interest in the property into the courtroom at the same time, and to give each of them the opportunity to oppose the government's attempt to establish that the property is subject to forfeiture.[17] Hence, in a civil forfeiture case, the government is the plaintiff, the property is the defendant, and third parties wishing to contest the forfeiture are called "claimants" who must intervene to protect whatever interests they may have in the property.[18] If the government prevails, it will obtain clear title to the property, and can dispose of it as it sees fit.[19]

To establish the forfeitability of the property, the government must establish, by a preponderance of the evidence, that a crime was committed and that the property was involved in that crime.[20] Importantly, however, in contrast to a criminal forfeiture case, no criminal conviction is required to obtain a forfeiture order.[21] Indeed,

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16 *See Types of Federal Forfeiture*, U.S. DEP'T OF JUSTICE (Feb. 1, 2017) https://www.justice.gov/afp/types-federal-forfeiture [https://perma.cc/VEX9-DMRP].

17 *Id.*

18 *See* United States v. $8,440,190.00 in U.S. Currency, 719 F.3d 49, 57 (1st Cir. 2013) (noting in a civil forfeiture case, the defendant is the property, and persons raising defenses to the forfeiture must establish standing to intervene); United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito), 295 F.3d 23, 25 (D.C. Cir. 2002) ("Civil forfeiture actions are brought against property, not people. The owner of the property may intervene to protect his interest.").

19 *See $8,440,190.00 in U.S. Currency*, 719 F.3d at 57; *All Funds in Account Nos. 747.034/278*, 295 F.3d at 25.

20 *See* 18 U.S.C. § 983(c)(1) (2019). *But see* 18 U.S.C. § 983(i) (exempting cases brought under the customs laws from the provision placing the burden of proof on the Government).

21 *See* United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361–62 (1984)

the culpability of the property owner herself is not at issue;[22] what matters is the nexus between the property and the crime. Hence, civil forfeiture is the government's vehicle of choice to recover stolen artwork and antiquities when it is not possible to bring a criminal case, but it is possible to prove that the property was derived from a criminal offense.[23]

When the government elects the civil forfeiture option, the process works as follows. The government seizes the property, generally with a judicial warrant,[24] and files a complaint in federal court setting forth the legal basis for the forfeiture action.[25] The government must then send notice of the forfeiture action to all potential claimants,[26] who must respond by filing a verified claim

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(stating acquittal on gun violation under § 922 does not bar civil forfeiture under § 924(d)); Paret-Ruiz v. United States, 827 F.3d 167 (1st Cir. 2016) ("Civil forfeiture may occur without a finding of criminal liability;" reversal of defendant's criminal conviction had no effect on the administrative forfeiture of personal property that was completed when defendant did not file a timely claim); United States v. $6,190.00 in U.S. Currency, 581 F.3d 881, 885 (9th Cir. 2009) (holding the district court's jurisdiction over a civil forfeiture case does not depend on there being a related criminal case; it depends solely on the existence of a federal statute authorizing civil forfeiture); Von Hofe v. United States, 492 F.3d 175, 190 (2d Cir. 2007) ("[C]riminal conviction of a claimant either in state or federal court is neither a necessary nor sufficient precondition to an *in rem* forfeiture.").

22 *See* United States v. $734,578.82 in U.S. Currency, 286 F.3d 641, 657 (3d Cir. 2002) ("Civil forfeiture is an *in rem* action against the property itself; the forfeiture is 'not conditioned upon the culpability of the owner of the defendant property.'"); United States v. Cherry, 330 F.3d 658, 668 n.16 (4th Cir. 2003) ("The most notable distinction between civil and criminal forfeiture is that civil forfeiture proceedings are brought against property, not against the property owner; the owner's culpability is irrelevant in deciding whether property should be forfeited."); United States v. Sandini, 816 F.2d 869, 872 (3d Cir. 1987) ("Civil forfeiture is an *in rem* proceeding. The property is the defendant in the case . . . . The innocence of the owner is irrelevant—it is enough that the property was involved in a violation to which forfeiture attaches.").

23 *See $734,578.82 in U.S. Currency*, 286 F.3d at 657; *Cherry*, 330 F.3d at 668 n.16; *Sandini*, 816 F.2d at 872.

24 *See* 18 U.S.C. § 981(b) (2019) (requiring a judicial warrant to commence a forfeiture action unless an exception to the Fourth Amendment warrant requirement applies).

25 *See* FED. R. CIV. P. G(2), Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions [hereinafter "Supplemental Rules"]. There is also a procedure for forfeiting property administratively without commencing a judicial action, but that is rarely used in cultural property cases and is not discussed here. For the procedures pertaining to administrative forfeitures, see 18 U.S.C. § 983(a) (2019).

26 *See* Supplemental Rule G(4), *supra* note 25.

within a fixed period of time if they wish to contest it.[27] If no one files a claim, the government may move for a default judgment.[28] But if the action is contested, the claimant must first establish that he has a legal interest in the property sufficient to establish standing.[29] If the claimant is successful, the burden shifts to the government to establish, by a preponderance of the evidence, that the property is subject to forfeiture.[30] That is, it must establish that a crime for which forfeiture is authorized has occurred, and that the property was derived from or otherwise involved in that crime.[31]

Importantly, in cases in which the forfeiture is based on violations of the customs laws,[32] the procedure is slightly different. While the issues regarding the forfeitability of the property are the same—i.e., there must have been a criminal offense to which the property was connected—the government's burden is only to show *probable cause* that the property is subject to forfeiture, at which point the burden shifts to the claimant to prove that it is not.[33] This turns out to be a significant point in cases involving stolen artwork and antiquities, as we shall see.[34]

3. The innocent owner defense

As already noted, in civil forfeiture cases the focus is on the connection between the property and the offense, not on the culpability of the property owner. In most civil forfeiture cases,

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27 *See* Supplemental Rule G(5), *supra* note 25.

28 *See, e.g.*, United States v. Bersa, Model: Thunder, 2015 WL 1503652 (E.D. Tex. Mar. 31, 2015) (granting default judgment based on finding that Government complied with Rule G(4), and no one filed a claim); United States v. One 2007 Toyota Camry, 2013 WL 5074147 (N.D. Cal. Sept. 13, 2013) (under the Local Rules, Government is entitled to a default judgment upon showing that it provided notice in accordance with Rule G(4), and that no one has filed a claim).

29 *See* United States v. $8,440,190.00 in U.S. Currency, 719 F.3d 49, 57 (1st Cir. 2013) ("Standing is a threshold consideration in all cases, including civil forfeiture cases."); United States v. Real Property Located at 5208 Los Franciscos Way, 385 F.3d 1187, 1191 (9th Cir. 2004) (noting that standing is a threshold issue on which the claimant bears the burden of proof in every civil forfeiture case).

30 18 U.S.C. § 983(c)(1) (2019).

31 *See* Cassella, ASSET FORFEITURE LAW IN THE UNITED STATES, *supra* note 1.

32 The term "the customs laws" generally refers to the Tariff Act of 1930, codified at 19 U.S.C. §§ 1202–1683g (2018).

33 *See id.*

34 *See* United States v. Davis, 648 F.3d 84, 95 (2d Cir. 2011); 19 U.S.C. § 1615.

however, once the government establishes the forfeitability of the property, the claimant may assert what is commonly known as the innocent owner defense.[35] Codified at 18 U.S.C. § 983(d), the defense allows a property owner to prevail in a forfeiture action if she owned the property before the crime giving rise to the forfeiture occurred and she was unaware that it was being used illegally,[36] or if she acquired it thereafter as a bona fide purchaser for value and was without reason to know that it was subject to forfeiture at the time that she acquired it.[37] Thus, the victim of the theft of a work of art will generally be able to recover it by asserting a claim under Section 983(d)(2) (because she owned it when the crime occurred), and a person who acquired it in an arm's-length financial transaction without knowing of its illegal provenance will generally be able to recover it by asserting a claim under Section 983(d)(3) (because she was a bona fide purchaser for value).[38]

Again, however, the law is different for cases arising under the customs laws. In such cases, *there is no innocent owner defense* and thus no ability for the claimant to prevent the government from taking title to the property once its forfeitability is established.[39] As will be discussed in Part V, *infra*, the availability of an innocent owner defense in most civil forfeiture cases, and the lack of such a defense in customs cases, is a critically important factor in cases involving stolen artwork and antiquities.

4. Parallel civil and criminal proceedings

Criminal and civil forfeiture are not mutually exclusive. Indeed, the government may file a civil forfeiture action and then ask the court to stay it while a related criminal investigation or prosecution goes forward.[40] Or it may file a civil forfeiture action after a related criminal prosecution has been completed. In *United States v. One*

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35 *See* 18 U.S.C. § 983(d) (2018).

36 *See* § 983(d)(2).

37 *See* § 983(d)(3). There is a statutory counterpart to the innocent owner defense that applies in criminal forfeiture cases. *See* 21 U.S.C. § 853(n)(6).

38 *See* § 983(d)(2)–(3).

39 *See Davis*, 648 F.3d at 93–95 (stating that there is no innocent owner defense in 19 U.S.C. § 1595(a) and that 18 U.S.C § 983(d) does not apply because of the customs carve-out in § 983(i)).

40 *See* 18 U.S.C. § 981(g) (2018).

Ancient Mosaic,[41] the government did the former when it filed a civil forfeiture action against a 2,000-year-old mosaic discovered during the search of the residence of a person under investigation for smuggling items looted from war zones in the Middle East, and then moved to stay the action pending the conclusion of the criminal case.[42] And in *United States v. Assorted Artifacts*,[43] the government did the latter when, after obtaining a conviction against a person who had smuggled various antiquities into the United States from Pakistan, it filed a civil forfeiture action to obtain clear title to the property.[44]

For the reasons suggested earlier, however, the vast majority of forfeiture cases involving stolen artwork are filed exclusively as civil forfeiture cases. Accordingly, the examples given throughout this article consist almost entirely of civil forfeiture cases.

III. Theories of Forfeiture

To bring a forfeiture action, the government must have a statutory basis for doing so.[45] There is no common law of forfeiture nor a blanket provision authorizing forfeiture in all cases where a crime has occurred.[46] Thus, in every case, the government must cite the statute giving rise to the forfeiture and conform its proof to the requirements of that statute.[47]

To recover stolen artwork and antiquities, the government has a variety of statutory options. Some, however, are quite limited in scope and apply in only narrow circumstances.

A. The Cultural Property Implementation Act (CPIA)

If the stolen artwork or antiquity fits the definition of "ethological material" important to the cultural heritage of a country

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41 Complaint, United States v. One Ancient Mosaic, No. 2:18-cv-04420 (C.D. Cal. May 23, 2018).

42 Status of Report Re: Stay, United States v. One Ancient Mosaic, No. 2:18-cv-04420 (C.D. Cal. Apr. 22, 2019).

43 Proposed Findings of Fact and Recommendations, United States v. Assorted Artifacts, 2017 WL 1205086 (E.D. Va. Feb. 21, 2017).

44 *Id*. at *4 (granting the Government's motion for a default judgment).

45 *See, e.g.*, United States v. Davis, 648 F.3d 84, 87 (2d Cir. 2011).

46 *See* United States v. Grundy, 7 U.S. 337, 340–41 (1806).

47 *See, e.g.*, *Davis*, 648 F.3d at 87.

that is a party to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property—commonly known as the "Convention on Cultural Property"—the property may be recovered in a forfeiture action if certain criteria are satisfied.[48]

Congress implemented the Convention by enacting 19 U.S.C. § 2606, *et seq*. (the Cultural Property Implementation Act (CPIA)), which makes it unlawful to import "ethnological material" (defined in great detail in the regulations) into the United States without the permission of the country of origin.[49] The forfeiture provision, 19 U.S.C. § 2609, authorizes the forfeiture of any ethnological material imported into the United States in violation of Section 2606.[50] In such cases, it is not necessary to show that the item was stolen; it is only necessary to show that it is covered by the regulations and various agreements designating it as ethnological material and that it was imported without the permission of the country of origin.[51]

1. Eighteenth Century Peruvian Oil on Canvas

In *United States v. Eighteenth Century Peruvian Oil on Canvas*,[52] the government used the CPIA to file a civil forfeiture action to recover two oil paintings that had been stolen from churches in Peru or Bolivia and imported to the United States for sale.[53] The facts were straightforward. A man named Ortiz brought two oil paintings into National Airport in Washington from Bolivia: one was called the *Doble Trinidad* and the other was *San Antonio De Padua and Santa Rosa De Lima*.[54] The paintings were rolled up in cardboard tubes and had been cut from their frames with a razor.[55]

No one could link the paintings to a particular theft from a

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48 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

49 *See* 19 U.S.C. § 2606 (2018).

50 *See* 19 U.S.C. § 2609(a) (2018).

51 United States v. Eighteenth Century Peruvian Oil on Canvas Painting of the Doble Trinidad, 597 F. Supp. 2d 618, 621 (E.D. Va. 2009) (describing the regulations, memoranda of understanding, and other agreements defining and designating ethnological material).

52 *See id*.

53 *See id*.

54 *Id*. at 619.

55 *Id*.

particular church—indeed, it wasn't clear if they were from Peru or from Bolivia—and there was no proof that Ortiz was involved in the theft. But art experts provided affidavits saying that they were a product of the Cuzco School during the 17th and 18th Centuries in the Andean region around Cuzco, Peru (straddling the modern-day border between Peru and Bolivia).[56]

The paintings fit the definition of "ethnological material" in that they were "the product of a tribal or nonindustrial society," "used for religious evangelism," and thus "important to the cultural heritage" of the people of that region, and neither Peru nor Bolivia had given permission for the paintings to be exported out of either country.[57] Thus, even though there was no criminal investigation or prosecution—indeed, there was no identifiable victim of the theft and the forfeiture was not based on the paintings' having been stolen—there were sufficient grounds to recover the paintings through civil forfeiture.[58]

While it was uncertain whether the paintings came from Peru or from Bolivia, for purposes of the government's motion for summary judgment in the civil forfeiture case, it did not matter.[59] All that the government had to do was show that the paintings fit the definition of ethnological material and that they came from some country that was a party to the Convention and that had not given permission for them to be exported.[60] The court granted summary judgment for the government and left it to the Attorney General to decide how (and to whom) to repatriate the paintings.[61]

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56 *Id*. at 620.

57 "In sum, the CPIA makes it illegal to import into the United States a (1) Colonial-era painting (2) produced in Peru (3) by indigenous people, (4) used for religious evangelism among those people, and (5) that is important to the cultural heritage of those people (6) without documentation from Peru either certifying that the exportation from Peru (whether or not that export was directly to the United States) did not violate Peruvian law." United States v. Eighteenth Century Peruvian Oil on Canvas Painting of the Doble Trinidad, 597 F. Supp. 2d 618, 621–22 (E.D. Va. 2009).

58 *See generally id*.

59 *Id*. at 625 ("Claimant's assertions regarding the origin of the Defendant paintings are unsupported and inadequate to defeat summary judgment.").

60 The burden of proof under the CPIA is somewhat unique. The Government has the initial burden of showing that the CPIA applies because the property has been designated as ethnological material. The burden then shifts to the claimant to prove that the property is not subject to forfeiture under the terms of the statute. *Id*. at 623.

61 *See id*. at 625–26.

2. Twenty-Nine Pre-Columbian Artifacts

In a similar case, *United States v. Twenty-Nine Pre-Columbian and Colonial Artifacts from Peru*,[62] Customs and Border Patrol agents in Miami intercepted a Peruvian citizen arriving on a flight from Peru with thirty-two objects that appeared to be ancient artifacts in his luggage.[63] When the Peruvian government advised the traveler that the artifacts "constituted part of the Peruvian cultural heritage" and that Peru had not authorized their exportation, the government filed a civil forfeiture action under the CPIA and other statutes to recover the property.[64]

The claimant—the traveler from whom the objects were seized—contested the forfeiture and raised a series of procedural objections including the denial of his right to due process and the failure of the government to establish that the objects fit the definition of "ethnological materials," all of which were unsuccessful.[65] The government responded by challenging the claimant's standing to contest the forfeiture,[66] and his refusal to appear for a deposition.[67] In the end, the claimant's refusal to submit to a deposition led the court to dismiss his claim and to enter a judgment of forfeiture for the government as to all of the seized artifacts.[68]

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62 United States v. Twenty-Nine Pre-Columbian and Colonial Artifacts from Peru, 2014 WL 12861854 (S.D. Fla. Sept. 11, 2014).

63 *Id.* at *1.

64 *Id.*

65 *Id.* at *2–5 (addressing and refuting each of the Claimant's contentions in favor of the Government).

66 Twenty-Nine Pre-Columbian and Colonial Artifacts from Peru, 2014 WL 12861856, at *2 (S.D. Fla. Nov. 13, 2014) (denying the Government's motion for summary judgment on the basis of claimant's lack of standing and granting the Government's motion to strike a paragraph of claimant's answer to its second complaint).

67 United States v. Twenty-Nine Pre-Columbian and Colonial Artifacts from Peru, 2015 WL 1518033, at *2–5 (S.D. Fla. Apr. 2, 2015) (directing claimant to show cause why his claim should not be dismissed for refusal to submit to a deposition).

68 United States v. Twenty-Nine Pre-Columbian and Colonial Artifacts from Peru, No. 1:13-cv-21697-LENARD (Doc. 269) (S.D. Fla. Aug. 24, 2015) (granting the Government's motion for final forfeiture and ordering forfeiture of the artifacts thereto), *aff'd per curiam*, 695 F. App'x 461 (11th Cir. 2017) (affirming "[t]he district court's entry of final judgment of forfeiture in the consolidated forfeiture action").

3. Ancient Coin Collector's Guild

A third CPIA case, *Ancient Coin Collector's Guild v. Customs and Border Protection*,[69] involved ancient Cypriot and Chinese coins that were imported into the United States by coin collectors.[70] Customs agents seized the coins on the grounds that they were being imported in violation of the CPIA, and the government filed a civil forfeiture action against them.[71]

The claimant, the Ancient Coin Collectors Guild, opposed the seizure on a number of statutory and constitutional grounds.[72] The gravamen of the Guild's objection was that the CPIA limited the rights of its members to collect ancient coins, but the court rejected each of its challenges to the CPIA on the merits.[73] Among other things, the court held that it did not have jurisdiction to review the State Department's procedure for including the coins on the list of archaeological materials covered by the CPIA, that the State Department did not exceed its statutory authority to issue regulations under the CPIA, and that banning the importation of the coins did not violate the Guild's rights under the First Amendment.[74]

B. Terrorism Cases

Another forfeiture statute applicable to a narrow set of circumstances, and hence one that is rarely used, is 18 U.S.C. § 981(a)(1)(G), which authorizes the forfeiture of "all assets, foreign or domestic, of any individual, entity, or organization engaged in planning or perpetrating" an act of terrorism against the United States or against a foreign government.[75] While the scope of the statute is broad—"all assets" literally means "all assets" whether

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69 Ancient Coin Collector's Guild v. U.S. Customs & Border Protection, 698 F.3d 171, 185 (4th Cir. 2012).

70 *Id.* at 171.

71 *Id.* at 177–78.

72 *Id.* at 178–79.

73 *Id.* at 178–79, 184–85 (affirming the district court's judgment as a "faithfully interpret[ing] the CPIA").

74 *Id.* at 184–85; *see also* Ancient Coin Collector's Guild v. U.S. Customs & Border Protection, 801 F. Supp. 2d 383, 417–18 (D. Md. 2011) (discussing the application of the procedures in the Civil Asset Forfeiture Reform Act (CAFRA) to forfeitures brought under the Customs laws, and holding that they do not apply to forfeitures under the CPIA).

75 18 U.S.C. § 981(a)(1)(G)(i) (2012); § 981(a)(1)(G)(iv).

they were used to commit the terrorist offense or not—it applies only when the government has proof that that the owner of the assets is a terrorist or terrorist organization.[76]

One application of this statute already mentioned was *United States v. One Gold Ring With Carved Gemstone*,[77] in which the U.S. Attorney for the District of Columbia filed an action against several coins, rings, and other jewelry items that were allegedly looted or taken through extortion from archaeological sites in Syria and used to finance terrorist activities perpetrated by ISIS.[78] Among other things, the items included Roman coins from the first century B.C. and the second century A.D., a Neo-Assyrian stone carving from the ninth century B.C., and gold jewelry of Roman origin from the third century A.D.[79] When no one filed a claim contesting the forfeiture, the court granted the government's motion for summary judgment.[80]

C. Failure to Declare Imported Goods

A simple way for the government to recover artwork and other cultural property is to show that it was brought into the United States by a traveler who failed to declare it on a customs form upon arrival.[81] While the statute only applies when the property was in the personal possession of the international traveler, it is useful when it applies.[82]

In *United States v. Various Ukranian [sic] Artifacts*,[83] a flight attendant arrived at JFK Airport in New York on a flight from Ukraine with 123 religious artifacts in her luggage, none of which

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76 *See* 18 U.S.C. § 2332b(g)(5) (defining the crime of terrorism under federal law).

77 Amended Complaint, United States v. One Gold Ring with Carved Gemstone, No. 1:16-02442-TFH (D.D.C. Dec. 6, 2017).

78 *Id*. at 2.

79 *Id*. at 10–19.

80 United States v. One Gold Ring with Carved Gemstone, 2019 WL 5853493 (D.D.C. Nov. 7, 2019) (entering default judgment under § 981(a)(1)(G) against foreign assets of terrorist organization ISIS).

81 19 U.S.C. §§ 1485, 1497 (2012); United States v. An Antique Platter of Gold, 184 F.3d 131, 135–36 (2d Cir. 1999).

82 *See* 19 U.S.C. §§ 1485, 1497 (2012); *An Antique Platter of Gold*, 184 F.3d at 135–36.

83 United States of America v. Various Ukranian [*sic*] Artifacts, 1997 WL 793093 (E.D.N.Y. Nov. 21, 1997).

were declared on her customs declaration form.[84] Accordingly, the government commenced a civil forfeiture action against the items, citing 19 U.S.C. § 1497, a statute that makes such undeclared merchandise subject to forfeiture.[85]

A claim to the property was filed by Stuart Freeman, who alleged that he purchased the items from a dealer who was responsible for arranging the shipping from Ukraine to New York. Because it was the dealer, not he, who was responsible for filing the Customs form, Freeman said, he should be protected from the forfeiture as an innocent owner.[86] The court held, however, that there is no innocent owner defense to a forfeiture under Section 1497, and thus entered summary judgment for the government based solely on the shipper and flight attendant's failure to declare the property upon arrival in the United States.[87] As we will see, the absence of an innocent owner defense in forfeiture cases brought under customs laws is a recurring theme in cultural property cases.

D. False Customs Declaration

A similar device for recovering artwork and antiquities is 18 U.S.C. § 545, a statute that makes it an offense to smuggle or "clandestinely introduce" merchandise into the United States "with the intent to defraud." In addition to providing for criminal penalties, the statute authorizes the forfeiture of the smuggled merchandise.[88]

One example already mentioned was *United States v. Assorted Artifacts*,[89] in which the government filed a civil forfeiture action under Section 545 to recover numerous items after the smuggler, Ijaz Khan, was convicted in a related case of a criminal violation of the same statute.[90] The complaint alleged that Khan shipped a load of artifacts including pottery items, arrowheads, ancient and medieval coins, and jewelry—with an aggregate value of more than

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84 *Id.* at *1.

85 *Id.*

86 *Id.*

87 *Id.* at *3.

88 18 U.S.C. § 545 (2012).

89 United States of America v. Assorted Artifacts, 2017 WL 1205086 (E.D. Va. Feb. 21, 2017).

90 *Id.* at *2.

$10,000—from Pakistan to the United States accompanied by "a false and fraudulent way bill and goods declaration that described the artifacts as decoration pieces," and that he subsequently sold the items on eBay.[91] Because Khan had already been convicted and no other person filed a claim to the property—the collector who purchased the items on eBay having voluntarily turned them over to the government—the court entered a default judgment.[92]

A better-known example of a forfeiture under Section 545 is *United States v. An Antique Platter of Gold*,[93] in which a New York art dealer purchased an ancient Sicilian "Phiale"—a platter of gold—from a Swiss art dealer for approximately $1.2 million on behalf of an American client.[94] Under an Italian "patrimony" law, any archaeological item of Italian origin is presumed to belong to the Italian government unless its possessor can show private ownership prior to 1902.[95] That meant that the Phiale was Italian government property, but the art dealer, who knew that the Phiale was of Italian/Sicilian origin, attempted to circumvent the Italian law by faxing a commercial invoice to a customs broker in New York falsely indicating that the Phiale's country of origin was Switzerland and falsely stating its value as $250,000.[96] The art dealer thereafter transported the Phiale to New York, and the customs broker used the false invoice to clear the Phiale through customs and deliver it to the client.[97]

When the scheme was discovered, the U.S. Attorney, acting at the request of the Italian government, filed a civil forfeiture action against the Phiale under two alternative theories: (1) that the property was imported in violation of Section 545 because the false statements made in the invoice concerning the country of origin and the value of the property were material misstatements in violation of Section 542; and (2) that the property was imported "contrary to law" within the meaning of 19 U.S.C. § 1595a because it constituted

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91 Indictment at 22–25, United States v. Khan, No. 1:16-cr-00130 (E.D. Va. May 26, 2016).

92 *Assorted Artifacts*, 2017 WL 1205086, at *3–4.

93 United States v. An Antique Platter of Gold, 184 F.3d 131, 138–39 (2d Cir. 1999).

94 *Id.* at 133.

95 *Id.* at 134.

96 *Id.* at 133–34.

97 *Id.*

stolen property under Italian law and thus could not be imported into the United States under the National Stolen Property Act (18 U.S.C. §§ 2314–15).[98]

The owner of the Phiale—the client of the New York art dealer—filed a claim, but the district court granted summary judgment for the government on both theories.[99] The Second Circuit affirmed the forfeiture under Section 545 without reaching the alternative theory under Section 1595a.[100]

The first issue was whether the false statement regarding the country of origin was material, and the panel held that it was.[101] The claimant then argued that he was entitled to an innocent owner defense when a forfeiture is based on Section 545, but the panel held that he was not.[102]

At the time the case was decided in 1999, the ruling as to the innocent owner defense was correct: there was no uniform innocent owner defense to forfeitures under Title 18 of the U.S. Code until 2000 when Congress enacted Section 983(d) as part of the Civil Asset Forfeiture Reform Act (CAFRA). As mentioned in Part II.B, *supra,* when CAFRA took effect the next year, it made the innocent owner defense available in all cases except customs cases brought under the customs laws codified in Title 19. Section 545 is a customs statute, but it is in Title 18.[103]

As will be discussed in Part V, *infra*, if this case were brought today under Section 545, the owner of the property would be entitled to assert an innocent owner defense, which seriously limits the ability of the government to use the statute to recover artwork and antiquities and return them to their rightful owners or to their country of origin. Accordingly, given the availability of alternatives, except in cases like *Ancient Artifacts* where the forfeiture is uncontested, the government is reluctant to seek the forfeiture of illegally imported property under Section 545 today.

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98 *An Antique Platter of Gold*, 184 F.3d at 134.

99 *Id*.

100 *Id*. at 134.

101 *Id*. at 135–38.

102 *Id*. at 138–39.

103 18 U.S.C. § 545.

E. Forfeiture Under 19 U.S.C. § 1595a(c) and the National Stolen Property Act

To recover property in other circumstances, the government needs to rely on statutes that are broader in scope.[104] The statutes of choice in cases involving stolen artwork and antiquities are usually 19 U.S.C. § 1595a(c), which provides for the forfeiture of any merchandise that is introduced into the United States "contrary to law," and 18 U.S.C. § 981(a)(1)(C), which authorizes the forfeiture of the proceeds of a long list of crimes, including the National Stolen Property Act, 18 U.S.C. §§ 2314–15.[105] Given their prevalence in forfeiture cases brought to recover stolen artwork, it is worth taking a moment to discuss the requirements of both statutes.

Section 1595a(c)(1)(A) provides as follows: "Merchandise which is introduced . . . into the United States contrary to law shall be . . . seized and forfeited if it – (A) is stolen, smuggled, or clandestinely imported or introduced."[106] As courts have held, the government can obtain forfeiture under this provision if it establishes two separate, if somewhat overlapping, elements: (1) that the property was introduced into the United States "contrary to law," and (2) that it was "stolen, smuggled, or clandestinely imported or introduced."[107]

There are several ways to show that merchandise was introduced "contrary to law." One of the simplest is to show that when it was imported, the importer provided false information on the required customs forms or related documents in violation of 18 U.S.C. § 542.[108] For example, in *United States v. The Painting Known as Hannibal*, the government based its forfeiture action under Section 1595a(c), not on any allegation that the painting was stolen, but based on the importer's having falsely claimed, at the

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104 *See* 19 U.S.C. § 1595a(c); 18 U.S.C. § 981(a)(1)(C).

105 *See* § 1595a(c); *see also* § 981(a)(1)(C).

106 19 U.S.C. § 1595a(c)(1)(A).

107 *See* United States v. Broadening-Info Enters. (*Hannibal II*), 462 F. App'x 93, 96 (2d Cir. 2012) (following United States v. Davis, 648 F.3d 84, 90 (2d Cir. 2011)*;* United States v. A 10th Century Cambodian Sandstone Sculpture, 2013 WL 1290515, at *6 (S.D.N.Y. Mar. 28, 2013).

108 18 U.S.C. § 542 (making it an offense to introduce merchandise "by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement . . . .").

time of the importation, that the painting was valued at only $100, instead of the $8 million at which it had been appraised.[109]

In such cases, the government still must satisfy the second element—i.e., that the painting was "stolen, smuggled, or clandestinely imported or introduced," but as the court held in *Hannibal*, the intentionally and materially false statements on the importation documents satisfied the "smuggled or clandestinely imported or introduced" requirement.[110]

If the government chooses to allege that the property was imported "contrary to law" because it was stolen, it generally will pair the Section 1595a(c) allegation with an allegation that the property was imported in violation of the National Stolen Property Act, 18 U.S.C. § 2314–15.[111] In such cases, proof that the painting was stolen will simultaneously satisfy both the "contrary to law" requirement and the requirement that it was "stolen, smuggled, or clandestinely imported or introduced."[112] Importantly, however, if the government chooses to go this route, it must prove not only that the painting was stolen at the time it was imported, but also that the person who imported it *knew that it was stolen* at the time that she did so.[113] As we will see, this has proven to be problematic in some cases.

In the case of property involved in a domestic theft, the government will likely bring its civil forfeiture action under 18 U.S.C. § 981(a)(1)(C), which authorizes the forfeiture of all "proceeds" of any violation of a long list of state, federal, and foreign crimes, including the National Stolen Property Act.[114] Thus, when a painting entitled "Othello and Desdemona" was stolen from

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109 United States v. Painting Known as Hannibal (*Hannibal I*), 2010 WL 2102484, at *2 (S.D.N.Y. May 18, 2010).

110 United States v. Painting Known as Hannibal (*Hannibal III*), 2013 WL 1890220, at *5 (S.D.N.Y. Apr. 25, 2013). The *Hannibal* case is discussed in more detail in Part V, *infra*.

111 *See, e.g.*, United States v. Portrait of Wally (*Wally IV*), 663 F. Supp. 2d 232, 250 (S.D.N.Y. 2009).

112 *10th Century Cambodian Sandstone Sculpture*, 2013 WL 1290515, at *6 (citing *Davis*, 648 F.3d at 90).

113 *Wally IV*, 663 F. Supp. 2d at 269.

114 Verified Complaint for Forfeiture *In Rem* at 2, United States v. One Oil Painting Entitled Othello and Desdemona by Marc Chagall, No. 1:18-cv-841 (D.D.C. Apr. 12, 2018).

a residence in New York in 1988, and turned up nearly thirty years later at a gallery in Washington, D.C., the government filed its forfeiture action under Section 981(a)(1)(C), alleging that the painting was the proceeds of interstate transportation of stolen property in violation of Sections 2314 and 2315.[115] In such a case, the government need only prove that the property was stolen and that the person who transported it in interstate commerce knew it was stolen at the time he transported it.

While the forfeiture theories are similar, there is a critical difference between forfeitures under Section 1595a(c) and forfeitures under Section 981(a)(1)(C). As mentioned above, the former is part of the customs laws and thus is not covered by the innocent owner defense that was enacted as part of CAFRA in 2000.[116] The latter, however, is definitely covered by the innocent owner defense. As we will see in Part V, this distinction has enormous consequences.

IV. Case Examples

The following examples of actions to recover stolen artwork pursuant to Section 1595a(c) and/or Section 981(a)(1)(C) are grouped by how the litigation unfolded and the issues that were raised. The cases involving the most problematic issue—the innocent owner defense—are reserved until Part V.

A. The Uncontested Cases

1. "Untitled" by Robert Motherwell

Sometimes things go so well for the government that it is not necessary to file a forfeiture action at all. Such was the case involving an untitled painting by the twentieth century American artist, Robert Motherwell, which had been missing for forty years.[117] In 2017, the son of a deceased worker for a moving company that

115 *Id*. at 2–3.

116 United States v. Davis, 648 F.3d 84, 93 (2d Cir. 2011) (holding that CAFRA expressly excludes forfeitures brought under Title 19 from the innocent owner provision, and refusing to find such a defense implicit in the statute).

117 Press Release, U.S. Dep't of Justice, Manhattan U.S. Attorney and FBI Announce Recovery of Stolen Robert Motherwell Painting (July 12, 2018, https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-and-fbi-announce-recovery-stolen-robert-motherwell-painting [https://perma.cc/4P54-QRP8].

had been in charge of relocating Motherwell's artwork in the 1960s and 1970s, notified the foundation that held title to Motherwell's collection that a painting had been found among his father's possessions.[118] When contacted by the FBI, the son relinquished the painting to the FBI's Art Crime Team, which identified it as a Motherwell painting that had been missing since at least 1978.[119] The FBI turned it over to the foundation, thereby restoring it to its rightful owner without having to commence any formal forfeiture action.[120]

Most cases, however, involve the filing of a formal civil forfeiture complaint and the sending of notice of the forfeiture action to persons who appear to have an interest in the property.[121] Then, if the person who was in possession of the artwork when it was discovered does not contest its forfeiture, the government, upon the entry of a forfeiture judgment, can restore the property to its rightful owner. There are many recent examples of this.

2. A Scholar Sharpening His Quill

During the Second World War, a seventeenth century painting by Salomon Koninck entitled "A Scholar Sharpening His Quill" was stolen by the Nazis from a collection of Dutch and Flemish paintings (known as the Schloss Collection) held by a Jewish family in France.[122] Owing to the meticulous records the Nazis kept of their trove of looted artwork, an inventory of paintings that disappeared during the 1940s in Europe has been available to scholars, art historians, and law enforcement for decades.[123] The Koninck painting was included in that inventory; indeed, a photograph of the painting was included in a gold-tooled, leather-bound album presented to Adolf Hitler, recording the works taken from the

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118 *Id.*

119 *Id.*

120 *Id.*

121 *See* Supplemental Rule G(2), *supra* note 25; Supplemental Rule G(4), *supra* note 25.

122 Verified Complaint for Forfeiture at 2, United States v. Painting Known as A Scholar Sharpening His Quill by the Artist Salomon Koninck, No. 1:18-cv-09611 (S.D.N.Y. Oct. 19, 2018).

123 *Id.* at 4–5.

Schloss Collection.[124]

In November 2017, an art dealer in Chile entered into an agreement with Christie's auction house in New York to sell the painting.[125] When it arrived in New York, however, Christies' employees accessed the inventory of paintings stolen during the Holocaust and identified the Koninck painting as one missing from the Schloss Collection.[126] Informed of these events, the Chilean art dealer advised the government that her father had purchased the painting in Munich, Germany in 1952, and that she had inherited it upon his death in 1987.[127]

The government filed a civil forfeiture action against the painting pursuant to Sections 1595a(c) and 981(a)(1)(C), alleging that it was a stolen work of art that had been introduced into the United States contrary to law, and that it was the proceeds of a violation of the National Stolen Property Act, 18 U.S.C. § 2314.[128] The art dealer voluntarily agreed to relinquish all rights to the painting, the court entered a stipulated order of forfeiture, and the government agreed to return the paint to the Schloss heirs.[129] Other than the filing of the complaint, there was no litigation of the forfeiture issues.

3. An Amorous Couple

The recovery of a painting called *An Amorous Couple* by Pierre Louis Goudreaux involves a similar tale. The painting was looted by German troops from the Khanenko Museum in Ukraine in 1943

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124 *Id*. at 5–6.

125 *Id*.

126 *Id*. at 7.

127 *Id*. at 8; Stipulation and Order (Doc. 7) at 2, United States v. Painting Known as A Scholar Sharpening His Quill by the Artist Salomon Koninck, No. 1:18-cv-09611 (S.D.N.Y. Oct. 19, 2018).

128 Verified Complaint for Forfeiture at 9–10, Painting Known as A Scholar Sharpening His Quill by the Artist Salomon Koninck, No. 1:18-cv-09611 (S.D.N.Y. Oct. 19, 2018).

129 *See* Stipulation and Order, *supra* note 127, at 3; Judgment of Forfeiture at 2, Painting Known as A Scholar Sharpening His Quill by the Artist Salomon Koninck No. 1:18-cv-09611 (S.D.N.Y. Mar. 11, 2019); *see also* Press Release, U.S. Dep't of Justice, Manhattan U.S. Attorney Announces Return to its Rightful Owners of Old Master Painting Stolen by Nazis (Apr. 2, 2019), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-return-its-rightful-owners-old-master-painting-stolen [https://perma.cc/9FST-58ZR].

and disappeared until 2013 when it was posted for sale on the official website of the Doyle Auction House in New York.[130] The FBI commenced an investigation which culminated in the filing of a civil forfeiture complaint against the painting pursuant to Sections 1595a(c) and 981(a)(1)(C) in 2019.[131]

When no one, including the person who had consigned the painting to the auction house, filed a claim contesting the forfeiture, the court entered a default judgment, forfeiting the painting to the United States so that it could be returned to the museum in Ukraine.[132]

4. Ivan the Terrible

One other World War II-era theft involved a painting of *Ivan the Terrible* that was stolen from another Ukrainian museum during the war. In 1987, a U.S. citizen purchased a home in Connecticut and found that a painting of *Ivan the Terrible*, measuring 7.5 feet by 8.5 feet, had been conveyed with the house (apparently the prior owner did not want it).[133] Investigation revealed that the prior owner, in turn, had obtained title to the painting in 1962 when he purchased the same house from a former Swiss army officer who had served in the Second World War and emigrated to the United States in 1946.[134]

In 2017, the owners of the painting transported it to Washington, D.C. with the intent to sell it through an auction house.[135] When a

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130 *See* Verified Civil Complaint for Forfeiture at 3, United States v. Painting Formerly Entitled A Family Portrait and Currently Entitled An Amorous Couple Or Alternatively A Loving Glance by The Artist Pierre Louis Goudreaux, No. 1:19-cv-02517 (S.D.N.Y. July 17, 2019).

131 *See id*. at 1–2; Press Release, U.S. Dep't of Justice, Manhattan U.S. Attorney Announces Action to Recover Ukrainian Painting Looted by Nazis (Mar. 21, 2019), www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-action-recover-ukrainian-painting-looted-nazis

[https://perma.cc/LK3N-AHNP].

132 *See* Judgment of Forfeiture at 2–4, Painting Formerly Entitled A Family Portrait and Currently Entitled An Amorous Couple Or Alternatively A Loving Glance by The Artist Pierre Louis Goudreaux, No. 1:19-cv-02517.

133 *See* Verified Complaint for Forfeiture *In Rem* at 2–3, United States v. One Painting Entitled Secret Departure of Ivan the Terrible Before the Oprichina, No. 1:18-cv-03015 (D.D.C. June 12, 2019).

134 *See id*.

135 *Id*. at 3.

photograph of the painting appeared in the auction house's catalogue, however, the Ukrainian museum contacted the consignee, which halted the sale.[136]

Ultimately, the government filed a civil forfeiture action against the painting, based once again on Sections 1595a(c) and 981(a)(1)(C), and the Ukrainian museum filed the only claim.[137] The owners of the painting agreed to waive any right they had to the painting, which allowed the museum and the government to enter into a Consent Order of Forfeiture forfeiting the painting to the United States, which agreed to return it to the museum as the rightful owner.[138]

5. Five Architectural Drawings

A case involving a more recent theft involved five ink and watercolor drawings of a Polish synagogue that were stolen from the Polish State Archives by an unknown thief in 1999.[139] Nearly twenty years later, Polish law enforcement authorities contacted their counterparts in the United States, seeking assistance in recovering the drawings, which turned out to have been purchased by two American collectors from Sotheby's auction house in 2008.[140]

The collectors agreed to relinquish any claim to the drawings, and the court—apparently without requiring the government to file a formal civil forfeiture complaint—entered a Stipulation and Order directing the government to return the drawings to the Polish State

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136 *Id*. at 3–4.

137 *See* Verified Complaint for Forfeiture *In Rem* at 1–2, United States v. One Painting Entitled Secret Departure of Ivan the Terrible Before the Oprichina, No. 1:18-cv-03015 (D.D.C. June 12, 2019); *see also* Notice of Verified Claim of Claimant Dnipropetrovsk Art Museum, United States v. One Painting Entitled Secret Departure of Ivan the Terrible Before the Oprichina, No. 1:18-cv-03015 (D.D.C. 2019).

138 *See* Consent Order of Forfeiture at 1–2, United States v. One Painting Entitled Secret Departure of Ivan the Terrible Before the Oprichina, No. 1:18-cv-03015 (D.D.C. 2019). *See also* Barbara Leonard, *US Sues for Forfeiture of 'Ivan the Terrible' Painting*, COURTHOUSE NEWS SERV. (Dec. 21, 2018), https://www.courthousenews.com/us-sues-for-forfeiture-of-ivan-the-terrible-painting/ [https://perma.cc/PT3G-GLTM].

139 *See* Stipulation and Order at 1–2, *In re* Five Architectural Drawings of the Stara Synagogue on Wolborska St. in Lodz (Poland) by Adolf Zeligson, No. 1:19-mc-00297 (S.D.N.Y. June 21, 2019).

140 *See id*.

Archive.[141] Notably, the Stipulation and Order allowed the collectors to reserve the right to assert a claim against Sotheby's to recover the money that they paid for the drawings.[142]

6. Othello and Desdemona

Finally, there is the case of *Othello and Desdemona*, a painting by Marc Chagall, that was stolen from a private residence in New York City in 1988. When someone attempted to consign the painting to an art gallery in Washington, D.C. in 2017, the gallery owner refused to accept it and counseled the would-be consignor to contact the FBI.[143] The consignor did so, and the FBI established that the painting was indeed the one that was stolen in New York nearly thirty years before.[144]

Because this case, unlike those mentioned previously, involved a purely domestic violation of criminal law, the government filed its civil forfeiture complaint solely under 18 U.S.C. § 981(a)(1)(C), alleging that it was the proceeds of a domestic violation of the National Stolen Property Act, 18 U.S.C. §§ 2314–15.[145] The estate of the victim of the theft filed a claim contesting the forfeiture, asserting that it was the rightful owner of the property.[146] When no one else filed a claim, however, the government and the estate filed a joint motion asking the court to enter a judgment of forfeiture.[147] The court did so, directing the government to surrender the painting to the estate once the forfeiture order was final.[148]

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141 *Id*. at 3.

142 *Id*. *See also* Press Release, U.S. Dep't of Justice, Manhattan U.S. Attorney Announces Return to Polish Government of Stolen Architectural Drawings of Historic Synagogue (June 21, 2019), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-return-polish-government-stolen-architectural-drawings [https://perma.cc/4MQQ-ET9J].

143 Verified Complaint for Forfeiture *In Rem* at 1, 3–4, United States v. One Oil Painting Entitled Othello and Desdemona by Marc Chagall, No. 1:18-cv-00841 (D.D.C. Oct. 29, 2018).

144 *See id*. at 6.

145 *See id*.

146 *See id*.

147 *Id*.

148 *See* Spencer S. Hsu, *30 Years After Theft, FBI Recovers Chagall Painting Stolen from New York Couple's Apartment*, WASH. POST (Apr. 12, 2018), https://www.washingtonpost.com/local/public-safety/marc-chagall-painting-stolen-from-new-york-apartment-recovered-by-fbi-after-30-years/2018/04/12/15514510-3da9-11e8-

B. Contested Cases

1. Claims that settle

Often, of course, things do not go so smoothly. One or more parties may contest the government's forfeiture action, raising both procedural and substantive objections to the actions taken by the government, or simply asserting claims that compete with those of other allegedly innocent owners. In such cases, the best result, from the government's perspective, is a settlement in which the competing claims are amicably resolved among the parties.

In *United States v. One Oil Painting Entitled "Femme en Blanc" by Pablo Picasso*,[149] the government filed a civil forfeiture action pursuant to Sections 981(a)(1)(C) and 2314–15, alleging that a 1922 Picasso was subject to forfeiture because it had been stolen by the Nazis from a Jewish woman in Paris in 1940, and subsequently transported to the United States.[150] The grandson of the victim filed a claim to the painting, asserting that it belonged to him as his grandmother's rightful heir.[151] But a woman who had purchased the painting in 1976 from an art gallery in New York, without having any reason to know that it was stolen, filed a competing claim asserting that the painting belonged to her as a bona fide purchaser for value.[152]

The parties filed private lawsuits against each other, cross-claims in the forfeiture proceeding, and motions challenging the government's right to take title to the painting under the forfeiture laws.[153] In the end, with the court declining to grant any of the procedural motions that would have given one claimant an advantage over the other, the parties entered into a settlement whereby the court granted title to the buyer, who in turn agreed to

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a7d1-e4efec6389f0_story.html [https://perma.cc/R9NE-5B22].

149 United States v. One Oil Painting Entitled "Femme en Blanc," 362 F. Supp. 2d 1175 (C.D. Cal. 2005).

150 *Id.* at 1178–79.

151 *Id.* at 1179.

152 *Id.* at 1178–79; Stipulation Attaching Exhibits to Consent Judgment at 9, United States v. One Oil Painting Entitled "Femme en Blanc" by Pablo Picasso, No. 2:04-cv-8333 (C.D. Cal. Nov. 17, 2005).

153 *One Oil Painting Entitled "Femme en Blanc*," 362 F. Supp.2d at 1180.

pay $6.5 million to the heir.[154]

An even more creative settlement was reached to resolve the competing claims to a wood-panel painting by a thirteenth century Florentine known as "Madonna and Child."[155] In the 1980s, two individuals each held a fifty-percent share of the painting, which was stored in a safety deposit box at a Swiss bank in Geneva.[156] In 1986, the painting disappeared—according to the heirs of one of the co-owners, it was stolen by the other—and was unaccounted for until it appeared in a Sotheby's auction catalogue in 2014, slated for auction in New York.[157]

The government filed a civil forfeiture action against the painting under 18 U.S.C. § 981(a)(1)(C), alleging that it was the proceeds of a violation of the National Stolen Property Act, 18 U.S.C. § 2315, because the second co-owner had removed the painting from the safety deposit box without the permission of the first, and had consigned it to Sotheby's for sale without giving notice to the other.[158] Numerous parties filed claims including the alleged thief, who moved to dismiss the forfeiture complaint on the ground that, because the painting belonged to her, it could not have been stolen.[159]

The court declined to dismiss the complaint, ruling quite correctly that factual issues such as who owned the painting would have to be resolved at trial.[160] This prompted the parties to enter

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154 *See* Consent Judgment at 2–4, United States v. One Oil Painting Entitled "Femme en Blanc" by Pablo Picasso, No. 2:04-cv-8333 (C.D. Cal. Nov. 8, 2005) (government relinquishing title and parties agreeing to settle); Claire Selvin, *Picasso Painting Once the Subject of Nazi-Loot Lawsuit to appear at Zurich Art Weekend*, ART NEWS (June 16, 2019), https://www.artnews.com/art-news/news/nazi-looted-picasso-hauser-wirth-zurich-12693/#! [https://perma.cc/YH4B-RVT3] (buyer paying 6.5 million dollars to the heir).

155 United States v. The Painting Known and Described as "Madonna and Child," 2015 WL 108416, *1 (S.D.N.Y. Jan. 6, 2015).

156 *Id*. at *1–2.

157 *Id*. at *4–6.

158 *Id*. at *4–5; *see also* Verified Complaint at 7, United States v. The Painting Known and Described as "Madonna and Child," No. 1:14-cv-4485 (S.D.N.Y. June 23, 2014) (alleging that the painting was the proceeds of a violation of 18 U.S.C. § 2315 as well as a violation of 18 U.S.C. § 542, which prohibits the entry of goods into the United States by means of false statements).

159 *The Painting Known and Described as "Madonna and Child,"* 2015 WL 108416, at *5.

160 *Id*. at *6–7.

into settlement negotiations and, in the end, they agreed that the painting would be sold and that the proceeds of the sale (minus attorneys' fees and storage expenses) would be divided among the claimants.[161] One-half was allocated to the heirs of the first co-owner, and the other half was divided three ways between the other co-owner and two individuals who claimed that she had transferred her share to them at some point in the past.[162]

2. "Portrait of Wally"

When civil forfeiture cases do not settle, the government has little choice but to press forward with the forfeiture action, opposing the claims of the third parties who believe the government's attempt to recover the property for the person, entity, or country that the government considers to be the rightful owner to be misguided. Often this can lead to years of litigation, forcing the government to expend considerable resources.

The best-known example of such protracted and contentious litigation involves a painting by the artist Egon Schiele, known as "Portrait of Wally."[163] In 1938, the owner of the painting, the Jewish owner of an art gallery in Austria, was forced to sell the painting along with the rest of her collection to a Nazi Party member on the eve of her flight to England to escape the Holocaust.[164] When the war ended, the painting was recovered by American armed forces, and through a complex—and disputed—series of events, was ultimately acquired by an Austrian museum.[165]

In 1997, the museum loaned the painting to the Museum of Modern Art in New York.[166] Two years later, in 1999, the government seized the painting and filed a civil forfeiture action under 19 U.S.C. § 1595a(c), alleging that it was stolen property that

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161 Stipulation and Order for Settlement at 4, United States v. The Painting Known and Described as "Madonna and Child," No. 1:14-cv-4485 (S.D.N.Y. May 11, 2015).

162 *Id*. at 4–5.

163 United States v. Portrait of Wally (*Wally I*), 105 F. Supp. 2d 288 (S.D.N.Y. July 19, 2000); United States v. Portrait of Wally (*Wally II*), 2000 WL 1890403 (S.D.N.Y. Dec. 28, 2000); United States v. Portrait of Wally (*Wally III*), 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002); United States v. Portrait of Wally (*Wally IV*), 663 F. Supp. 2d 232 (S.D.N.Y. 2009) (Wally IV).

164 *Wally IV*, 663 F. Supp. 2d 232, 238 (S.D.N.Y. 2009).

165 *Id*. at 238–43.

166 *Id*. at 246.

had been imported into the United States "contrary to law."[167]

The Austrian museum contested the forfeiture and, putting on a "full court press," filed a series of motions that resulted in four lengthy district court opinions between 2000 and 2009.[168] Among other things, the museum contested the court's jurisdiction to litigate the case, alleged that in seizing the painting, the government violated its rights under the Due Process Clause, and claimed that the delay of over 60 years in bringing the case violated the doctrine of laches.[169] Moreover, on the merits of the government's complaint, the museum argued that, because it was sold to the Nazi Party member and not taken without the owner's consent, the painting had never been stolen; that even if it was stolen originally, it was no longer "stolen" within the meaning of the National Stolen Property Act when the museum acquired it after it was recovered by American armed forces, and that the museum did not know that it was stolen when it caused the painting to be imported into the United States in 1997.[170]

In the end, in ruling on cross-motions for summary judgment by the government and the museum, the court held that the painting was "stolen" within the meaning of the National Stolen Property Act because it was acquired from the owner by a Nazi Party member who demanded it from her "at a time when she could not refuse."[171] And it held that it remained "stolen" at the time it was imported into the United States, despite its recovery by American armed forces and the owner's failure to recover it at that time.[172] Nevertheless, the court held that there was a material issue of fact as to whether the museum's director knew that the painting was stolen at the time it was imported into the United States.[173] Because such knowledge is required to prove that there was a violation of the National Stolen

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167 *Id*. at 250. *See* Amended Verified Complaint ¶¶ 8–9, *Wally I* , 105 F. Supp. 2d 288 (S.D.N.Y. July 19, 2000) (No. 99 Civ. 9940).

168 *See generally Wally I*, 105 F. Supp. 2d 288; *Wally II*, 2000 WL 1890403; *Wally III*, 2002 WL 553532.

169 *See Wally IV*, 633 F. Supp. 2d at 236–46 (summarizing the procedural history of the case).

170 *Id*.

171 *Id*. at 256.

172 *Id*. at 259–60.

173 *Id*. at 269–73.

Property Act, the court could not conclude that the government was entitled to the painting under Section 1595a(c) as long as that element was in dispute.[174] Accordingly, the court denied both parties' motions for summary judgment and set the case for trial.[175]

Finally, on the eve of trial, more than ten years after the forfeiture action was commenced, the parties settled the matter, with the museum agreeing to pay the heirs of the rightful owner $19 million, and the heirs and the government agreeing to relinquish the painting to the museum.[176]

3. 10th Century Cambodian Sandstone and the Mask of Ka-Nefer-Nefer

Two other hotly-contested civil forfeiture cases illustrate other issues that the government has been forced to litigate when attempting to recover and repatriate stolen artwork and antiquities, and the pitfalls of the judicial process.

In *United States v. A 10th Century Cambodian Sandstone Sculpture*,[177] the government filed a civil forfeiture action under 19 U.S.C. § 1595a(c) and 18 U.S.C. §§ 545 and 981(a)(1)(C) to recover a statue that was looted from an archaeological site in Cambodia during the war in the 1960s and 1970s.[178] The statue was allegedly taken in 1972 and purchased by a collector in Thailand, who then attempted to sell it on the international market.[179] After struggling to find a buyer, the Thai collector sold the statue through an auction house in the U.K. to a Belgian businessman in 1975, whose widow consigned it to Sotheby's for sale in the United States in 2010.[180]

Sotheby's and the consignor filed claims contesting the forfeiture and moved to dismiss the action on the ground that the facts alleged in the complaint would not be sufficient to establish

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174 *Wally IV*, 663 F. Supp. 2d 232, 269 (S.D.N.Y. 2009).

175 *Id.* at 276.

176 Stipulation and Order of Settlement and Discontinuance, United States v. Portrait of Wally, 1:99-cv-9940 (S.D.N.Y. 2013).

177 United States v. A 10th Century Cambodian Sandstone Sculpture, 2013 WL 1290515 (S.D.N.Y. Mar. 28, 2013).

178 *Id.* at *1.

179 *Id.* at *2.

180 *Id.*

the requirements of any of the named forfeiture statutes.[181] In particular, the claimants asserted that the government could not prove the three factors that it was required to prove: (1) that the statue was stolen, (2) that it remained stolen at the time it was imported, and (3) that the entity that imported it—which was Sotheby's—knew it was stolen at that time.[182] The court allowed the government to amend its complaint to address these concerns, and denied the motion to dismiss.[183]

While no one knew the identity of the thief nor the circumstances surrounding the removal of the statue from the archaeological site, the court held the complaint alleged enough facts to show that it was the property of Cambodia and that Cambodia had not given permission to anyone to remove it from that country.[184] Moreover, the court held that under English law, Cambodia's ownership was not extinguished by the intervening sale of the statue to the Belgian businessman in the U.K. in 1975.[185] Thus, the complaint properly alleged that the statue was stolen and remained stolen when it was imported into the United States.[186]

Whether the complaint alleged sufficient facts to support the third element was the most difficult issue, as the claimants argued that there was no evidence that Sotheby's knew the statue was stolen at the time it imported it.[187] The court held, however, that the evidence—that Sotheby's has "particular expertise in works from India and Southeast Asia," that Sotheby's had consulted with the Thai collector before it imported the statue and knew that he had had trouble selling it because of insufficient documentation as to its origin, that the Thai collector himself knew the statue was stolen, and that Sotheby's "provided inaccurate provenance information" in communicating with potential buyers—was sufficient, taken together, to withstand the motion to dismiss.[188] Thereafter, to avoid

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181 *Id*. at *1.

182 *Id*. at *7.

183 United States v. A 10th Century Cambodian Sandstone Sculpture, 2013 WL 1290515, at *10 (S.D.N.Y. Mar. 28, 2013).

184 *See id*. at *8.

185 *Id*. at *10.

186 *Id*.

187 *Id*. at *27–28.

188 *Id*. at *28–29.

further litigation, Sotheby's and the consignor withdrew their claims and agreed to allow the statue to be returned to Cambodia.[189]

A case with seemingly similar facts, however, resulted in a very different disposition in another court. In 1973, a 3,000 year-old Egyptian mask "went missing" from its storage location in Cairo.[190] Years later, the mask turned up in the St. Louis Art Museum.[191] When the museum refused to return the mask at the request of the Egyptian government, the United States filed a civil forfeiture action entitled *United States v. Mask of Ka-Nefer-Nefer*,[192] alleging that the mask was subject to forfeiture under 19 U.S.C. § 1595a(c) as property imported into the United States "contrary to law," and that it was "stolen, smuggled, or clandestinely imported or introduced."[193]

As in the case *10th Century Cambodian Sandstone Sculpture*, the Museum filed a motion to dismiss the complaint, alleging that the facts set forth by the government were not sufficient to support a reasonable belief that the government would be able to establish the forfeitability of the property at trial, as required by Supplemental Rule G(2)(f).[194] The district court agreed with the Museum and granted the motion to dismiss.[195] It is not sufficient, the court said, to allege "that because something went missing from one party in 1973 and turned up with another party in 1998, it was therefore stolen and/or imported or exported illegally."[196]

The government moved to amend its complaint to allege additional facts showing that the mask was stolen within the

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189 *See* United States v. A 10th Century Cambodian Sandstone Sculpture, No. 1:12-cv-2600 (S.D.N.Y.), Stipulation and Order of Settlement (Doc. 76), filed Dec. 13, 2013. *See also* Press Release, U.S. Dep't of Justice, Manhattan U.S. Attorney Announces Return Of 10th Century Sandstone Sculpture To The Kingdom Of Cambodia (May 7, 2014), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-return-10th-century-sandstone-sculpture-kingdom [https://perma.cc/Y45E-HTKR].

190 United States v. Mask of Ka-Nefer-Nefer, 2012 WL 1094658 (E.D. Mo. Mar. 31, 2012), *aff'd*, 752 F.3d 737 (8th Cir. 2014).

191 *Id*.

192 *Id*. at 739.

193 *Id*. at 739–40.

194 *Id*.

195 *Id*. at 740.

196 United States v. Mask of Ka-Nefer-Nefer, 2012 WL 1094658 (E.D. Mo. Mar. 31, 2012), *aff'd*, 752 F.3d 737, 740 (8th Cir. 2014).

meaning of the National Stolen Property Act, but the district court denied the motion as untimely, and the government appealed.[197]

The Eighth Circuit affirmed the district court on the narrow procedural issue, agreeing with the district court that the government's motion to amend was untimely.[198] In *dicta*, however, two of the three judges expressed a clear hostility to the merits of the government's forfeiture action.[199]

In the majority's view, the government failed to cite the Stolen Property Act in the first instance because it wanted to avoid having to prove that whoever imported the mask knew that it was stolen.[200] Such proof, the majority said, is essential to establishing that the importation was "contrary to law" as Section 1595a(c) requires.[201] Otherwise, the government could use the forfeiture laws to the detriment of museums "and other good faith purchasers in the international marketplace for ancient artifacts."[202] "The Executive Branch," the panel added, "should anticipate judicial resistance" to the use of the forfeiture laws to take property from "non-culpable parties."[203]

In an opinion concurring only on the procedural issue, the third member of the panel objected to the majority's view on this point.[204] The judge argued that the illegal trade in cultural artifacts is a serious international issue and the government is, therefore, justified in using the forfeiture laws to combat it.[205] Importantly, Congress exempted the customs laws from the innocent owner defense enacted by CAFRA.[206] Because "[e]ven innocent owners may have to forfeit their property, the judge concluded, "museums and other participants in the international market for art and antiquities need to exercise caution and care in their dealings in order to protect this

197 *Id*. at 744.

198 *Id*.

199 *Id*.

200 *Id*. at 745 (Murphy, J., concurring).

201 *Id*. at 742.

202 United States v. Mask of Ka-Nefer-Nefer, 2012 WL 1094658 (E.D. Mo. Mar. 31, 2012), *aff'd*, 752 F.3d 737, 738 (8th Cir. 2014).

203 *Id*. at 742 n.7.

204 *Id*. at 745–46 (Murphy, J., concurring).

205 *Id*. at 745 (Murphy, J., concurring).

206 *Id*.

heritage and to understand that the United States might ultimately be able to recover such purchases."[207]

V. The Innocent Owner Defense

The judicial reluctance to trespass on the property rights of third parties who acquire property without knowing that it is stolen, as expressed in the Eighth Circuit's decision in *Mask of Ka-Nefer-Nefer*,[208] brings us to the controversy created by the enactment of the innocent owner defense to civil forfeitures and its criminal forfeiture counterpart.[209] We begin the discussion with some brief background on the civil forfeiture provision, and then look at how it has been applied.

A. The Innocent Owner Defense: 18 U.S.C. § 983(d)

Historically, civil forfeiture statutes–some of which date back to the eighteenth century–contained no provision exempting innocent owners from the consequences of a forfeiture action brought against their property.[210] Nor was any such protection found to be implicit in the Due Process Clause of the Fifth Amendment.[211] To the contrary, as the Supreme Court held in *Bennis v. Michigan*,[212] except in those cases where Congress had enacted an innocent owner defense that applied in a particular situation, property could be forfeited based on its use in the commission of an offense whether the property owner was aware of the illicit use of her property or not.[213]

In CAFRA, Congress reacted to the *Bennis* decision by enacting a uniform innocent owner defense that applies to most civil forfeiture cases.[214] Codified at 18 U.S.C. § 983(d), the defense

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207 *Id.* at 745–46 (Murphy, J., concurring).

208 United States v. Mask of Ka-Nefer-Nefer, 2012 WL 1094658 (E.D. Mo. Mar. 31, 2012), *aff'd*, 752 F.3d 737, 745 (8th Cir. 2014) (Murphy, J., concurring).

209 18 U.S.C. § 983(d)(1) (2019).

210 *See* Bennis v. Michigan, 516 U.S. 442, 446 (1996).

211 *Id.* at 448.

212 516 U.S. 442 (1996).

213 *Id.* at 446. *See* Cassella, ASSET FORFEITURE LAW IN THE UNITED STATES, *supra* note 1, at § 12-56 (explaining the history of the innocent owner defense).

214 Civil Asset Forfeiture Reform Act of 2000, H.R. 1658, 106th Cong. § 2(d) (2d Sess. 2000).

provides categorically that the interest of an innocent owner "shall not be forfeited under any civil forfeiture statute."[215]

The statute goes on to define an innocent owner in two ways. With respect to a person who had an interest in the property before it was involved in the commission of the offense, the defense applies to one who "did not know of the conduct giving rise to the forfeiture" or who "did all that reasonably could be expected under the circumstances" to prevent the illegal use of her property.[216] With respect to a person who acquired her interest in the property after it was involved in the commission of the offense, the defense applies to a person who was "a bona fide purchaser . . . for value [who] did not know and was reasonably without cause to believe that the property was subject to forfeiture" at the time that she acquired it.[217]

In the context of cases involving stolen property, the former provision protects the rightful owner who never surrendered title to her property and did not consent to it being taken from her,[218] and the latter provision protects someone who purchased the stolen property—from the thief or otherwise—in an arm's-length transaction (i.e., for fair market value), without reason to know that it was stolen.[219]

In enacting CAFRA, however, Congress chose to exempt

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215 18 U.S.C. § 983(d)(1) (2019).

216 § 983(d)(2).

217 § 983(d)(3).

218 *Cf.* United States v. Abdullahi, 2019 WL 3824233 (W.D. Wash. Aug. 14, 2019) (noting in a criminal forfeiture case, that the Government recognized that the rightful owner of a stolen firearm may recover it even if it was used by another person to commit a criminal offense and was forfeited); United States v. Monzon, 2009 WL 361095, at *2 (S.D. Fla. Feb. 9, 2009) (noting that the government recognizes that a robbery victim has a pre-existing, superior interest in stolen funds and agrees to amend the order of forfeiture to recognize that interest); Bethany Coll. v. United States, 2015 WL 7430798 (N.D. W. Va. Nov. 19, 2015) (holding that a victim of embezzlement has the right to notice of forfeiture of embezzled funds when they are found in the possession of a third party who obtained them from the embezzler).

219 *See, e.g.*, United States v. Munson, 477 F. App'x 57, 67–68 (4th Cir. 2012) (holding that the BFP requirement comes from commercial law; only persons who acquire the property in an arm's-length transaction can be BFPs); United States v. 10503 Campus Way South, 2018 WL 6834355 (D. Or. Dec. 27, 2018) (holding that a transfer of residence from brother to sister for $10 was not a purchase; because the purchase must be an arm's length transaction, "love and affection" cannot be considered part of the consideration).

certain forfeiture actions from its provisions.[220] As the Second Circuit explained in *Davis*, Congress expressly provided in Section 983(i) that the term "civil forfeiture statute" does not include "the Tariff Act of 1930 or any other provision of law codified in title 19."[221] The forfeiture statute that the government uses most often to recover stolen property that was brought into the United States after it was stolen—19 U.S.C. § 1595a(c)—is part of the Tariff Act of 1930 and, hence, is exempt from the application of the innocent owner statute.[222]

On the other hand, the forfeiture statute that the government uses most often to recover stolen property in purely domestic cases—18 U.S.C. § 981(a)(1)(C)—is clearly covered by the innocent owner defense,[223] which means that both the victim of the theft of the property *and a bona fide purchaser for value* who subsequently acquired the property would be protected from a forfeiture action.[224] The following cases illustrate how these issues have played out in post-CAFRA cases.

B. Cases Applying the Innocent Owner Defense

1. "The Painting Known as Hannibal"

The first case does not involve the victim of a theft or competing claims, but it nevertheless illustrates how a forfeiture action involving a work of art will be resolved when the statute on which the forfeiture is based does not contain an innocent owner defense.[225]

In *United States v. The Painting Known as "Hannibal,"*[226] the owner of a modern work by Jean-Michel Basquiat contracted with

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220 United States v. Davis, 648 F.3d 84, 93 (2d Cir. 2011).

221 *Id.* at 94 (quoting 18 U.S.C. § 983(i)(2)(A) (2011)).

222 *Id.*

223 *Id.* at 88 ("As for the government's forfeiture claims under 18 U.S.C. § 981, the district court found that Davis had established that she was an innocent owner of the monotype within the meaning of 18 U.S.C. § 981(d)(3)(A), and was therefore entitled to summary judgment on those claims. The government has not appealed that ruling.").

224 *See id.* at 93–96*; see also* 18 U.S.C. § 983(d)(2)–(3).

225 *Hannibal I*, 2010 WL 2102484 (S.D.N.Y. May 18, 2010), *aff'd in part, remanded in part sub nom*; *Hannibal II*, 462 F. App'x 93 (2d Cir. 2012), on remand; *Hannibal III*, 2013 WL 1890220 (S.D.N.Y. Apr. 25, 2013).

226 *Hannibal I*, 2010 WL 2102484.

a firm to transfer the painting from the Netherlands to New York, and to arrange for its sale.[227] The firm did so, but as mentioned earlier, the invoice accompanying the painting falsely gave its value as $100—not the $1 million that the owner paid for the painting when he acquired it, and not the $8 million for which it was later appraised.[228]

The government commenced a civil forfeiture action against the painting under Section 1595a(c), alleging that it was introduced into the United States "contrary to law" because the false invoice constituted a violation of 18 U.S.C. § 542, which prohibits the entry of goods into the United States by means of false statements.[229] The owner opposed the forfeiture, asserting that the allegedly false statement on the invoice was not material and that, in any event, he was an innocent owner entitled to protection from forfeiture because he was not the one who shipped the painting to the United States, and because he was unaware that the firm that did ship the painting made the false statement on the invoice.[230]

The district court held that the false statement as to the value of the painting was material because, by stating the value to be less than $200, the shipper evaded customs regulations requiring more extensive documentation before merchandise can be imported into the United States.[231] Moreover, the court held that, because there is no innocent owner defense to forfeitures brought under the customs laws, the owner's lack of involvement in the shipping process, and his lack of knowledge of the shipper's false statements on the invoice accompanying the shipment, were irrelevant and gave him no basis to object to the forfeiture.[232]

On appeal, the Second Circuit agreed with the district court that the false statement regarding the painting's value was a material misrepresentation,[233] and that there is no innocent owner defense to forfeitures under Section 1595a(c).[234] Thus, as the district court

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227 *Id*. at *1.

228 *Id*. at *1–2.

229 *Id*. at *2–3.

230 *Id*. at *3–4.

231 *Hannibal I*, 2010 WL 2102484, at *4 (S.D.N.Y. May 18, 2010).

232 *Id*.

233 *Hannibal II*, 462 F. App'x 93, 97 (2d Cir. 2012).

234 *Id*. at 95 (citing United States v. Davis, 648 F.3d 84, 92–94 (2d Cir. 2011)).

later explained on remand, because the culpability of the owner of the property is not a factor in civil forfeiture cases, the false statement *by the shipper* was all that was required to render the painting subject to forfeiture under Section 1595a(c).[235]

2. "The Painting Known as Le Marche"

With that background, it will be easy to understand what happened when the government filed a civil forfeiture action against a stolen painting under two forfeiture statutes—one of which carried an innocent owner defense and one of which did not—and a wholly innocent third-party buyer who filed a claim.[236]

In *United States v. The Painting Known as Le Marche*,[237] the government filed a civil forfeiture action against a painting by Camille Pissarro that a buyer, Sharyl Davis, purchased for fair market value in 1985, unaware that it had recently been stolen from a French museum.[238] Indeed, Davis had displayed the painting in her home for ten years before consigning it to Sotheby's for sale.[239]

When the government became aware of the provenance of the painting, it filed a civil forfeiture action to recover it and return it to France, but unlike the cases discussed earlier in which the buyer voluntarily relinquished her interest in the stolen work or engaged in a settlement, Davis "refused to blink," and forcefully pressed her claim to the painting as an innocent owner.[240]

The government's action was based on two theories: (1) that the painting was subject to forfeiture under Section 981(a)(1)(C) as the proceeds of a violation of the National Stolen Property Act, and (2) that it was subject to forfeiture under Section 1595a(c) as stolen property introduced into the United States contrary to law.[241]

The district court held that Davis was a bona fide purchaser for value, which meant that she was an "innocent owner" within the

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235 *Hannibal III*, 2013 WL 1890220, at *5 (S.D.N.Y. Apr. 25, 2013).

236 *See* United States v. The Painting Known as "Le Marche," 2010 WL 2229159, at *1 (S.D.N.Y. May 25, 2010), *aff'd sub nom. Davis*, 648 F.3d at 87.

237 *Le Marche*, 2010 WL 2229159.

238 *See Davis*, 648 F.3d at 86–87 (providing factual background that was not provided in the lower court's opinion).

239 *Id.*

240 *Id.*

241 *Id.* at 87; *Le Marche*, 2010 WL 2229159, at *1.

meaning of Section 983(d)(3), and thus was entitled to prevail against the government (and the museum) to the extent that the forfeiture action was based on Section 981(a)(1)(C).[242] But it held that because the innocent owner defense does not apply to Section 1595a(c), Davis's status as a bona fide purchaser gave her no advantage over the government (or the museum) insofar as the forfeiture was based on that statute.[243] Rather, to prevail in a forfeiture action based on Section 1595a(c), Davis would have to contest the forfeiture on the merits and establish that the painting was not stolen, that it was not transported in interstate or foreign commerce, or that the person who transported it did not know that it was stolen at that time.[244]

Accordingly, the court granted Davis's motion for summary judgment with respect to the Section 981(a)(1)(C) theory, but denied it with respect to Section 1595a(c) and set the case for trial.[245] When a jury returned a unanimous verdict for the government, finding that Davis failed to meet her burden of proof, the court entered judgment for the government, and Davis appealed.[246]

The Second Circuit affirmed the district court's decision, agreeing that there is no innocent owner defense in Section 1595a(c) and that one cannot be judicially implied.[247] Moreover, it rejected Davis's claim that the forfeiture of property from an innocent owner violated the Excessive Fines Clause of the Eighth Amendment,[248] and denied Davis's request for attorney's fees even though she had prevailed as to the part of the government forfeiture action that was based on Section 981(a)(1)(C).[249]

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242 United States v. Davis, 648 F.3d 84, 88 (2d Cir. 2011); United States v. The Painting Known as "Le Marche," 2010 WL 2229159, at *1 (S.D.N.Y. May 25, 2010).

243 *Davis,* 648 F.3d at 88; *Le Marche,* 2010 WL 2229159, at *1.

244 *See Davis,* 648 F.3d at 88; *see also* 19 U.S.C. §§ 1595(a)(c), 1615 (2019).

245 *Davis,* 648 F.3d at 88; *Le Marche,* 2010 WL 2229159, at *1.

246 *Davis,* 648 F.3d at 88; *Le Marche,* 2010 WL 2229159, at *1.

247 United States v. Davis, 648 F.3d 84, 94–95 (2d Cir. 2011).

248 *Id*. at 97.

249 *Davis*, 648 F.3d at 98 (denying request for attorney's fees under 28 U.S.C. § 2465(c) because recovery under that statute is limited to one who "substantially prevails," and a person who prevails as to one issue but ultimately fails to achieve the objective of her claim – to recover the property – has not "substantially prevailed"). *See also* Kate Taylor, *Treasured Pissarro Print Turns into Costly Headache*, N.Y. TIMES (June 8, 2011), https://www.nytimes.com/2011/06/09/arts/design/buyer-of-stolen-pissarro-work-suffers-

The lesson from this case is clear: a bona fide purchaser for value can prevail against the government and the rightful owner of stolen property if the government brings its forfeiture action under a statute to which the innocent owner defense applies, but she cannot prevail if the government brings its action under a statute to which the defense *does not* apply unless she is able to prove that the government's premise—e.g., that the property was the proceeds of theft under the National Stolen Property Act—was incorrect.[250]

Accordingly, in the interest of protecting the rights of the rightful owner of property who was the victim of a theft, the government will likely choose to file its civil forfeiture action under Section 1595a(c)—or another provision of Title 19—whenever it is able to do so, and not under Section 981(a)(1)(C).[251] But what happens if the forfeiture action is based on a purely domestic transaction and Section 981(a)(1)(C) is the only forfeiture statute that applies?

3. United States v. Chowaiki

Those are the issues that arose in *United States v. Chowaiki*,[252] a case involving the innocent owners of a painting that was taken from them by fraud, and not one but two possible bona fide purchasers who laid claim to the painting in the forfeiture proceeding.[253] The case, unlike most of those discussed previously, was a criminal forfeiture case, but the forfeiture statute and the bona fide purchaser defense available to third parties were the same.[254]

Ezra Chowaiki owned an art gallery where people would consign paintings for sale, with Chowaiki earning a commission if the paintings were sold and if the consignor approved the sale and the sale price.[255] In his criminal case, Chowaiki was convicted of defrauding the consignors by using the consigned works as collateral for loans to his gallery and by selling their paintings to third parties without the consignors' approval of the terms of the

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hefty-loss.html [https://perma.cc/68YK-XBRN].

250 *Davis*, 648 F.3d at 97.

251 *Id.*

252 United States v. Chowaiki, 369 F. Supp. 3d 569 (S.D.N.Y. 2019).

253 *See generally id.*

254 *See generally id.*

255 *Id.* at 569–70.

sale.[256] As part of his sentence, he was ordered to forfeit the paintings pursuant to Section 981(a)(1)(C) on the ground that they constituted the proceeds of the fraud.[257]

One of the forfeited paintings was a work by Picasso entitled "Le Clown," which had been consigned to Chowaiki's gallery by its owners.[258] The owners made a claim to the painting in the forfeiture proceeding, asserting that they had retained title to the painting at all times and had never agreed to its sale.[259] Indeed, the government indicated that it was prepared to recognize the owners' claim and return the painting to them, but two other third parties also filed claims, asserting that they had acquired the painting as bona fide purchasers for value.[260]

One of the claimants was an entity to whom Chowaiki had sold the painting without advising the owners or obtaining their agreement as to the sale and the sale price, and the other was a lender who had loaned money to Chowaiki, taking a secured interest in the painting as collateral.[261] The facts and legal issues surrounding the third-party claims are complex, and their claims appear likely to fail on technical grounds,[262] but the point is that, in this situation, the government and the court were faced with the competing claims of

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256 *Id*. at 571.

257 *Id*.

258 United States v. Chowaiki, 369 F. Supp. 3d 569 (S.D.N.Y. 2019).

259 *Id*. at 570–71 (noting that four parties filed petitions asserting interests on the painting: The Neumans; KS Enterprise LLC; Piedmont Capital LLC; and Albert Togut, the Bankruptcy Trustee for the Gallery's estate).

260 *Id*. In a criminal case, the forfeiture issues are litigated in a post-conviction ancillary proceeding pursuant to 21 U.S.C. §853(n). Third parties asserting a bona fide purchaser defense may do so pursuant to Section 853(n)(6)(B), which is identical in all relevant respects to Section 983(d)(3), its civil forfeiture counterpart). *See* Cassella, ASSET FORFEITURE LAW IN THE UNITED STATES, *supra* note 1, at Ch. 23.

261 *Chowaiki*, 369 F. Supp. 3d at 577 (noting that the lender had asserted a plausible claim that it acquired a legal interest in Le Clown as a bona fide purchaser for value). *Under forfeiture law, a lender who extends a loan and receives a secured interest in property in return is considered to be a bona fide purchaser of the property*. Cassella, ASSET FORFEITURE LAW IN THE UNITED STATES, *supra* note 1, at § 23-16(b).

262 *Chowaiki*, 369 F. Supp.3d at 574–77 (noting that the buyer appears to have subsequently sold the painting back to Chowaiki and the lender may have obtained its secured interest at a time when Chowaiki did not own the painting because he had already sold it to the buyer and had not yet bought it back). For purposes of the discussion, however, the outcome of the litigation of the third-party claims is not important.

three parties—the owners who consigned the painting but retained ownership, the buyer who bought the painting believing that the defendant had the authority to sell it, and the lender who took the painting as collateral in exchange for a loan—all of whom appeared to have a valid claim to the painting under the applicable forfeiture statute.

In a case like *Chowaiki*, if the government is unable to defeat the claims of the putative bona fide purchasers on technical grounds, there is the real possibility that one or both of them would be found to have a valid claim under the innocent owner statute that trumps—or is at least on par with—the claim of the actual owner of the property and who is seeking its return.[263]

4. Resolution: Is there a way out of this?

When it enacted the bona fide purchaser provision of the innocent owner statute, it is unlikely that Congress intended to elevate the rights of a thief, or a third party who acquired stolen property from a vendor, over the rights of the owner of the property from whom it was stolen.[264] However, that is a likely outcome when the government attempts to use its forfeiture authority to recover stolen property for the benefit of the victim, only to have a third-party purchaser with a plausible claim intervene in a case where the innocent owner statute applies.[265]

The government can always take the third-party claimant head on, as it did in *Chowaiki*, and attempt to show that he did not give fair market value for the property in an arm's-length transaction,[266]

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263 *See* 21 U.S.C. § 853(n)(6) (2018) (providing that a person with an interest in the property that is superior to the interest of the defendant, such as the victim of a theft, should prevail in the ancillary proceeding, but offering no direction as to whether such a person has a superior property interest to a bona fide purchaser).

264 *See* 18 U.S.C. § 981(e)(6) (2018); 21 U.S.C. § 853(i)(1) (2018); 28 U.S.C. § 2461(c) (2017) (statutes allowing the Federal Government to return property seized through criminal or civil asset forfeiture to the victim of the theft).

265 *See* United States v. Davis, 648 F.3d 84, 93 (2d Cir. 2011) (noting that had the forfeiture action been solely brought under the statute with an innocent owner provision, Davis would have prevailed on her claim of the innocent owner defense, even though she was only a bona fide purchaser and not the original victim).

266 *See* United States. v. Munson, 477 F. App'x 57, 66 (4th Cir. 2012) ("'Bona fide purchaser for value' is not defined in CAFRA. Accordingly, courts often turn to the definition in the criminal forfeiture statute, which 'includes all persons who give value . . . in an arm's length transaction with the expectation that they would receive

that he had reason to know the property was subject to forfeiture when he acquired it,[267] or that there is some technical flaw in the third party's claim.[268] But there appears to be no escaping the bona fide purchaser defense if all of its requirements are satisfied.[269]

In one case involving stolen artwork, the government was able to avoid the innocent owner statute by foregoing forfeiture altogether.[270] In *In re Paysage Bords de Seine*,[271] a painting by Auguste Renoir was stolen from the Baltimore Museum of Art in 1951.[272] In 2012, the FBI learned that the painting was being offered for sale at an auction in Virginia and took possession of it with a seizure warrant to stop the sale.[273]

The woman who claimed ownership of the painting, and was trying to sell it, asserted that she found the painting at a flea market in West Virginia in 2008 or 2009 and purchased it for $7.[274] The government was skeptical of her claim, taking the view that authentic Renoirs seldom turn up in West Virginia flea markets.[275] Rather than commence a forfeiture action in which the "owner"

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equivalent value in return.'").

267 *See* United States v. Chowaiki, 369 F. Supp. 3d 569, 572 (S.D.N.Y. 2019) (explaining that a party asserting a third party claim to a forfeited asset cannot prevail in gaining title if they fail to show that they were without cause to believe the property was subject to forfeiture at the time of purchase).

268 *See id*. at 573 ("The Government argues that the Trustee lacks a cognizable interest in the Work itself. Rather, according to the Government, the Trustee has at most a contractual claim for money damages.").

269 *See id*. at 571–72 (noting that the government's interest in the proceeds of a crime or fraud vest as soon as those proceeds come into being, and can only be trumped by the interest of a bona fide purchaser for value).

270 *See In re* Paysage Bords De Seine, 991 F. Supp. 2d 740, 742 (E.D. Va. 2014) (filing an interpleader action to have the court determine who was the rightful owner of the painting that was reported stolen in 1951, before being purchased by a bona fide buyer in 2008).

271 *Id*.

272 *Id*. at 741–42.

273 *Id*. at 742.

274 *Id*.

275 *See* Memorandum of Points and Authorities in Support of Baltimore Museum of Art's Motion for Partial Summary Judgment at 7, *In re* Paysage Bords De Seine, 991 F. Supp. 2d 740, 2013 WL 6978215 ("Notwithstanding the 'Renoir' plate on the frame of the Painting and the paper on the back indicating that it was by Renoir and entitled 'Paysage Borde de Seine,' Fuqua did not realize that the Painting was an original Renoir at the time of her purchase or in the following years.").

might have raised a plausible innocent owner defense, the government filed an interpleader action pursuant to 28 U.S.C. § 1335 and Rule 22 of the Federal Rules of Civil Procedure, and invited the museum and the "owner" to file competing claims.[276]

Both did so, with the museum putting forth proof of the theft and the owner advancing her flea market story.[277] In the end, the court held that it was unnecessary to determine if the flea market story was true because under Virginia law, which governed the interpleader, "even a good-faith purchaser for value cannot acquire title to stolen goods."[278] Accordingly, it was only necessary for the museum to prove that the painting was stolen.[279] It did so, and the court therefore entered judgment for the museum and dismissed the "owner's" claim.[280]

The lesson to be learned from this is that, when state law provides that even a bona fide purchaser for value cannot take title to stolen property, a proceeding in which state law, not federal forfeiture law, governs the outcome could be a better vehicle for returning stolen property to its rightful owner.[281] But filing an interpleader action and letting the opposing parties battle over the property with competing claims is hardly an ideal solution.[282] In doing so, the government foregoes the opportunity to use its superior resources for the benefit of crime victims, forcing them to retain their own counsel and to litigate their claims—for months or years—in what may be a foreign forum.[283]

A much better approach would be for Congress to amend the bona fide purchaser provisions of both the civil and the criminal

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276 *In re Paysage Bords De Seine*, 991 F. Supp. 2d at 743.

277 *Id*. at 743–44.

278 *Id*. at 744 ("Longstanding Virginia law provides that one who does not have title to goods cannot transfer title to a buyer, even a bona fide purchaser for value without notice.") (citation omitted).

279 *Id*.

280 *Id*. at 748.

281 *See id*. at 743–44 (explaining that when Virginia law governs the case, the claimant can rebut the bona-fide purchaser claim and to recover their property under a detinue action).

282 *See In re* Paysage Bords De Seine, 991 F. Supp. 2d 740, 742 (E.D. Va. 2014) (requiring the Baltimore Museum of Art to litigate their claims in the Eastern District of Virginia in the interpleader action brought by the federal government).

283 *See id*.

forfeiture statutes to eliminate the unintended advantage the statute currently gives third-party purchasers over the victims of a theft.[284] Specifically, the statutes could be amended to provide that, in any case in which the government has established that the property is subject to forfeiture because it was taken from its rightful owner without her consent, competing claims between the rightful owner and a person who acquired it at some later time must be resolved in favor of the rightful owner, even if the subsequent buyer was a bona fide purchaser for value without notice that the property was subject to forfeiture.

VI. Conclusion

The civil and criminal forfeiture laws give the government a powerful tool for the recovery of stolen artwork and antiquities for the benefit of the rightful owners. In a great many cases, the process works smoothly, with the property being restored to the victim of the theft with minimal litigation and cost.[285] But an unintended consequence of enacting a protection from forfeiture for bona fide purchasers for value limits the government's ability to perform this useful service for crime victims in cases in which a third party has acquired the property and has the ability to advance a claim that trumps that of the rightful owner.

Amending the federal forfeiture statutes to mirror state laws providing that even a bona fide purchaser for value cannot take title to stolen property would eliminate this problem, and allow the government to make full use of the forfeiture laws to recover property for victims, as Congress intended when the statutes were enacted.

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284 Generally speaking, the common law does not allow a person to gain title to stolen or fraudulently obtained property. *See* Cassirer v. Thyssen-Bornmisza Collection, 862 F.3d 951, 960 (9th Cir. 2017) ("Under California law, thieves cannot pass good title to anyone, *including a good faith purchaser* . . . [t]his is also the general rule at common law.") (emphasis added). It seems unjust, then, to allow a person to gain title over the victim of a theft simply because the forfeiture is brought under a statute that allows the innocent owner defense in 983(d).

285 *See supra* notes 117–148 and accompanying text ("The Uncontested Cases").