

# Art Law Gallery

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## [Grandma Robbed by Nazis - Grandson Sues Spain to Recover Stolen Paintings](#)

In August, 2009, the Ninth Circuit decided en banc by 9-2 that a California resident Claude Cassirer can sue Spain to recover his grandmother's oil painting "Rue Saint-Honore, apres-midi, effet de pluie," painted by the French impressionist Camille Pissarro and taken by the Nazi government. (*Cassirer v. Kingdom of Spain*, 2010 U.S. App. 2010 WL 3169570 (9th Cir. 2010).) The court rejected Spain's defense, holding that the defendants cannot claim a sovereign immunity from suit in the U.S. under the Foreign Sovereign Immunities Act ("FSIA").

The plaintiff's grandmother, Lilly Cassirer, owned the painting in Germany. After the World War II started, being threatened as a German Jew, she had to leave the country and "sell" the painting without being paid. The Gestapo of the Nazi government eventually confiscated the painting, which was purchased by several collectors and ended up in the hand of the Thyssen-Bornemisza Collection Foundation, an instrumentality of Spain. When the plaintiff Claude Cassirer discovered in 2000 that the painting was displayed at the Madrid museum, he asked the Spanish government to return it, but the request was refused.

He sued Spain and the Foundation in the U.S. district court of California in 2005, seeking return of the painting or recovery of damages for conversion. In response, Spain and the Foundation filed a motion to dismiss, claiming that the plaintiff cannot sue them under the FSIA. The FSIA makes a foreign country immune from the jurisdiction of the U.S. courts unless an exception applies. (28 U.S.C. §§ 1602, 1604.) The only pertinent exception in this case is provided by section 1605(a)(3), "takings exception," where a foreign state is not immune if "right in property [was] taken in violation of international law . . . and that property . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." (28 U.S.C. § 1605(a)(3).) Against this background, the Ninth Circuit focused on three issues.

### **(1) Does the FSIA's takings exception apply to Spain, which did not expropriate the property?**

The court dismissed the defendants' argument that the takings exception does not apply to Spain, which subsequently purchased the painting. The court reasoned that the plain language of section 1605(a)(3) does not require that defendant foreign state be the entity that took the property in violation of international law. The court pointed out that the textual passive voice "property

taken in violation of international law" focuses on an event without regard to a specific foreign country that took the property. In addition, it briefly examined Congress' intention in legislating the FSIA, and concluded that the purpose of the FSIA buttresses the plain meaning of the text.

## **(2) Was the Foundation engaged in sufficient commercial activities in the U.S.?**

The court also dismissed another claim by the defendants that the Foundation's activities in the U.S. were *de minimis* and in lack of the requisite connection to the property. The court stated that the Foundation engaged in many commercial activities in the U.S., including buying books, selling the museum's products, and advertizing the museum. Again, the court looked to the plain language of section 1605(a)(3), and held that the clause does not require plaintiff's claim to arise out of specific activity involving the property in the U.S., unlike the traditional concepts of specific personal jurisdiction.

## **(3) Is the plaintiff required to exhaust judicial remedies in Spain before suing in the U.S.?**

Further, the court dismissed Spain's claim that the plaintiff is required to exhaust judicial remedies available in local jurisdiction (here Spain or Germany) before the court may determine whether Spain is immune from suit. The court relied on the plain language of section 1605(a)(3) to conclude that the text does not contain such requirement. The general rule is that judicial discretion governs where Congress has not clearly required exhaustion, the court stated.

Accordingly, the Ninth Circuit concluded that the defendants are not immune from a suit, and the courts in the U.S. entertain subject matter jurisdiction over them. Beyond that, the court expressed no opinion, leaving the decisions to the district court.

## **Dissents**

Two judges disagreed with the majority, reasoning that a taking by the Nazi government in violation of international law does not invoke waiver of sovereign immunity by Spain. As opposed to the majority's opinion, the dissents think that the plain meaning of the statutory text is ambiguous, which demands more exacting statutory interpretation than the majority did. For example, they stated that the statute should not be construed in a way to violate the Due Process Clause of the U.S. Constitution or international law, as done by the majority. Further, for policy reason, the dissents expressed concern of numerous lawsuits as a consequence of allowing jurisdiction over any foreign state that possesses property that was previously taken by another state in violation of international law. They were also concerned about diplomatic implications by letting Spain suffer loss of its sovereign immunity.