

## MEMORANDUM

TO: [REDACTED], Esq.  
Attorney at Law

FROM: [REDACTED]

DATE: [REDACTED], [REDACTED]

RE: Your Research Question of [REDACTED]

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Pursuant to our telephone conversation of March 3, 2002, we have researched New York case law as it pertains to the situation you described, namely:

Your client was in a relationship with a woman for about ten years. The parties were never married to one another. He was an art collector and maintained a large collection in a storage facility to which he held the keys. He never gave the keys to the woman nor did he ever consent to her taking possession of the art collection, but she nonetheless succeeded in duping the guards at the facility by telling them that your client had consented to her removal of most of the valuable items from the collection, which she did. Your client seeks the return of these items. The police have declined to get involved in the “theft” because they deem the circumstances to be a civil “family dispute.”

You have requested that we seek out other cases with analogous facts and explore how these situations were resolved. You have also asked that we confine our research solely to cases involving the law of the State of New York, where your client is domiciled.

Our research has revealed the following:

**1. Your Assumption That Your Client’s Paramour Lacked Any Rights to the Art Collection Because the Parties Were Never Married is Correct.**

We commenced our research with a view toward achieving certainty that under New York law, your client’s former paramour has no claim that could “trump” your client’s more obvious claim for conversion and its accompanying remedies of replevin and damages. Our research confirms that assuming no allegation that a contract or other “palimony” type of fact situation exists between your client and his former paramour, it is true that she did not, merely by virtue of the 10-year relationship between the parties, acquire any rights to the art collection. “New York has refused to recognize any non-ceremonial or common law marriage since 1933. (See Dom.Rel.L.

§ 11).” *Two Associates v. Brown*, 502 N.Y.S.2d 604, 131 Misc.2d 986 (N.Y.Sup., 1986). *Accord*, see *In the Matter of Steiner*, 2003-08506 (N.Y. 11/29/2004) (N.Y., 2004); and *Cross v. Cross*, 541 N.Y.S.2d 202, 146 A.D.2d 302 (N.Y.A.D. 1 Dept., 1989). None of the facts you expressed during our March 3<sup>rd</sup> discussion appear to us to give rise to any supportable claim or defense in support of your client’s paramour’s taking or retention of any part of the art collection.

**2. Your Assertion That the Taking of a Large Portion of the Art Collection Was Also a Criminal Act is Also Correct.**

In *People v. Calandra*, 459 N.Y.S.2d 549, 117 Misc.2d 972 (N.Y.Sup., 1983), the court noted that in general, conversion is an unauthorized exercise of dominion or control over property by one who is not the owner, which interferes with and is in defiance of the owner’s possession (citing *Meese v. Miller*, 79 A.D.2d 237, 242-243, 436 N.Y.S.2d 496 (4<sup>th</sup> Dept., 1981)). The *Calandra*, *supra* court then went on to say that “In the context of *larceny*, the interference must be to the degree that the owner is deprived altogether of the economic value of his property. (Penal Law 155.00, subds. 3, 4.)” [Emphasis added] From the facts you have related, this is clearly the case here; the unauthorized taking of the large portion of your client’s art collection did indeed amount to the crime of larceny, pure and simple.

The problem, of course, is to induce the police to pursue the matter as a criminal case rather than treat it as just another garden-variety domestic dispute.

You appear to be in the unfortunate, but common, position wherein when the police are confronted with a fact situation that has both civil as well as criminal components, the inclination is to leave the parties to their civil remedies and move on to what law enforcement authorities usually consider matters of larger import. (It would be a different story, of course, if your client had been murdered by his paramour; that scenario, too, would present both civil and criminal implications, but would obviously attract the interest of the police with more enthusiasm than the idea of refereeing a dispute over some missing art objects.) During prior instances similar to the one you now face, we have sometimes found that a letter in the form of a complaint directly to the Office of the District Attorney, specifically alleging the criminal nature of the violation, has led to more fruitful results than attempting to deal with the police. To this it should be added that, in our experience, the higher the stated value of the property taken, the higher degree of interest by law enforcement authorities you may expect. Given the subjective nature of any art collection’s valuation, we would advise you to emphasize the highest reasonably supportable valuation when formulating your complaint to the District Attorney’s office.

Another unsolicited thought on this subject is that you may wish to attempt to get the Federal Bureau of Investigation involved in the matter. The Bureau is well aware that much of what goes on in the multi-billion dollar stolen art black market involves the transport of stolen works across interstate lines, not to mention transnational borders. Its “Art Crime Team,” consisting of eight field agents and two Assistant U.S. Attorneys, works full-time in this area, maintains a database of all artwork reported or otherwise coming to its attention as having been stolen, and currently estimates that art theft in the United States alone accounts for nearly \$6 billion in losses annually. The Bureau has potential jurisdiction over your client’s loss of a portion of his

collection under 18 U.S.C. §§ 2314 and 2315 (interstate transportation of stolen property); 18 U.S.C. § 668 (theft of major artwork); and 18 U.S.C. § 1170 (illegal trafficking in Native American Human Remains and Cultural Items, if all or part of your client's collection falls into this protected category). As you have already found to be the case with the local police, of course, the level of the Bureau's interest in what it, too, might be tempted to label a "domestic dispute" will probably turn out to be directly relative to the nature and value of the collection itself.

### **3. The Primary Cause of Action Available to Your Client Against His Former Paramour is For "Conversion" Coupled With the Remedy of "Replevin."**

In your fact situation, it happens that the items wrongfully taken by your client's paramour consisted of a portion of an art collection. The underlying cause of action to which these facts give rise is that of conversion. Virtually any personal property can be wrongfully converted and hence subject to the conversion cause of action; the fact that parts of an art collection are involved here is germane only insofar as the measure of damages is concerned (see ¶5 below).

The remedies for conversion are (i) replevin, i.e., an order of the court that the converted property be restored to its rightful owner or possessor; and/or (ii) monetary damages based on the value of the converted property.

In *Scholastic Inc. v. Harris*, 80 F.Supp.2d 139 (S.D.N.Y., 1999), the court, citing *Key Bank v. Grossi*, 227 A.D.2d 841, 642 N.Y.S.2d 403 (3<sup>rd</sup> Dep't 1996), held that under New York law, the elements of conversion are (1) that the plaintiff has a "right to possession" of the property converted; (2) the defendant's possession of the property was unauthorized; (3) the defendant acted to exclude the rights of the lawful owner of the property; (4) the property is "specifically identifiable"; and (5) the defendant is obligated to return the property.

Much earlier, in *Nat Koslow, Inc. v. Bletterman*, 23 Misc.2d 340, 197 N.Y.S.2d 583 (N.Y.Sup., 1960), it had been said that:

"Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent[23 Misc.2d 343] with his rights therein' (*Meyer v. Price*, 250 N.Y. 370, 381, 165 N.E. 814, 819). Where a person exercises wrongful dominion over property, it is immaterial that he acted in good faith, for a 'wrongful intent is not an essential element of the conversion' (*Boyce v. Brockway*, 31 N.Y. 490, 493; *Pease v. Smith*, 61 N.Y. 477, 480). The taking of property without right constitutes a conversion and no demand and refusal are necessary to render the defendant liable (*Pierpoint v. Hoyt*, 260 N.Y. 26, 29, 182 N.E. 235, 236, 83 A.L.R. 1495; *Mullen v. J. J. Quinlan & Co.*, 195 N.Y. 109, 115, 87 N.E. 1078, 1080, 24 L.R.A.,N.S., 511). Finally, conversion may consist of wrongful detention as distinguished from wrongful taking (*Pierpoint v. Hoyt, supra*). In such case, no formal demand for return is necessary where the person having

possession, though lawfully in the first instance, is informed of the true facts (*Employers' Fire Insurance Co. v. Cotten*, 245 N.Y. 102, 105, 156 N.E. 629, 630, 51 A.L.R. 1462).”

Similarly, in *Ahles v. Aztec Enterprises, Inc.*, 502 N.Y.S.2d 821, 120 A.D.2d 903 (N.Y.A.D. 3 Dept., 1986), the court held that in order to establish a cause of action for conversion, a plaintiff must establish legal ownership of a specific identifiable piece of property and the defendant’s exercise of dominion over or interference with the property in defiance of the plaintiff’s rights (citing *Meese v. Miller*, 79 A.D.2d 237, 242-243, 436 N.Y.S.2d 496 (N.Y.A.D. 4 Dept., 1981)). Other courts have gone further to hold that the intent to possess another’s property is not an essential element of conversion. See, e.g., *Brown v. Garey*, 267 N.Y. 167, 170, 196 N.E. 12, *cert. den.* 296 U.S. 615, 56 S.Ct. 136, 80 L.Ed. 437 (1935). Indeed, it is not even necessary that a converter take physical possession of the subject property. “Any wrongful exercise of dominion by one other than the owner is a conversion.” *General Elec. Co. v. American Export Isbrandtsen Lines*, 37 A.D.2d 959, 327 N.Y.S.2d 93 (N.Y.A.D. 2 Dept., 1971).

Under these standards, the facts you have described involving the purloining of a portion of your client’s art collection establish a prima facie cause of action against his paramour for conversion.

That a claim for conversion can be made applicable specifically in “art theft” cases has definitively been established in New York. In *Richard S. Ravenal, Inc. v. Gross*, 456 N.Y.S.2d 358, 90 A.D.2d 760 (N.Y.A.D. 1 Dept., 1982), for example, the plaintiff served a complaint in 1977 asserting a contract claim that art works were delivered to defendants and were neither paid for nor returned. In 1980, plaintiff obtained leave of court and served a first amended complaint which added a cause of action in replevin. In 1981, plaintiff obtained an inspection and appraisal of the art works, the thereafter sought leave to file a second amended complaint adding causes of action for fraud, restitution, conversion, and intentional infliction of economic harm. The appellate court overturned the trial court’s refusal to grant leave to file the second amended complaint, holding that the pleading stated facts sufficient to constitute causes of action and that these facts were unknown to plaintiff prior to the time of the inspection and appraisal. The holding in *Richard S. Ravenal, Inc.*, *supra*, thus establishes that the wrongful taking of works of art can potentially give rise to causes of action for breach of contract<sup>1</sup>, replevin, fraud, restitution, conversion, and intentional infliction of economic harm (though all but the replevin, restitution, and conversion claims are fact-dependent and outside the scope of what you conveyed during our March 3<sup>rd</sup> conversation).

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<sup>1</sup> Assuming your client intends to file suit against his ex-lover, you should be wary about couching any part of the claim as being based on a breach of contract. First, this strategy would open the door to the defendant’s claim that *some kind* of contract regarding the ownership or possession of the art collection *existed*, which could lead perilously close to a “palimony” claim. Second, more than one court has said that claims for conversion will be deemed redundant and dismissed when “damages are merely being sought for breach of contract.” *Will of Rothko*, 392 N.Y.S.2d 870, 56 A.D.2d 499 (N.Y.A.D. 1 Dept., 1977), citing *Peters Griffin Woodward, Inc. v. WCSC, Inc.*, 88 A.D.2d 883, 884, 452 N.Y.S.2d 599, 600 (N.Y.A.D. 1<sup>st</sup> Dept. 1982). Your fact situation lends itself far more strongly to a claim for conversion than to one based on the existence of some type of oral or implied contract.

Likewise, in *Soloman R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311, 567 N.Y.S.2d 623 (N.Y., 1991), the court in an art theft case said that “New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of a good-faith purchaser for value.” While the result insofar as innocent, good-faith purchasers may seem harsh, it is nevertheless *required*. As one court explained more than sixteen decades ago: “Throughout the course of human history, the perpetration of evil has inevitably resulted in the suffering of the innocent, and those who act in good faith. And the principle has been basic in the law that a thief conveys no title as against the true owner.” *Silsbury v. McCoon*, 3 N.Y. 379, 383-384 (1850); II Kent Comm. 14th ed., per Holmes, 324-325.

The case of the purloined photographs that you mentioned during our March 3<sup>rd</sup> conversation may have been *Barrows v. Rozansky*, 489 N.Y.S.2d 481, 111 A.D.2d 105 (N.Y.A.D. 1 Dept., 1985). *Barrows, supra*, received more than just its fair share of publicity in its day. Plaintiff Sydney Biddle Barrows, the daughter of a socially prominent family whose ancestry traced back to the founding Pilgrims (hence the *nom de plur* “Mayflower Madame”), was arrested on a charge of promoting prostitution. Her arrest was sensationalized by the local and national news media. Defendant was a former lover of plaintiff who had, during their relationship, taken photographs of plaintiff in the nude (with her consent, at the time). When the relationship ended plaintiff demanded that the photos be returned to her, but defendant responded that he could not locate either the prints or the original negatives. Some eleven years later, following plaintiff’s sensationalized arrest, defendant came forward with the pictures and sold them to members of the media.

In the resulting lawsuit, plaintiff succeeded in persuading the appellate court that the trial court’s conclusion that defendant was the exclusive owner of the photographs and did not need plaintiff’s consent to sell them had been incorrect. The appellate court, citing *Holmes v. Underwood and Underwood*, 225 A.D. 360, 362, 233 N.Y.S. 153 (A.D. 1 Dept., 1929), held that “The nonconsensual sale of a person’s photograph to a newspaper alleges an unauthorized use under the [New York privacy] statute for purposes of trade.” The court later in its opinion went on to further say that “Furthermore, it is well-established that consent to have a photograph taken does not equate with written consent to use for advertising or trade purposes, which consent is expressly required by the right to privacy statute. *Brinkley v. Casablanca*, 80 A.D.2d 428, 434, 438 N.Y.S.2d 1004.”

Although it was held in *Barrows, supra*, that plaintiff and plaintiff alone was entitled to possession of the photographs that were at issue, the appellate court’s reasoning was not predicated on a common law cause of action for conversion, nor did it deal with replevin as a corollary remedy for conversion. Rather, the basis for the decision was found in New York’s privacy statute. The reasoning and holding in *Barrows, supra*, is thus of limited value in relation to the facts your client’s art collection theft presents. The application of the holdings in *Scholastic Inc., supra*, *Nat Koslow, Inc., supra*, and the cases cited therein, however, is more than sufficient to establish a claim for conversion as a straightforward matter of law.

**4. The Complaint in Your Client’s Lawsuit Should Allege the Primary Cause of Action of “Conversion” And Should Seek Two Separate Alternative Remedies, Namely, Replevin and Monetary Damages.**

The reasons why your client’s prayer for relief should be one for “replevin” based on the wrongful “conversion” of his property by his ex-paramour (coupled with an alternative prayer for monetary damages) were well explained in *Mongelli v. Cabral*, 632 N.Y.S.2d 927, 166 Misc.2d 240 (N.Y. City Ct., 1995) which, even though it involved possession of a rare bird as opposed to rare art, is nonetheless pertinent because the item at issue was by definition unique rather than fungible:

**“Whether styled as an action in conversion** [see e.g., *Republic of Haiti v. Duvalier*, 211 A.D.2d 379, 384, 626 N.Y.S.2d 472, 475 (1995) (‘The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner...’); *General Electric Co. v. American Export Isbrandtsen Lines*, 37 A.D.2d 959, 327 N.Y.S.2d 93 (1971); 23 N.Y.Jur.2d Conversion, and Action for Recovery of Chattel, §§ 1-6, 173-176] **or replevin** [see e.g., *Stone v. Church*, 172 Misc. 1007, 16 N.Y.S.2d 512 (1939) (excellent history of replevin); *International Import & Export Corp. v. Epstein*, 189 Misc. 401, 402, 71 N.Y.S.2d 373, 374 (1947) (“The primary object of the action is the recovery of the property itself, with damages for the taking and detention, and secondarily, the recovery of a sum of money equivalent to the value of the property taken and detained ...”); *Conti v. ASPCA*, 77 Misc.2d 61, 353 N.Y.S.2d 288; *Malanga v. Goldshein*, NYLJ, June 30, 1993, p. 22 col. 3; *Saunders v. Regeer*, 50 Misc.2d 850, 271 N.Y.S.2d 788; *Dean v. Butler*, 166 App.Div. 367, 152 N.Y.S. 34; *Sullivan v. Ringland*, 117 N.H. 596, 376 A.2d 130 (1977); *Julian v. Story*, 1994 WL 706581 (Ark.App.1994)], **the Mongellis seek the recovery of a chattel, i.e., Peaches the Cockatoo** [see 23 NY Jur.2d Action For Recovery Of Chattel §§ 87-92].” [Emphasis added]

We are presuming, as discussed in our March 3<sup>rd</sup> conversation, that your client’s primary objective is the return of the purloined art objects, rather than monetary damages equal to their value. But a possibility that should be seen as potentially foreseeable is that the ex-paramour may no longer be in possession of some or all of the art works that she stole; she may have conveyed title either to someone with whom she conspired directly or, worse, to a bona fide purchaser for value. We discuss these potentialities, and what remedies are available should they arise, in ¶5 below.

## 5. Some Observations Regarding How Your Client's Claims Should Be Pleaded and the Likely Defenses the Defendant(s) Will Probably Assert.

As earlier noted, nearly any kind of personal property – tangible as well as intangible – can be wrongfully taken and hence form the basis for a cause of action for conversion. In New York, there are several cases in which the subject of the conversion has been a work of art. Virtually all of these cases take it for granted that when a third party with no rights in the subject property (such as, here, your client's paramour) wrongfully takes possession of that property, a cause of action for conversion will lie. Rather than extensively commenting on *whether* conversion has taken place in "art theft" cases (because it practically always, by definition, has), the courts have mostly dealt with secondary issues incident to the conversion claim such as, e.g., what Statute of Limitations rules may apply, how they may apply, and to whom they may apply; and in the absence of facts that would render replevin an impracticable remedy, how the appropriate amount of monetary damages should be calculated.

The balance of this ¶5 provides a kind of "road map" for what will likely happen assuming you decide to file suit on your client's behalf.

**First:** You will need to make a formal, preferably written, demand on your client's paramour that the misappropriated portion of the art collection be returned forthwith. This step is in the nature of an "abundance of caution" procedure as a result of trial court holdings such as that which was reviewed in *Leveraged Leasing Admin. Corp. v. PacifiCorp Capital, Inc.*, 87 F.3d 44 (C.A.2 (N.Y.), 1996). There, the trial court had determined that the plaintiffs had not made a demand for the return of the equipment which was at issue or for "specific, identifiable money," and took the view that this failure to make a demand was fatal to their claim. Further, in *Will of Rothko, supra*, the court, citing *Heide v. Glidden Buick Corp.*, 188 Misc. 198, 67 N.Y.S.2d 905 (1 Dept., 1947), indicated that "Our case law already recognizes that the true owner, having discovered the location of its lost property, cannot unreasonably delay making demand upon the person in possession of that property." "A cause of action for replevin or conversion requires a demand for the property and refusal," according to *Soloman R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311, 317, 567 N.Y.S.2d 623 (N.Y., 1991), as well as *Douglas v. Christie's International*, 640 N.Y.S.2d 530, 226 A.D.2d 185 (N.Y.A.D. 1 Dept., 1996), to which approval was afforded by *Feld v. Feld*, 720 N.Y.S.2d 35 (A.D. 1 Dept., 2001). Your demand, thus, should be made as soon as possible.

(Assuming that your client's paramour is herself still in possession of the converted art objects, you could likely defeat any defense based on failure to make demand before filing suit. *Leveraged Leasing Admin. Corp., supra*, did go on to say that "New York law does not, however, always require that a demand be made and be met by a refusal to make out a claim of conversion. Instead, a demand is necessary only where the property is held lawfully by the defendant." And in *Nat Koslow, Inc., supra*, the court held that where the defendant holds the property unlawfully – where, for example, he stole the property – "no demand and refusal are necessary to render the defendant liable." But given that the issue of whether demand has been properly made has often been raised as a defense in conversion actions, it seems to us pointless to allow even for the potentiality of the issue to be raised when the simple and expedient procedure of making a pre-filing demand will lay it to rest once and for all.)

**Second:** Assuming that your demand is rejected or that no reply is received (which would be equivalent to a rejection), the next step will be for you to draft and file your complaint with the appropriate trial court. That pleading should contain *at a minimum* a cause of action for conversion together with a prayer requesting the alternative remedies of replevin and/or monetary damages. You have not asked that we comment on other causes of action that might be available given the existence of facts outside the scope of what we discussed on March 3<sup>rd</sup>, so we will leave that to your good discretion.

**Third:** The summons and complaint will need to be served on the defendant(s). If the information in your possession is that your client's former paramour is still in possession of the entirety of what she wrongfully removed from the storage unit, she will need to be the only defendant named.<sup>2</sup> But if it develops, either pre-filing (in which case the original complaint should include additional defendants), or post-filing (in which case leave of the court should be sought to file an amended complaint naming additional defendants), that your client's former lover has transferred either possession, ownership, or both to one or more third parties, each of these parties will need to be named as defendants as well. Even if the other parties so named allege that they acquired the stolen art works without notice or awareness that they were stolen, plus paid good and valuable consideration in return for them, they will not prevail in the face of your client's prima facie case for conversion. New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of a good-faith purchaser for value. See, e.g., *Saltus & Saltus v. Everett*, 20 Wend. 267, 282. And once you have made the demand described earlier, a party who prior to the demand was in lawful possession of a stolen chattel is deemed to have come into unlawful possession as soon as the demand is received, since he or she will then have been "...informed of the defect of his title and have an opportunity to deliver the property to the true owner..." *Employers' Fire Ins. Co. v. Cotton*, 245 N.Y. 102, 106, 156 N.E. 629 (1927).

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<sup>2</sup> Together, of course, with the storage company from whose premises the items were wrongfully removed. You have not requested that we comment on your remedies against this specific defendant, so we will limit them to the observation that this party has clear, direct liability to your client for breach of bailment. For general reference regarding this issue, one of the seminal New York cases you may wish to review covering this area is *Martin v. Briggs*, 663 N.Y.S.2d 184, 235 A.D.2d 192 (N.Y.A.D. 1 Dept., 1997). The law in New York is clear that a "...[b]ailment does not necessarily and always, though generally, depend upon a contractual relation. It is the element of lawful possession, however created, and duty to account for the thing as the property of another that creates the bailment, regardless of whether such possession is based on contract in the ordinary sense or not." *Foulke v. New York Consolidated Railroad Co.*, 228 N.Y. 269, 275, 127 N.E. 237 (1920). A bailment "...may arise from the bare fact of the thing coming into the actual possession and control of a person fortuitously, or by mistake as to the duty or ability of the recipient to effect the purpose contemplated by the absolute owner." *Phelps v. People*, 72 N.Y. 334, 358. A bailment "...may be created by operation of law. It is the element of lawful possession, and the duty to account for the thing as the property of another, that creates the bailment, whether such possession results from contract or is otherwise lawfully obtained. It makes no difference whether the thing be intrusted [*sic*] to a person by the owner or by another. Taking lawful possession without present intent to appropriate creates a bailment."

**Fourth:** As previously mentioned, the facts you have related to us clearly establish a prima facie case for conversion, the remedies for which include replevin and, alternatively, monetary damages. Some observations on the defenses you are likely to encounter, together with suggested responses to each, include the following:

- **Statute of Limitations:** The applicable Statute of Limitations for conversion actions in the State of New York is three (3) years.<sup>3</sup> “The facts set forth in the complaint clearly allege a cause of action to recover damages for conversion (citation omitted). Therefore, the three-year Statute of Limitations for conversion is applicable.” *Gold Sun Shipping Ltd. v. Ionian Transport Inc.*, 666 N.Y.S.2d 677, 245 A.D.2d 420 (N.Y.A.D. 2 Dept., 1997). Hopefully, at this moment in time you are well within that window. Note that in art theft cases, one issue often litigated is the question of *when* the Statute commenced to run. The answer in New York is a strange one, seemingly giving art thieves more protection than is afforded bona fide purchasers for value of art they do not know is stolen.
  - The rule is that the applicable Statute of Limitations (three years) runs, as against a thief who remains in possession, from the time of the theft. *Sporn v. MCA Records*, 58 N.Y.2d 482, 487-488, 462 N.Y.S.2d 413, 448 N.E.2d 1324 (1983). This is true even if the property owner was unaware of the theft at the time that it occurred. *Varga v. Credit-Suisse*, 5 A.D.2d 289, 171 N.Y.S.2d 674 (N.Y.A.D. 1 Dept., 1958), *aff’d*. 5 N.Y.2d 865, 182 N.Y.S.2d 17, 155 N.E.2d 865 (1958).
  - But as against a good-faith purchaser for value of a stolen chattel, the Statute begins to accrue when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it. *Goodwin v. Wertheimer*, 99 N.Y. 149, 153, 1 N.E. 404; *Cohen v. Keizer, Inc.*, 246 App.Div. 277, 285 N.Y.S. 488 (1 Dept., 1936). Until demand is made and refused, possession of the stolen property by the good-faith purchaser for value is not considered wrongful (see, e.g., *Gillet v. Roberts*, 57 N.Y. 28, 30-31 (1874); *Menzel v. List*, 49 Misc.2d 300, 304-305, 267 N.Y.S.2d 804 (N.Y.Sup., 1966), *mod.* as to damages 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), *rev’d.* as to modification 24 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742 (1969).<sup>4</sup>

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<sup>3</sup> C.P.L.R. § 314[3].

<sup>4</sup> If this result seems strange, well, it is, at least compared with how several other states have decided to deal with the issue. Some states, for example, have provided by statute that the period of limitations commences from the time that the owner discovered or reasonably should have

- By now you are probably thinking to yourself that the New York rule, as it has evolved, seems rather harsh toward those whose valuable art works have been purloined. It gets even worse: Not only does the rightful owner have to make **demand** on the possessor of his or her stolen art; the demand has to be made **timely**, and in between, following the theft but before the discovery of where the purloined chattels ended up, the rightful owner has an affirmative obligation to try to **locate** the property, all at his or her expense. All of this was summarized in *Hoelzer v. City of Stamford, Conn.*, 933 F.2d 1131 (C.A.2 (N.Y.), 1991), in which the court recounted:

“In a case with facts somewhat similar to those before us, this Court resolved an ownership dispute between a West German National and an American good faith purchaser over a painting by Claude Monet, which had disappeared from Germany shortly after World War II. *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir.1987), cert. denied, 486 U.S. 1056, 108 S.Ct. 2823, 100 L.Ed.2d 924 (1988). We held that where an owner proceeds against a rightful possessor of property, ‘the limitations period begins to run only when the owner demands return of the property and the purchaser

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discovered the whereabouts of the work of art that had been stolen. See, e.g., *O’Keeffe v. Snyder*, 83 N.J. 478, 416 A.2d 862 (1980); *California Code of Civil Procedure* § 338[c]. By comparison, New York has already considered -- and rejected -- adoption of a discovery rule. In 1986, both houses of the New York State Legislature passed Assembly Bill 11462-A (Senate Bill 3274-B), which would have modified the demand and refusal rule and instituted a discovery rule in actions for recovery of art objects brought against certain not-for-profit institutions. This bill provided that the three-year Statute of Limitations would run from the time these institutions gave notice, in a manner specified by the statute, that they were in possession of a particular object. Governor Cuomo vetoed the measure, however, on advice of the United States Department of State, the United States Department of Justice and the United States Information Agency (see, 3 U.S. Agencies Urge Veto of Art-Claim Bill, *N.Y. Times*, July 23, 1986, at C15, col. 1). In his veto message, the Governor expressed his concern that the statute “[did] not provide a reasonable opportunity for individuals or foreign governments to receive notice of a museum’s acquisition and take action to recover it before their rights are extinguished.” The Governor also stated that he had been advised by the State Department that the bill, if it went into effect, would have caused New York to become “a haven for cultural property stolen abroad since such objects [would] be immune from recovery under the limited time periods established by the bill.”

refuses.’ *Id.* at 106. We went on to note, however, that ‘[w]here demand and refusal are necessary to start a limitations period, the demand may not be unreasonably delayed.’ *Id.* at 107. Construing available New York law to impose an obligation of due diligence upon owners searching for lost property, we reversed a district court judgment in favor of Mrs. DeWeerth on the basis that her efforts to locate the missing Monet, over the course of thirty years, had been insubstantial.”

- **Appropriate Remedies:** Probably the second most often litigated question in art theft cases, following the Statutes of Limitation defense, is the question of what remedies are appropriate. First and foremost, assuming that the objects in question can still be located and have not been destroyed, defaced, or otherwise impaired in value, we understand your client’s objective to be that of retrieving possession of the purloined art objects. He wants, in other words, *replevin*.

The action he will be seeking is clearly available, and is in fact favored over other causes of action (such as, e.g., declaratory relief) wherein unique property, such as art, is involved. In *Hunterfly Realty Corp. v. State*, 309 N.Y.S.2d 260, 62 Misc.2d 567 (N.Y.Sup., 1970), the plaintiff brought an action for declaratory relief as well as for conversion and replevin against the State of New York and other defendants, in which it sought an adjudication that it was the rightful owner and entitled to possession of the skeleton of a mastodon then in the State Museum at Albany. The item was unique because it was over ten million years old, and as best the court could determine, nothing quite like it had been unearthed for at least the past hundred years. The court held that “It appears from all the facts before me that replevin is decidedly more suited to plaintiff’s claim than a declaratory judgment.” The court cited *G. Goldberg & Sons, Inc. v. Gilet Bldg. Corp.*, 135 Misc. 158, 237 N.Y.S. 258, in which it had been held that “Replevin is a more precise and complete remedy for unlawful detention than a declaratory judgment, for when final judgment is entered on the former, all rights between the parties will have been determined, but such result may not necessarily obtain where a declaratory judgment is sought.”

A problem arises, however, where replevin would be inadequate because the location of the converted chattels is unknown and cannot be determined; or where the chattels have been destroyed or defaced. In such instances, the only remedy left is that of monetary damages; the question inevitably at issue is, “How should the amount be determined?”

The general rule with regard to the measure of damages in conversion (when monetary damages, rather than replevin, are appropriate) is to award the value of the property at the time of conversion, together with interest. *Jones v. Morgan*, 90 N.Y. 4, 10 (1882); 10 N.Y.Jur., “Conversion,” § 69. *Accord*, see *Will of Rothko, supra*.

But the general rule is subject to several exceptions, the area of art theft being one of these in particular. Where the conversion of an item of fluctuating value is involved, then damages are measured by considering the highest market value within a “reasonable time” after notice of the conversion. *Baker v. Drake*, 53 N.Y. 211, 217 (1873); *Mayer v. Monzo*, 221 N.Y. 442, 446, 117 N.E. 948, 949 (1917); *Hartford Accident & Indemnity Company v. Walston & Co., Inc.*, 22 N.Y.2d 672, 673, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968). What constitutes a “reasonable time” has been the subject of several efforts at interpretation.<sup>5</sup>

The rule applicable to computing monetary damages with regard to purloined works of art was laid down definitively in *Menzel v. List*, 24 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742 (1969). There, it was held that where converted property is unique and irreplaceable, such as the works of art that were the subject of the holding, then failure to return the property must result in the wrongdoer’s responding in damages to the extent of the value of the item at the time of trial.<sup>6</sup>

A comprehensive discussion covering the calculation of money damages in situations that do not lend themselves to replevin – beginning with simple, ordinary conversion and progressing into the specific aspects of conversion as it applies to works of art – was set forth in *Hoffman v. Dornier*, 86 A.D.2d 651, 447 N.Y.S.2d 20 (N.Y.A.D. 2 Dept., 1982). That court opined as follows:

“In this conversion action, a divorced husband alleges, inter alia, that his former wife and her new husband appropriated and converted his collection of gold and silver coins.

The general rule of damages in a conversion action is the value of the property at the time and place of the conversion, plus interest (*Fantis Foods v. Standard Importing Co.*, 49 N.Y.2d 317, 326, 425 N.Y.S.2d 783, 402 N.E.2d 122; *Jones v. Morgan*, 90 N.Y. 4, 10). Where, however, the property converted is of fluctuating value, the damages are measured by considering the highest market value

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<sup>5</sup> One of the earliest commentators on the subject stated the broad rule to be that where the item converted is subject to price variation, then the highest market value until the time of trial is the proper measure of damages (Clark, *New York Law of Damages*, Vol. I, 1925, § 459, p. 786, and cases cited therein). This rule was rejected when the conversion involved corporate stock. (See *Baker v. Drake*, 53 N.Y. 211 (1873); 10 N.Y. Damages Law, § 908.) The more modern cases are addressed above in the text.

<sup>6</sup> Incredibly, some defendants have argued that they should receive credit for increases in value resulting from having promoted the art they stole. These attempts have unsurprisingly not met with any success. In *Will of Rothko, supra*, it was held that “Nor should this Court consider that the property involved may have been enhanced in value through the expenditure of money by the wrongdoers in promotion of these works of art. Increase in value by the labor of the wrongdoer without change in the character of the property improved inures to the benefit of the wronged party, and the wrongdoer is entitled to no credit therefor [citations omitted].”

within a reasonable time after the plaintiff's discovery of the conversion (*Hartford Acc. & Ind. Co. v. Walston & Co.*, 22 N.Y.2d 672, 673, 291 N.Y.S.2d 366, 238 N.E.2d 754; *Baker v. Drake*, 53 N.Y. 211). Gold and silver coins and bullion clearly constitute property with fluctuating value. *Such coins are not unique and irreplaceable, however, as are works of art, for which the failure to return such works would result in the wrongdoer's responding in damages to the extent of the value of the item at the time of trial* (*Menzel v. List*, 24 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742, *Matter of Rothko*, 56 A.D.2d 499, 392 N.Y.S.2d 870, *aff'd*. 43 N.Y.2d 305, 401 N.Y.S.2d 449, 372 N.E.2d 291). [Emphasis added]

**6. Conclusion.**

With the exception that the items that were wrongfully taken by your client's former paramour were components of an art collection and are, as such, unique in and of themselves, your fact situation is in most other respects a simple one giving rise primarily to a claim for conversion and the alternative remedies of replevin or, alternatively if the circumstances so require, monetary damages. Except as otherwise observed above, we cannot recommend any special or unique procedures or rules or cautionary notes – within the scope of your assignment to us -- that you will need to observe in order to successfully prosecute your client's claim.

As always, we will welcome the opportunity to further discuss any portion of this Memorandum with you as well as look into any other aspects you may feel are in need of further inquiry after you have had the opportunity to review the foregoing.

Respectfully submitted,

[Redacted signature line]

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