

MAYBE NOT THE BEST SOLUTION, BUT A SOLUTION: THE GERMAN FOUNDATION AGREEMENT

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I. INTRODUCTION

The Insurance Companies

After the Holocaust, they broke their promises. *They lied.* They said ‘Give us a little money each week and if something bad happens to you we’ll take care of your family.’ Well something had happened. Something really bad, and the insurance companies didn’t live up to their end of the bargain. And they still haven’t.¹

Over fifty-five years have passed since the Holocaust ended.² Though time has separated victims from the atrocities, their reality

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¹ MICHAEL J. BAZYLER, HOLOCAUST JUSTICE 138 (New York University Press 2003) (quoting from an advertisement that ran in California, as well as in London, under the headline “Time is Running Out.” The ad concluded with the tag line: “It’s about restitution, it’s about justice and it’s about time. Haven’t they been waiting long enough?” This ad stemmed from part of a campaign to put political pressure on the insurance companies. The ad was run by the California Department of Insurance.); *see also* Symposium, *The Methods Used to Secure Monetary Restitution*, 25 *FORDHAM INT’L L.J.* 223, 229, 234 (2001) [hereinafter *Monetary Restitution*] (speaking at symposium, Melyvn Weiss, Senior Partner of Milberg Weiss Bershal Hynes & Lerach LLP. He has played an important role in Holocaust restitution cases as one of the chief negotiators and a lead counsel for claimants in the Swiss Bank litigation. He explains that public relations tactics were used to get assistance from the German and Swiss Governments and companies, to encourage them “to get rid of this for the correct amount of dollars.” In the same symposium, Deputy Director General for Legal Affairs of the German Ministry of Foreign Relations, Michael Geier, responded to the U.S.’s ad tactic, stating that the problem with the ad campaign was that it was aimed at the companies leading the effort to come to some resolution. A company like Daimler Chrysler, who was playing a central role, found themselves saying “we are going to pay,” and also found that they had to rally other companies to join the process. The majority of Germans supported the enactment of the Foundation Law and its outcome.).

² *See* Elie Wiesel, *Foreword* to STUART E. EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II, at x (Public Affairs 2003) (citing from foreword by Elie Wiesel, who questions why there is this late

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is always present. Time may have given them distance, but in their reality, they know that they can never be made whole, that they can never be compensated for their losses, for the pain they endured, or for their loved ones who perished.³ While there can never be sufficient compensation to victims of the Holocaust, there is indeed the strong “desire to provide those victims [with] at least some measure of justice and closure in their lifetimes.”⁴ One means of providing closure is to honor life insurance policies from World War II.⁵ This issue is truly urgent today, given that the average Holocaust survivor is in his or her eighties.⁶

The United States and European countries have acknowledged the need for an expedient and just means to settle the insurance claims of victims of the Nazi regime.⁷ Since 1997, the United

concern for stolen money and wealth); *see also* Ronald J. Bettauer, *Stefan A. Riesenfeld Symposium 2001: Keynote Address – The Role of the United States Government in Recent Holocaust Claims Resolution*, 20 *BERKELEY J. INT’L L.* 1 (2001) (commenting how “striking” it is that half a century later, issues of World War II reparations and restitution have finally come to the fore).

³ *See generally* Wiesel, *supra* note 2, at ix. Wiesel explains his refusal in the late 1990s to become president of the Swiss Government’s fund for Jewish survivors, offering two reasons: the first being his lack of experience in finance and the second,

I felt reluctant to define the greatest tragedy in Jewish history in terms of money. I thought, how does one measure human suffering in terms of material reward? How much ought a government body have to pay a surviving mother for the murder of her child? To me, Auschwitz and Treblinka had to with something other than financial evaluation. They had to do more with morality and even theology.

Id. at ix.

⁴ Bettauer, *supra* note 2, at 2 (quoting Ronald J. Bettauer, former Deputy Legal Adviser to the U.S. Department of State. He cites this as one of the factors that has led to the series of settlements of Holocaust era claims. Other factors include: “a recognition that there can be no adequate compensation to victims of the Holocaust, the reunification of Germany, and the fall of the Soviet Union.”).

⁵ *See generally* Lisa Friedman, *New Push for Holocaust-era Data; Lawmakers Want European Insurance Firms to Release Policy Holders’ Names*, *ALAMEDA TIMES-STAR* (ALAMEDA, CA), Sept. 25, 2002, at Headline News section (quoting what the recovery of a family’s insurance policy from the World War II era means to one survivor’s family: “[it] means very much to me. It’s probably the last thing that I can have of my father.’ Besides . . . ‘It’s ours. Our parents bought it for us. It doesn’t belong to anybody but us . . .’”).

⁶ *See* Stuart Eizenstat, Dean’s Speaker at the Benjamin N. Cardozo School of Law (Nov. 19, 2003) (notes from lecture on file with the Benjamin N. Cardozo School of Law Journal of Conflict Resolution) (commenting that the window of opportunity for restitution is very narrow since Holocaust survivors are dying at a rate of 10% per year).

⁷ *See generally* Agreement Concerning the Foundation ‘Remembrance, Responsibility and the Future’, July 17, 2000, U.S.-F.R.G., 39 *I.L.M.* 1298, 1299 [hereinafter German Foundation] (stating that both parties to the Agreement, the United States and Germany, believe that the German Foundation “will provide as expeditious as possible a mechanism for making fair and speedy payments to now elderly victims.”). The Agreement tries to achieve justice by allowing victims who would have had great difficulty recovering any sort of compensation in the United States courts to have the opportunity to file an application

States and Germany have been working together to try to establish “cooperative”⁸ and “non-confrontational”⁹ methods for resolving such insurance disputes outside of the courts.¹⁰ As a result, the two countries have devised a seemingly fair and equitable way to help survivors, along with their heirs, realize the benefit of life insurance policies from the World War II era.¹¹ The arduous negotiations between the two countries resulted in the signing of the German Foundation Agreement in 2000 (“Agreement” or “Foundation Agreement”), which serves to take the disputes out of court, leaving it to established processing mechanisms “to compensate. . . [those] who suffered at the hands of German Companies during the Nationalist and Socialist era.”¹²

This note will question whether the processes devised by the Agreement really favor survivors, helping them to realize some

with the International Commission on Holocaust Era Insurance Claims (ICHEIC) to recover according to the terms set out in the Agreement. *Id.* Also specified is that the “United States’ interests include . . . a fair and prompt resolution of the issues involved in these lawsuits to bring some measure of justice to the victims of the Nationalist Socialist era and World War II in their lifetimes . . .” *Id.* at annex B, ¶ 4.

⁸ Ambassador J.D. Bindenagel, The Return of History, Remarks at the Forum Alpbach, Austria (Aug. 28, 2001) at <http://www.usembassy.at/en/policy/bind1.htm> (last visited Feb. 25, 2004) (speaking at the Alpbach Forum, Ambassador J.D. Bindenagel of the U.S. Department of State, explains that Europeans and Americans have worked with one another to arrive at “non-confrontational” means to resolve disputes out of courts. Bindenagel worked on negotiations with Austria that led to international agreements between the United States and Austria.).

⁹ *Id.*

¹⁰ *Id.*; see also Bettauer, *supra* note 2, at 6 (stating that the German government and the German companies asked the United States government to play a role in this matter, specifically, to be their partner, in arriving at a solution. Plaintiff’s attorneys also appealed to the United States government to become a facilitator).

¹¹ See German Foundation, *supra* note 7, annex B, ¶ 8, 39 I.L.M. at 1304 (explaining how the Agreement is fair and equitable). Annex B of the Agreement, titled “Elements of U.S. Government Statement of Interest” states in paragraph 8 that the:

Foundation is fair and equitable based on: (a) the advancing age of the plaintiffs, their need for a speedy, non-bureaucratic resolution, and the desirability of expending available fund on victims rather than litigation; (b) the Foundation’s level of funding, allocation of its funds, payment system, and eligibility criteria; (c) the difficult legal hurdles faced by plaintiffs and the uncertainty of their litigation prospects; and (d) in the light of the particular difficulties presented by the asserted claims of heirs, the programs to benefit heir and others in the Future Fund.

Id.

¹² *Id.* at 1298; see also Bettauer, *supra* note 2, at 2 (stating that there was no precedent in the law of the United States for such an Agreement as this one. This Agreement settles claims of nationals against foreign private entities by way of an executive agreement; as such, this executive agreement would certainly face intense challenges). The Agreement provides for insurance claims to be handled by the International Commission on Holocaust Era Insurance Claims (ICHEIC). See *infra* text accompanying notes 92-94.

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form of compensation for their insurance policies.¹³ Despite the efforts of the Agreement to prevent litigation of such insurance claims, there are still cases being filed,¹⁴ and legislation being proposed, to try to facilitate compensatory actions at a faster pace.¹⁵ While the Agreement on its face seems to be a welcome solution to the vast amount of litigation, it may be that the Agreement was a

¹³ See Adrienne Scholz, Comment, *Restitution of Holocaust-Era Insurance Assets: Success or Failure?*, 9 *NEW ENG. J. INT'L & COMP. L.* 297, 317 (2003) (commenting that from the founding of the ICHEIC, many have doubted its "ability to settle these claims fairly and efficiently. Although the insurer members initially contributed \$100 million to the ICHEIC fund (of which \$10 million was immediately earmarked for 'operational expenses'), the bulk of these funds remain in escrow three years later . . . [the] agreement has not produced noticeable results."); see generally Henry Weinstein, *Holocaust Survivors Settlement Hits Snag: Court: Saying Germany Hasn't Fully Funded the Deal, Judge Refuses to Dismiss Suit Blocking Distribution of \$5 Billion in Compensation*, *LOS ANGELES TIMES*, Mar. 10, 2001, at A15 (discussing a Holocaust-related class-action lawsuit in New York, where Federal Judge Shirley W. Kram refused to grant a motion for dismissal due to the German companies not fully funding the settlement agreed upon in the German Foundation Agreement. Kram stated "that if she dismissed the case now the sole remedy available for many plaintiffs who 'have waited decades to receive compensation' would be claims filed with the German foundation. She said that at this time 'it would be unjust to divert . . . claims to a forum whose funding remains in doubt.'").

¹⁴ See, e.g., *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370 (D.N.J. 2001); *Haberfeld v. Assicurazioni Generali, S.p.A.*, 2000 U.S. Dist. LEXIS 4391 (S.D.N.Y. 2002); *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 354 (S.D.N.Y. 2002); see generally Weinstein, *supra* note 13, at A15 (mentioning other Holocaust-related cases which have been dismissed to keep the settlement process going); Steven Greenhouse, *Survivor of Nazi Experiments Says \$8,000 Isn't Enough*, *N.Y. TIMES*, Nov. 19, 2003, at B1 (discussing a survivor of Nazi medical experiments, who was made sterile by the experiments. He claims that the \$8,000 provided by the Agreement is not sufficient and so he has sued the pharmaceutical companies of Bayer and Schering, then a division of I.G. Farben. Stuart Eizenstat is quoted as saying "If the plaintiff were correct in this case . . . it would undercut the entire thrust of the German settlement, which is to put an overall cap on claims, to create a quick claim mechanism and to avoid individualized hearings.").

¹⁵ See John B. Treaster, *After the Holocaust Losses, Finding Hope in Legislation*, *N.Y. TIMES*, May 2, 2003, at A26 (pointing out proposed legislation drafted by Representative Mark Foley, a Florida Democrat and also sponsored by Representative Steve Israel, a New York Democrat, and Senator Norm Coleman, a Minnesota Republican). Representative Foley stated:

[W]hile federal law delegates the regulation of insurance companies to the states, there is no reference to Holocaust insurance. "This legislation affirms the states' right to collect this information and provides for a federal cause of action for the beneficiaries . . . I'm fed up watching insurance companies thumb their noses at Holocaust survivors. The time for talking is over. It's time Congress rights this horrible wrong." This legislation . . . would also extend the statute of limitation on Holocaust-era claims in the United States for 10 years.

Id. It was commented, by a lawyer for the American Insurance Association, that such legislation "runs counter to efforts by the Clinton and Bush administrations to resolve Holocaust issues through negotiations rather than litigation." *Id.* See, e.g., H.R. 1210, 108th Cong. § 2 (2003); H.R. 1905, 108th Cong. (2003) (for such recently proposed legislation).

convenient way for Germany to dispose of the hundreds of thousands of life insurance policy claims against its government and companies, as well as an expedient way for the United States to keep friendly relations with its close trading partner, in the interest of foreign policy.¹⁶ Despite the difficulties litigation would present to plaintiffs, it might have been dismissed too soon as a means for recovery. It must be considered that while the Agreement and its chosen methods for resolving the insurance claims are plagued with many weaknesses, it may be the best solution to this multifaceted problem.¹⁷ Throughout this discussion it is necessary to keep in mind that the attempt to achieve compensation and restitution for Holocaust victims is “by definition, a fundamentally impossible task. The task to try and deal with moral issues of enormous significance and to do justice – [one] can never do justice . . . moral restitution and the issue of doing moral justice is one that will not be settled by . . . any of these agreements.”¹⁸

¹⁶ See *Monetary Restitution*, *supra* note 1, at 240 (speaking at conference, Samuel J. Dubbin, an attorney who represents survivors in Florida and the rest of the United States); see also *Greenhouse*, *supra* note 14, at B1 (explaining, by Roger Witten, attorney for the pharmaceutical companies, that during the negotiations, the “U.S. side embraced the idea of legal peace for German companies . . . [t]his was not just in the interest of German companies and Germany, but also in the foreign policy interests of the United States for German companies to be able to put this behind them.”).

¹⁷ See *Government Reform Committee Hearing on “Holocaust Era Restitution after AIA v. Garamendi: Where Do We Go From Here?”*, 108th Cong. 9 (2003) [hereinafter *Hearings: testimony of Randolph M. Bell*] (statement of Ambassador Randolph M. Bell, Special Envoy for Holocaust Issues, U.S. Department of State, Washington, D.C.) available at http://www.house.gov/reform/min/pdfs_108/pdf_com/pdf_com_holocaust_insurance_claims_sept_16_testimony_bell.pdf (last visited Feb. 23, 2004) (stating at the hearing “[t]he choice for claimants has always been between a negotiated settlement and litigation. Sticking with the negotiated settlement is far preferable to years of uncertain litigation. Without the ICHEIC and related agreements, it is unlikely that such vast sums would ever flow to Holocaust survivors and heirs.”).

¹⁸ *Monetary Restitution*, *supra* note 1, at 244 (expressing his view on the issue of restitution at the conference, Gideon Taylor. He is the Executive Vice President of Conference on Jewish Material Claims Against Germany, a former Assistant Executive Vice President of the American Jewish Joint Distribution Committee, and currently serves as Treasurer of the World Jewish Restitution Organization. He recalls a discussion during the negotiations as: “Is there justice, a measure of justice, perfect justice?” Taylor spoke of how the Germans used a term that the Jewish side of the claims conference never used, “Wiedergutmachung,” literally meaning to make whole. Taylor says it is not a term that can ever be used or accepted when talking about compensation; he determines that moral justice is not something that will come out of any of these agreements.).

II. HISTORICAL BACKGROUND

The reign of the Nazi government in Germany not only resulted in the murder and enslavement of millions, but also in the seizure of people's assets.¹⁹ These assets included the value or proceeds of many Jewish life insurance policies that were issued before and during World War II.²⁰ Life insurance policies were extremely "popular investments"²¹ for Jews during this time and some experts estimate the total value of the policies to be worth around ten billion dollars in today's value.²² The few policies that had evaded confiscation during the war were usually dishonored.²³ The European insurers also refused to pay out the policies by denying that a policy ever existed, requiring heirs of victims to produce death certificates, actual policies, and other documents, or claiming that the policy had lapsed due to unpaid premiums.²⁴ Attempts to claim the insurance policies by survivors, or their rightful heirs, were further hindered by the fact that the German government was unwilling or unable to furnish heirs with death certificates or the equivalent documentation of the policyholder's death.²⁵ While the relative responsibilities of both the government and the insurance companies remains a source of contention, the truth is that the proceeds of a large number of insurance policies issued to Jews before

¹⁹ See *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401-02 (2003) (providing, in the opening of the majority opinion, an account of the seizure and theft of life insurance policies preceding and during World War II by the Nazi regime).

²⁰ See *id.*

²¹ BAZLYER, *supra* note 1, at 110 (stating that "an insurance policy came to be known as 'a poor man's Swiss bank account.'").

²² See *id.* (comparing the estimated value of "Holocaust era insurance" policies by an insurance trade journal of around two billion dollars, to an estimate by other experts at ten billion dollars); see also Tom Easton, *Line to Nowhere*, THE ECONOMIST, Aug. 2, 2003, at 62 (explaining Eagleburger's contention, that the money given to the ICHEIC in the German Agreement to distribute should be sufficient to cover all claims since Eagleburger does not believe the claims will exceed one hundred million dollars. Easton believes this will be hard to accept given Michael Bazlyer's citation of insurance policies worth around ten billion dollars).

²³ See *Garamendi*, 539 U.S. at 402.

²⁴ See *id.*; see also Friedman, *supra* note 5, at Headline News section (noting that such requirements were ridiculous; the Nazis certainly did not issue death certificates for the six million Jews and five million gypsies, homosexuals and others that they murdered).

²⁵ See *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 402 (2003).

and during the war were either paid out to the Third Reich,²⁶ or never paid at all.²⁷

A. Asset Distribution after the War

A focus of Allied post-war diplomacy became the confiscation and frustrations of such insurance claims, which fell under the title of reparation.²⁸ This issue first came up at the conclusion of the war at the Paris Conference.²⁹ There, it was recognized that these assets belonged to victims and survivors of the atrocities and that these assets should not remain with their murderers and captors.³⁰ The allies ultimately placed the duty of ensuring restitution to victims of Nazi persecution upon the new West German government.³¹ Although the West German government passed restitution laws and signed agreements with other countries to redress these issues, many claimants still remain uncompensated.³² In 1952 there was another attempt to provide compensation to the survivors with the Luxembourg Agreements.³³ Overall, this long process had the

²⁶ See *id.*; see also Michael Maniello & Robert Lenzer, *The Last Victims*, FORBES, May 14, 2001, at 112 (arguing that if the insurers had paid out policies to the Nazis, it would not be fair to ask them to pay again to the rightful beneficiary. Allianz insurance company willingly cooperated with paying policies out to the Third Reich.).

²⁷ See *Garamendi*, 539 U.S. at 403 (explaining in the opening of the majority opinion, the history of life insurance policies preceding and during World War II); see also Maniello & Lenzer, *supra* note 26, at 112.

²⁸ See *Garamendi*, 539 U.S. at 403.

²⁹ See *Monetary Restitution*, *supra* note 1, at 246 (speaking, Gideon Taylor, notes that this statement comes from U.S. Military Law Number 59, passed in 1947, in the military zone of the United States zone of Germany).

³⁰ See *id.*

³¹ See *Garamendi*, 539 U.S. at 404.

³² See STUART E. EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II 266 (Public Affairs 2003) (explaining that the German insurance companies, unlike the Swiss banks, had paid out thousands of beneficiaries under the postwar German restitution laws. Nevertheless, insurance companies such as Allianz agreed to help create the International Commission on Holocaust-Era Claims (ICHEIC)); see also *Garamendi*, 539 U.S. at 431 (Ginsburg, J., dissenting) (stating that “Allied diplomacy after World War II . . . failed to achieve any global resolution of such claims. European insurers, encountering no official compulsion, were themselves scarcely inclined to settle claims; turning claimants away, they relied on the absence of formal documentation and other technical infirmities that legions of Holocaust survivors were in no position to remedy.”).

³³ See *Monetary Restitution*, *supra* note 1, at 224 (speaking, moderator of the conference, Menachem Rosensaft, a partner at law firm Ross & Hardies, Executive Committee member of the United States Memorial Museum Council, and Founding Chairman of the International Network of Children of Jewish Holocaust survivors. He puts the discussion

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effect of benefiting the insurance companies, who over this time had collected premiums on policies that they never had to pay out.³⁴

B. Rise in Litigation

The advent of German reunification brought forth a great number of restitution claims in the United States courts.³⁵ Victims of the Holocaust, who were both United States and foreign citizens, brought forth a series of class action lawsuits against German companies.³⁶ The defendants were mostly companies, or successor

in a historical context by discussing that the Luxembourg Agreements, which provided compensation for survivors in an unprecedented, vast sum for that time, resulted in the German government paying over 100 billion DM in compensation. This does not suggest that this is enough compensation.)

³⁴ See Friedman, *supra* note 5, at Headline News section (quoting opinion of Leon Stabinski, head of the California Association of Holocaust survivors, who identifies that an injustice was committed).

³⁵ See Scholz, *supra* note 13, at 306-07 (explaining that:

The first major step taken in the current American restitution effort was a 1997 class-action suit filed in United States District Court in New York against Assicurazioni Generali and numerous other European insurance companies . . . The New York suit generated a flurry of settlement negotiations, apparently stalling the case throughout 1998 and 1999 . . .).

The 1997 class action referred to is *Cornell v. Assicurazioni Generali S.p.A.*, 97 Civ. 2262 (S.D.N.Y. 1997); For other examples of Holocaust litigation that spurred the negotiations between the United States and Germany see, e.g., *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, No. 1374, 2000 U.S. Dist. LEXIS 17853 (S.D.N.Y. 2000) (providing for the consolidation of insurance claims against the insurance company Generali in the Southern District of New York. The claims consolidated were from the Northern District of California, the Central District of California, the Southern District of California, the Southern District of Florida, the Southern District of New York, and the Eastern District of Wisconsin); *In re Holocaust Asset Litig.*, Master Docket No. CV-96-4849 (E.D.N.Y. filed 1996), *In re Nazi Era Cases against German Defendants Litigation*, 129 F. Supp. 2d 370, 381 (2001).

³⁶ See Bettauer, *supra* note 2, at 6 (explaining the background for the United States becoming involved in the German Foundation negotiations. Many class action lawsuits were being brought in the United State's courts by United States citizens and foreign citizens who were victims of the Holocaust. These suits were against German companies, mostly for compensation for slave and forced labor, along with a vast range of injustices that took place under the Nazi regime. The United States was initially called upon to be "facilitators" and "mediators" for an "unconventional and unprecedented arrangement."); see also *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation*, 2004 U.S. Dist. LEXIS 20569, *5 (S.D.N.Y. 2004) (relating to insurance claims, "[p]laintiffs, assertedly the policy beneficiaries of their surviving family members, have advanced numerous claims seeking damages for Generali's nonpayment of benefits, as well as ancillary claims predicated on other alleged misconduct. The claims arise under the statutes and common law of New York, Wisconsin, Florida, and California, as well as customary international law.").

companies,³⁷ who had conducted business in Germany under the Nazi regime.³⁸ Both the German government and the German companies asked the United States government to play a role in finding a solution to these lawsuits.³⁹ The defendants knew that while they were likely to win in the United States courts, there was a great possibility that they would lose “in the court of public opinion in the largest marketplace in the world.”⁴⁰ As such, the companies desired to be rid of these cases as “quickly and cheaply as possible to remove a cloud from their ability to do business in the United States.”⁴¹

Generali is one of many European insurance companies who have been the defendant in such lawsuits.

³⁷ See BAZYLER, *supra* note 1, at 112 (explaining that many of the insurance companies, or their successor companies, which sold policies to the Jewish population in Europe are still in operation today. He notes that a large number “of these European insurance companies significantly expanded after the war, not only in the insurance market, but also in related businesses. In effect they have become gigantic multinational insurance and financial service conglomerates.”).

³⁸ See Bettauer, *supra* note 2, at 6 (stating that the class action suits were brought against German companies since they had used “slave and forced labor” and also committed a variety of other immoral acts during World War II).

³⁹ See Stuart Eizenstat, Declaration of Stuart Eizenstat, ¶ 4, [hereinafter Eizenstat Decl.] at <http://www.state.gov/documents/organization/6532.doc> (last visited Feb. 16, 2004) (describing that in the fall of 1998, the German government asked Stuart Eizenstat to “help facilitate a resolution of class action lawsuits filed in U.S. courts arising from slave and forced labor and other wrongs during the Nazi era.”); see also Bettauer, *supra* note 2, at 6 (discussing the United States government’s role in arriving at a settlement).

⁴⁰ EIZENSTAT, *supra* note 32, at 210 (explaining the reasons why the German companies pushed for the Agreement between the United States and Germany. Specifically, Eizenstat describes a 1998 meeting between twelve major German companies at the Federation of German Industries, where the companies sought to find a solution that would avoid the precedent of the Swiss banks. Present at the meeting were lawyers who represented the Swiss banks and while they assured the companies “the cases were without merit and could be won in the U.S. courts . . . [they explained] that these cases were unique among class actions because of the German connection to the Holocaust and the emotions this aroused in the American Jewish community.” Therefore, even if the German companies won the class action lawsuits, as it seemed they likely would, they would be harming their reputation and business capabilities in the United States.).

⁴¹ *Id.* (stating that the German companies also wanted to accomplish this without admitting to legal liability, without the supervision of the United States courts, and without the threat of being sued at a forthcoming date); see also Bettauer, *supra* note 2, at 6 (explaining that the German companies, at the beginning of the settlement, believed that the whole matter could be dealt with via an executive agreement between Germany and the United States Government to settle the claims). It was impossible to settle the “whole” matter with an executive agreement given that the:

[C]ustomary international law of state responsibility and diplomatic protection would only cover claims of persons who were nationals of the espousing government at the time they arose, and furthermore, did not speak to the espousal and settlement of claims against private entities, such as foreign companies. Moreover, there was no

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The defendant companies' intuition proved to be correct; the American legal system was a deficient forum for resolving such "complex political issues."⁴² The courts of the United States were and remain ill fit for answering such "profound and historical political questions"⁴³ since the "procedures are too cumbersome, the rules of evidence too exacting, and third parties, recalcitrant opponents, or obdurate judges can hold up payments to needy people for an unconscionable period of time."⁴⁴

Yet, while the litigation of Holocaust insurance claims is generally viewed as futile,⁴⁵ without the pressure that these suits generated and the subsequent participation of the United States government that they brought about, the considerable settlements would never have taken place.⁴⁶ The vast number of lawsuits resulted in the protests of the defendant companies, who, along with their governments' protests, prompted the United States government to take action in an attempt to resolve "the last great compensation related to negotiation arising out of World War II."⁴⁷

C. Negotiations Resulting from Litigation

Stuart Eizenstat⁴⁸ states that negotiating the insurance settlement was the "most bitter and intense negotiation of the entire saga with Germany, the one to break the back of the dispute . . .

precedent in U.S. law for the settlement of claims of nationals against foreign private entities by executive agreement (as opposed to by treaty), and thus such a method could be subject to serious challenge. Therefore, despite lengthy negotiations . . . the State Department declined to enter into a traditional claims settlement negotiation.

Id. at 6.

⁴² EIZENSTAT, *supra* note 32, at 341 (explaining his disappointment with the "inadequacies" of the American legal system in resolving this matter. Eizenstat offers such examples as a federal judge holding up payments to forced laborers for six months in a German case, even longer in such an Austrian case, and three years in a Swiss case).

⁴³ *See id.*

⁴⁴ *Id.*

⁴⁵ *See* BAZYLER, *supra* note 1, at 122 (discussing the comparison to the successful outcomes in the Swiss bank and German slave labor litigation. While there were some "initial legal victories, the whole litigation enterprise can be seen as a failure.").

⁴⁶ *See* EIZENSTAT, *supra* note 32, at 342.

⁴⁷ *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 405 (2003).

⁴⁸ Stuart Eizenstat was the Deputy Secretary of Treasury and the Special Representative of the President and the Secretary of State on Holocaust issues, positions he held since July 1999 under the Clinton Administration. He also served as Under Secretary of State for Economic Affairs, Under Secretary of Commerce, and as U.S. Ambassador to the European Union. He played an integral role in negotiating the German Foundation Agreement.

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Insurance had hung over us like a dark cloud.”⁴⁹ With the start of negotiations, “[t]he first German demand’ was that whatever the agreement, the Jewish community would accept it as ‘closure.’”⁵⁰ The response was that the Agreement could not go forward with such a demand.⁵¹ “With the German government, as the successor of the Reich, there could not ever, ever be closure. This is not only a financial, but a moral issue . . . [;]” it is a struggle that will never be abandoned.⁵² Thus, throughout the negotiations, it was always maintained that “no amount of money [could] . . . make up for what happened to Holocaust victims.”⁵³ Any payment that resulted from the Agreement would be viewed as “symbolic in nature.”⁵⁴

As the negotiations went forward, the German companies refused to negotiate a class action settlement, as had been the precedent in the Swiss bank cases.⁵⁵ The companies “viewed such a settlement as giving the lawsuits status and legitimacy.”⁵⁶ The German defendant companies, along with the German government, agreed to create a foundation which would furnish payments to victims on an “ex gratia basis.”⁵⁷ Therefore, the negotiations at the

⁴⁹ EIZENSTAT, *supra* note 32, at 266 (explaining that the insurance settlement was so difficult because they had to harmonize two separate practices: “negotiations with Allianz and other German insurance companies as part of the broad German Initiative, and those headed by former Secretary of State Lawrence Eagleburger with five major European insurers, of which Allianz was the only German member.”); *see also* Eizenstat Decl., *supra* note 39, at ¶ 5 (participating throughout the year and a half of negotiations, the countries involved included the State of Israel, governments of Belarus, the Czech Republic, Poland, Russia, and the Ukraine, the Conference on Jewish Material Claims Against Germany, and representatives of German Industry, banks, and insurance companies).

⁵⁰ Janice Arnold, *Claims Head Asks Ex-slave Labourers to be Patient*, CANADA JEWISH NEWS, June 11, 2003, at v.33(24) (quoting Gideon Taylor). *See supra* note 18.

⁵¹ *See id.*

⁵² *Id.*

⁵³ Ron Grossman, *Holocaust Suit Raises Foreign Policy Issue*, CHICAGO TRIBUNE, July 7, 2003, at 8.

⁵⁴ *Id.* (quoting Kessler-Godin who said that it was always maintained that “no amount of money can make up for what happened to Holocaust victims.”).

⁵⁵ *See* Bettauer, *supra* note 2, at 7 (describing that during the meetings, the Germans stated that they wouldn’t follow the Swiss bank precedent. The United States government and German government were co-facilitators of the negotiations, with Eizenstat directing the United States and Finance Minister Lambsdorff, leading the Germans). *Cf.* Morris A. Ratner, *Stefan A. Riesenfeld Symposium 2001: The Settlement of Nazi-era Litigation Through the Executive and Judicial Branches*, 20 BERKELEY J. INT’L L. 212, 226 (2002) (explaining that during the German negotiations, the defendants preferred an approach for settling class action suits in the United States courts via executive agreements with the United States government issuing statements of interests).

⁵⁶ Bettauer, *supra* note 2, at 7.

⁵⁷ *See id.*

national level finally resulted in the German Foundation Agreement.⁵⁸

III. THE GERMAN FOUNDATION AGREEMENT

The negotiations between Germany and the United States finally culminated in the signing of the “German Foundation Agreement” on July 17, 2000.⁵⁹ This was an executive agreement, signed with the stated intention of compensating “forced laborers and slaves and those who suffered at the hands of German Companies during the Nationalist Socialist era.”⁶⁰ The Agreement provides for Germany to establish a foundation funded by 10 billion

⁵⁸ See German Foundation, *supra* note 7, 39 I.L.M. 1298. The Agreement seeks to resolve Holocaust-era related claims by having such suits dismissed from the U.S. courts. Such claims for compensation are to be afforded restitution and compensation through the mechanisms set out in the Agreement; see also Eizenstat *supra* note 32, at 340 (commenting that “[i]n the boisterous politics of the United States, the clash of interests produced policy. This occurred in our negotiations.”).

⁵⁹ See German Foundation, *supra* note 7, 39 I.L.M. 1298; see also American Ins. Ass’n v. Garamendi, 539 U.S. 396, 405 (2003) (signing the Agreement were President Clinton and German Chancellor Gerhard Schröder. In the Agreement, Germany agreed to pass legislation that would establish the foundation which would be funded equally by the German government and German companies); Eizenstat Decl., *supra* note 39, at ¶ 9 (stating that it was very difficult to reach the final results. Parties initially proposed very different capped amounts to resolve the perpetual litigation. They were further aggravated by the fact that they had to allocate the “capped fund” amongst the numerous categories of victims, “which eventually was agreed down to the last mark.”).

⁶⁰ See German Foundation, *supra* note 7, annex A, ¶ 1, 139 I.L.M. at 1300-1301 (Annex A is titled “Principles Governing the Operation of the Foundation”). *But cf.* Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT’L L.J. 1 (2003) (criticizing the use of an executive agreement. Commenting that executive agreements, such as those used in the German Agreement, as well as in the Austrian and French Agreements, which were formulated to settle litigation in the U.S. courts arising out of World War II, “were made without Senate ratification (as required by treaty) or congressional authorization . . . these executive agreements mark an important departure from prior practice in resolving pending U.S. litigation against private companies rather than claims against foreign sovereigns” and quoting a senior State Department official, that the German Agreement was a “move into unchartered areas.”). *Cf.* Hanan Sher, *Landmarks More than Deutschmarks*, THE JERUSALEM REPORT, Jan. 17, 2000, at 36 (explaining by Stuart Eizenstat, the key role that Chancellor Schröder played in the settlement:

The Chancellor deserves an enormous amount of credit, first for taking the whole issue on . . . and at a time when he was cutting DM 30 billion out of his own budget, in health care and pensions and to reduce the German deficit, coming up with so much money is an extraordinary act of political leadership.)

Deutsch Marks (DM),⁶¹ contributed to equally by the German government and German companies, to compensate the companies' victims during the Nazi era.⁶² Of the 10 billion DM (about 5 billion U.S. dollars), 500 million DM (over 300 million U.S. dollars), plus 50 million DM from interest, if necessary, is reserved for payments to individuals or their heirs, whose insurance policies have gone unpaid or were nationalized.⁶³ The amount allocated for the settlement of insurance claims was agreed to in addition to the settlement for payments to be made to forced and slave laborers. In return for their contribution of funds, the Agreement states that the German companies "should not be asked or expected to contribute again, in court or elsewhere, for the use of forced laborers or for any wrongs asserted against German companies"⁶⁴ The participation of the German government and German companies for financing the foundation is to ensure "legal peace in this matter."⁶⁵

This Agreement is not a "government-to-government claims settlement agreement"⁶⁶ and the Agreement does not serve to defeat any claims.⁶⁷ Rather, it is a "claims mechanism established under German law with the input of the United States, which the United States has pledged to fully support via the executive agree-

⁶¹ See Eizenstat Decl., *supra* note 39, at ¶ 7 (outlining the background of the German Foundation negotiations). Eizenstat explains that the United States and Germany agreed upon two imperative points:

[T]hat the German Government and companies would establish a foundation, capitalized by DM 10 billion, to make payments to forced laborers and others who suffered at the hands of German companies during the Nazi era and World War II, and that, in exchange, the plaintiffs would voluntarily dismiss their lawsuits against German companies asserting claims arising out of the Nazi era and World War II.

Id. at ¶ 6.

⁶² See *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 405 (2003).

⁶³ Eizenstat Decl., *supra* note 39, at ¶ 16 (explaining that the Agreement also provides for the establishment of a "Future Fund" which will contain DM 700 million and if the funds set aside for the payment of insurance claims are insufficient, DM 100 million of the "Future Fund's" capital can be used to supplement payment for the claims). For a description of qualified "heirs", see *infra* note 103.

⁶⁴ German Foundation, *supra* note 7, at 1298; see generally Eizenstat Decl., *supra* note 39.

⁶⁵ German Foundation, *supra* note 7, at 1298.

⁶⁶ Eizenstat Decl., *supra* note 39, at ¶ 13.

⁶⁷ See *id.* (expressing that the intent of the Agreement is try to provide for "expeditious justice to the widest population of survivors"). The Agreement in no way tries to deny the validity of any of the claims Holocaust victims and their heirs may have against Germany and/or German corporations.

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ment.”⁶⁸ The Agreement represents the United States enduring dedication to the “extra-judicial resolution of claims arising out of Nazi-era atrocities.”⁶⁹ The United States has agreed that the stipulations for resolution in the Agreement shall serve as the “exclusive remedy and forum”⁷⁰ for resolving such claims and as such, these issues should not be brought in American courts.⁷¹ If any claim should arise where a German company is sued in the United States, the United States President has agreed to inform its courts, through a “Statement of Interest,”⁷² that it is in the interest of the foreign policy of the United States for the Foundation to be the “exclusive remedy and forum”⁷³ for resolving such claims and therefore, such claims should be dismissed.⁷⁴ The Federal government also agreed that it would try to persuade state and local governments to respect the Agreement and as such, that it should be the sole method for resolving these claims.⁷⁵

⁶⁸ *In re* Nazi Era Cases against German Defendants Litig., 129 F. Supp. 2d 370, 381 (2001) (discussing the impact of the German Foundation on plaintiff’s claims. The court states that the Foundation does not have a “direct preclusive effect on the litigation of Plaintiff’s claims.”); *see* Wuerth, *supra* note 60.

⁶⁹ *In re* Nazi Era Cases against German Defendants Litig., 129 F. Supp. 2d at 381.

⁷⁰ German Foundation, *supra* note 7, annex B, ¶ 1, 39 I.L.M. at 1303 (citing a letter written by President Clinton, dated Dec. 13, 1999, where he concluded:

that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II, including without limitation those relating to slave and forced labor, aryanization, medical experimentation, children’s homes/Kinderheim, other cases of personal injury, damage to or loss of property, including bank assets and insurance policies).

⁷¹ German Foundation, *supra* note 7, annex B, ¶¶ 1 & 2, 39 I.L.M. at 1303 (stating that it is the belief of the United States that all Holocaust related claims should be resolved according to the methods laid out in the Agreement and not in the courts).

⁷² *Id.* at 1303 (indicating the nine points that the Statement of Interest will cover); *see generally* Wuerth, *supra* note 60, at 1 (offering a discussion on the Statement of Interest relating to the German, French, and Austrian Agreements and also examining the tension between such executive agreements and the Constitution).

⁷³ *See* Eizenstat Decl., *supra* note 39, at ¶ 3.

⁷⁴ *See* German Foundation, *supra* note 7, annex B, ¶¶ 1 & 3, 39 I.L.M. at 1303; *see generally* Ratner, *supra* note 55, at 227 (explaining that from the German companies perspective, the issuance of such a Statement of Interest on the part of the United States government in all pending and future cases, was one of the more important parts of the German Foundation Agreement). *But cf.* Wuerth, *supra* note 60, at 2 (explaining that the Statement of Interests are troubling since they were made via an executive agreement, without being ratified by Congress, as is required with enacting a treaty. Wuerth explains that the President is able to “achieve through the courts what [he] . . . could not otherwise do without the agreement of two-thirds of the Senate, as required by a treaty.”).

⁷⁵ *See Executive Agreements*, INTERNATIONAL LAW UPDATE, July 2003, vol. 9, No. 7, at 98 (summarizing the Supreme Court’s decision in *Garamendi*. Explains that in signing the

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A. The German Foundation Agreement's Alliance
with the ICHEIC

The United States and Germany agreed that the Foundation is to work with the "International Commission on Holocaust Era Insurance Claims" (ICHEIC)⁷⁶ to settle the unpaid insurance claims.⁷⁷ On October 16, 2002, a formal agreement was finally signed between the ICHEIC, the German Foundation, and the German Insurance Association (GDV).⁷⁸ The agreement came two years after the signing of the German Foundation Agreement. This alliance appeared to mark a great step in the direction of processing and paying out insurance claims.⁷⁹ This partnership provided for the release of about 100 million dollars to pay valid insurance claims against German companies and around 175 mil-

Agreement, the Federal government stated that it would try to convince both state and local governments to respect the Foundation Agreement by allowing it to be the only method for resolving such relevant claims. In other words, the states were not to try to deal with this matter, as California attempted to with passing the HVIRA statute. These issues should be left to the mechanism of the German Foundation for their resolution); *see infra* notes 159-168 and accompanying text for information on HVIRA.

⁷⁶ German Foundation, *supra* note 7, art. I, ¶ 4, 39 I.L.M. at 1300 (stating in the Agreement that any insurance claims that come within the purview of the procedures adopted by the ICHEIC, shall be handled according to the already established mechanisms of the ICHEIC); *see* <http://www.icheic.org> for the Commission's official website. The five insurance companies that participate in the ICHEIC are: Allianz AG of Germany, Assicurazioni of Italy, Axa of France, Winterthur, and Zurich, both of Switzerland. Henry Weinstein, *Insurers Reject Most Claims in Holocaust Cases*, LOS ANGELES TIMES, May 9, 2000, at A1. These five insurance companies wrote roughly 35% of the policies sold in Europe from 1930 to 1945. *Id.*

⁷⁷ *See* Eizenstat Decl., *supra* note 39, at ¶ 26.

⁷⁸ Agreement Concerning Holocaust Era Insurance Claims, Oct. 16, 2002, 1, *available at* <http://www.icheic.org/pdf/agreement-GFA.pdf> (last visited Feb. 25, 2004) (providing for the alliance of the German Foundation Agreement with the ICHEIC and the GDV. The agreement regards the "settlement of individual claims on unpaid or confiscated and not otherwise compensated policies of German insurance companies in connection with National Socialist injustice and by the Foundation and ICHEIC regarding payments to the Humanitarian Fund of ICHEIC."); *see also* Press Release, Eagleburger, Senior German Foundation and Insurance Officials Sign Landmark Agreement on the Payment of Holocaust Insurance Claims (Oct. 16, 2002) *available at* <http://www.icheic.org/pdf/2002-1016.pdf> (last visited Feb. 16, 2004) (announcing that Lawrence Eagleburger, Chairman of the ICHEIC signed the agreement with Dr. Hans Otto Braughtigam of the Foundation and Dr. Bernd Michaels and Dr. Jorg Freiherr Frank von Furstenwerth of the German Insurance Association).

⁷⁹ *See* Press Release, Eagleburger, Senior German Foundation and Insurance Officials Sign Landmark Agreement on the Payment of Holocaust Insurance Claims, *supra* note 78 (allowing for a means for "families of World War II Holocaust victims" to receive payment from German insurance companies).

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lion dollars to be used for humanitarian purposes.⁸⁰ The ICHEIC, the Foundation, and the GDV⁸¹ all work together to pay out the claims.⁸² This agreement allows for the ICHEIC to make payments for both the unpaid and confiscated insurance policies.⁸³

The ICHEIC seemed to be an optimal mechanism to deal with the insurance policies.⁸⁴ It had been in operation before the Foun-

⁸⁰ See *id.* (explaining that by signing this Agreement, this specified amount of money was released in order to pay out the valid claims); see also ICHEIC, PROCESSING GUIDE: HOLOCAUST ERA INSURANCE 7 (June 23, 2003), available at http://www.icheic.org/pdf/ICHEIC_CPG.pdf (last visited Oct. 23, 2004) (explaining that the German law provided for the transfer of DM 550 million to the ICHEIC, of which, DM 200 million is to be used for the payment of valid insurance claims and the associated costs, while DM 350 million is to be used for humanitarian purposes. If any of the DM 200 million is not used, it can be used for further humanitarian spending.).

⁸¹ The GDV references here the German insurance companies who are represented by the GDV who have entered into an agreement with the ICHEIC and the Foundation, these include Axa and Allianz. The following insurance companies have agreed to have their German claims processed according to the mechanism set out in the Foundation: Axa, Winterthur Leben, Zurich Financial Services, and Generali. See ICHEIC, PROCESSING GUIDE: HOLOCAUST ERA INSURANCE 15 (June 23, 2003), available at http://www.icheic.org/pdf/ICHEIC_CPG.pdf (last visited Oct. 23, 2004).

⁸² Press Release, Holocaust Insurance Agreement Reached, (Sept. 19, 2002) available at <http://www.state.gov/r/pa/prs/ps/2002/13580.htm> (last visited Feb. 24, 2004).

⁸³ Press Release, Holocaust Insurance Agreement Signed, (Oct. 17, 2002) available at <http://www.state.gov/r/pa/prs/ps/2002/14455.htm> (last visited Feb. 24, 2004) (announcing the signing of the October 16, 2002 agreement between the ICHEIC and the German Foundation. Stating that the agreement is demonstrative of the United States continued efforts to “address the injustices of World War II and National Socialist Era” and its support for the Foundation and its requirements of the German Foundation Agreement signed in July 2002.).

⁸⁴ See generally ICHEIC, *About ICHEIC*, at <http://www.icheic.org/about.html> (last visited Nov. 14, 2004) (providing information on the ICHEIC; stating that the handling of insurance claims has been done by the ICHEIC since its establishment in 1998). Since the mechanisms for handling the Holocaust-era insurance claims were already in place, the United States and German governments’ were not faced with the daunting task of developing their own claims processing procedures. The website, <http://www.icheic.org>, provides extensive information on the claims processing procedures. Background on the ICHEIC includes:

ICHEIC was established in 1998 following negotiations among European insurance companies and U.S. insurance regulators, as well as representatives of international Jewish and survivor organizations and the State of Israel. The resulting Memorandum of Understanding (“MOU”) - signed on August 25, 1998, by several European insurance companies - created ICHEIC.

Through the MOU, ICHEIC is charged with establishing a just process to collect and facilitate the signatory companies’ processing of insurance claims from the Holocaust period. Individuals negotiating on behalf of the companies and those negotiating on behalf of the claimants (U.S. insurance regulators from the National Association of Insurance Commissioners and international Jewish and survivor organizations) became either members of ICHEIC or Alternates or Observers to the Commission and all have a voice in the organization. Signatory companies agreed to process claims

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dation Agreement and as such, had already established a claims processing method.⁸⁵ In 1998, the German, Italian, French, and Swiss insurance companies along with International Jewish groups and U.S. insurance regulators founded the ICHEIC.⁸⁶ As a voluntary organization, the commission's responsibility is to settle unpaid insurance policies from the Nazi era.⁸⁷ The ICHEIC tries to settle such claims by negotiating with European insurers to provide information about the settlement of unpaid insurance policies, according to their set procedures.⁸⁸ The ICHEIC informs people of their rights regarding these insurance policies by publishing lists of names.⁸⁹ The goal is to make public hundreds of thousands of names; without this initiative, such names would never have otherwise been made public.⁹⁰ In other words, this partnership should make it very accessible for survivors and their heirs to check the list and see if they meet the criteria for compensation.⁹¹

according to ICHEIC guidelines, which were negotiated and established by consensus among the ICHEIC membership.

ICHEIC was the first organization ever to offer Holocaust survivors and their heirs an avenue to pursue a claim against an insurance company at no cost. The Commission was created as a means of addressing the gaps and shortfalls of postwar compensation programs of the 1950s and 1960s and was intended to provide an opportunity for thousands of Holocaust survivors and their heirs to submit claims for the first time.

ICHEIC, *About the ICHEIC*, at <http://www.icheic.org/about.html> (last visited, Nov. 14, 2004).

⁸⁵ See generally Eizenstat Decl., *supra* note 39, at ¶ 26.

⁸⁶ See *supra* note 84; cf. Easton, *supra* note 22, at 61 (commenting that the ICHEIC was founded "under pressure from American lawyers, Europe's biggest insurers and America's state insurance commissioners . . .").

⁸⁷ See Bindenagel, *supra* note 8; see also <http://www.icheic.org/eng/process/pdf> (last visited Oct. 17, 2003) (on file with the Benjamin N. Cardozo School of Law Journal of Conflict Resolution).

⁸⁸ See ICHEIC, *Claims Processing: ICHEIC's Role in the Claims Process*, at <http://www.icheic.org/claims-role.html> (last visited Mar. 2, 2004) (setting out the procedures for the processing of claims).

⁸⁹ See Henry Weinstein, *Deal Frees Up \$275 Million for Holocaust Payouts; Negotiations: After two years panel reaches agreement with German group on reparations for insurance claims from World War II era*, LOS ANGELES TIMES, Sept. 20, 2002, at Part 1, 15.

⁹⁰ See generally *id.*

⁹¹ See generally *id.*

Advocates for survivors have long maintained that disclosure of policyholder lists is the key to an equitable process because nearly all Holocaust victims lost their records when they were taken to the Nazi death camps. Consequently, hardly any survivors or their heirs have valid paperwork for claims, making them dependent on insurance companies to search their files and make them public.

Id. Therefore, the disclosure of names by the insurance companies enables policyholders and their rightful heirs to have a much easier time trying to ascertain whether they have a valid claim.

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B. The Claims Resolution Process

The money allocated to the ICHEIC is for the “resolution of unpaid insurance claims against German companies, and all insurance payments are to be made in accordance with ICHEIC’s claims and valuation procedures.”⁹² In the Foundation Agreement, Germany consents that the ICHEIC will have the responsibility of handling and processing the claims against the German insurance companies.⁹³ The ICHEIC’s “claims adjudication mechanism and a humanitarian fund to supplement the claims process” will be mostly funded by the Foundation.⁹⁴

The Claims Resolution Process of the ICHEIC serves to deal with insurance claims from Holocaust victims and their heirs and beneficiaries.⁹⁵ The first step in the process is for the ICHEIC to publish names on its website.⁹⁶ As part of the Agreement, German companies agreed to publish more than 350,000 names.⁹⁷ This is to be the most comprehensive list of insurance policies issued to Jews in Germany before and during the Nazi era.⁹⁸ The publishing of

⁹² *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 354 (S.D.N.Y. 2002).

⁹³ See German Foundation, *supra* note 7, art. I, ¶ 4, 39 I.L.M. at 1300. For a copy of the Holocaust Era Insurance Processing Guide of June 22, 2003 see http://www.icheic.org/pdf/ICHEIC_CPG.pdf.

⁹⁴ Eizenstat Decl., *supra* note 39, at ¶ 17.

⁹⁵ See Holocaust Era Insurance Processing Guide, *supra* note 93, at 8. To assist claimants with completing the claims process, the ICHEIC has published the “Holocaust-era claims Processing guide” which not only explains the evaluation process, but also contains background on the ICHEIC.

⁹⁶ See ICHEIC, *Search a Name*, at <http://www.icheic.org/search.html> (last visited Feb. 16, 2004) (enabling potential and current claimants to search on the ICHEIC website to see if their family name appears on the list. Upon clicking on this link, one is able to type in the last name, the first name (if known), the last known residence (if known), and where the policy was issued (if known). Then, by clicking the “submit” button, a list of such matching policies will appear. The website makes clear that just because a name appears on the list, it does not necessarily mean that the person or his or her heirs is entitled to recover. This is because an insurance company will investigate the claim once the claimant has found their name on the website. The insurance company’s further investigation “may reveal that the claim was previously completely settled or paid — which according to ICHEIC guidelines precludes this claim from being reconsidered. Additionally, there may be instances where policies were issued to individuals with common names that multiple victims/claimants might mistake as the holder of their particular policy.”).

⁹⁷ See Treaster, *supra* note 15, at A26 (explaining that German companies agreed to publish the names under the settlement between the United States and Germany on a variety of Holocaust issues).

⁹⁸ See Press Release, ICHEIC Announces Publication of 360,000 Names of Holocaust-Era Insurance Policyholders (Apr. 29, 2003) available at <http://www.icheic.org/pdf/2003->

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names is important because “families lost everything in the Holocaust; many were children at the time. As a result. . . many have no idea that they are owed money.”⁹⁹ The creation of a list allows survivors, their heirs, and the family members of victims, to search the list to see if their family name appears on it.¹⁰⁰ As of April 2003, nearly 450,000 names had been published, which represent more than 500,000 insurance policies throughout Europe.¹⁰¹

After determining if one’s name or family’s name is on the list, the next step is to file a claim with the ICHEIC.¹⁰² The Agreement allows for both survivors and their heirs to receive payment on insurance claims.¹⁰³ After the claim is filed, it is forwarded by the

0429.pdf (last visited Feb. 16, 2004); *see also Search a Name, supra* note 96 (quoting from the website:

These lists were compiled from insurance companies, insurance associations, various public archives and other sources. Names found here are those of individuals most likely to have had a life insurance policy of any kind (including education, dowry, endowment or pension/annuity policies) during the relevant period (1920-1945) and who are thought likely to have suffered any form of racial, religious or political persecution during the Holocaust.)

⁹⁹ Treaster, *supra* note 15, at A26 (explaining the story of one person who did not even know that his parents had bought an insurance policy. By looking on the ICHEIC website he was able to find his parents names. This example illustrates the significance of publishing the names.).

¹⁰⁰ *See Search a Name, supra* note 96.

¹⁰¹ *See* Press Release, ICHEIC Announces Publication of 360,000 Names of Holocaust-Era Insurance Policyholders (Apr. 29, 2003) *available at* <http://www.icheic.org/pdf/2003-0429.pdf> (last visited Feb. 16, 2004) (explaining that the list of policyholders was initially published in April 2000 and since then it has been updated many times); *see also* ICHEIC, *Claims Processing: Policyholder List Publication*, at <http://www.icheic.org/claims-list.html> (last visited Feb. 26, 2004) (stating that the ICHEIC lists currently include over 500,000 policyholder or policy holder-related names).

¹⁰² *See* ICHEIC, *Claims Processing*, at <http://www.icheic.org/claims.html> (last visited Feb. 16, 2004) (detailing the procedure followed once the ICHEIC receives the completed form from the claimant. There are three different options, depending on whether the claimant names the insurance company who issued the policy or not. If the claimant names the insurance policy, the ICHEIC will then forward the claim to such named insurance company. If the claimant does not specify the name of the insurance company who issued the policy, then the claim will be forwarded to all member companies or entities of the ICHEIC that could possibly have issued the type of insurance indicated in the claim. If the claimant is able to specify the insurance company, but the insurance company is not a participant in the ICHEIC process, the ICHEIC will send a letter to the company in which they ask them to investigate the claim. However, while the ICHEIC will ask such a company to process the claim according to the ICHEIC standards, the ICHEIC cannot guarantee that they will do so. Also, it should be noted that the right to appeal an insurance company’s decision relates only to the companies affiliated with the ICHEIC.); *see also* Treaster, *supra* note 15, at A26 (illustrating an example of searching the website).

¹⁰³ *See* German Foundation, *supra* note 7, annex A, ¶ 8, 39 I.L.M. at 1302 (specifying that “heirs” include the spouse or children, but if they no longer survive, then the payments are obtainable by living grandchildren, and if not, then to any living siblings. If

ICHEIC to the GDV to be processed according to the Agreement,¹⁰⁴ which provides that the claim be forwarded to the insurance company (if named) who then decides the merits of the claim. If the claim is denied, an arbiter will re-examine the denied claim, according to an established appeals procedure.¹⁰⁵ If the claim is accepted by a named insurance company, or matched by an unnamed insurance company, the value of the claim will be determined according to the ICHEIC valuation procedures.¹⁰⁶ Unlike claims for former slave laborers and former forced laborers,¹⁰⁷ where the Agreement places maximum amounts at \$7,500 and \$2,500 respectively, it does not put such a limit on insurance policies.¹⁰⁸ While any amount recovered seems trivial for the pain and suffering that they or their heirs experienced, the total payment to the Foundation of almost 4 billion dollars is unparalleled.¹⁰⁹

C. Benefits of the Foundation

The plaintiffs in these restitution cases must overcome many legal obstacles in order to get their day in court.¹¹⁰ The Foundation

there are no grandchildren or siblings, then the compensation will be made available to the individual beneficiary identified in the victim's will.).

¹⁰⁴ See Agreement Concerning Holocaust Era Insurance Claims, *supra* note 78, at § 3 Processing of Application, ¶ 1.

¹⁰⁵ See *id.* at § 4 (explaining the appeals procedure that, pursuant to section 19 of the Foundation Law, the ICHEIC, with the approval of the Foundation, will establish an independent appeals body. The appeals body is to consist of three members. An appeal must be filed within 120 days of the company's rejection. An applicant will be able to file an appeal for a review of (1) the German insurance company's decision to deny the claim or (2) whether the Valuation guidelines have been applied correctly in determining the offer made to the claimant. A decision of the appeals body may not be subject to legal challenges).

¹⁰⁶ See *Guide to Valuation Procedures*, at http://www.icheic.org/pdf/ICHEIC_VG.pdf (last visited Oct. 24, 2004).

¹⁰⁷ 8.1 billion DM of the 10 billion DM settlement in the German Foundation Agreement provides for payments to forced and slave laborers.

¹⁰⁸ See Arnold, *supra* note 50, at v.33 (24) (describing the difficulties associated with processing the claims).

¹⁰⁹ See *In re Nazi Era Cases against German Defendants Litig.*, 129 F. Supp. 2d 370, 389 (2001) (stating that if the court did not dismiss such claims as the plaintiffs', the German Foundation would not exist. While the \$7,500 paid by Foundation to individual claimants "seems miniscule against the backdrop of the horrors they once endured, the almost \$ 4 Billion in total payments to be made by the Foundation is unprecedented.").

¹¹⁰ See *Assicurazioni General SpA donates \$12 million to Holocaust fund*, BEST'S REVIEW: LIFE-HEALTH INSURANCE EDITION, Sept. 1997, at 20 (explaining motion to dismiss by nineteen European insurers who were named in suit brought by Holocaust survivors

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allows for the processing and honoring of many of these claims, which would otherwise be dismissed for various reasons.¹¹¹ The Foundation therefore appears to be “fair and equitable”¹¹² based on:

- (a) the advancing age of the plaintiffs, their need for a speedy non-bureaucratic resolution, and the desirability of expending available funds on victims rather than litigation;
- (b) the Foundation’s level of funding, allocation of its funds, payment system, and eligibility criteria;
- (c) the difficult legal hurdles faced by plaintiffs and the uncertainty of their litigation prospects; and
- (d) in light of the particular difficulties presented by the asserted claims of heirs, the programs to benefit heirs and others in the Future Fund.¹¹³

Therefore, the mediated settlement procedure of the Agreement seems like a welcome alternative to the prospect of endless litigation that may not provide any clear results.¹¹⁴

D. Reasons Why the ICHEIC’s Resolution Methods Appear to Be Superior to Litigation

The courts have proven unfavorable to plaintiffs trying to realize benefits from their insurance policies.¹¹⁵ It is argued that the

and their heirs. Their grounds for dismissal will include lack of jurisdiction and forum non conveniens.)

¹¹¹ See German Foundation, *supra* note 7, at annex B, ¶ 7, 39 I.L.M. at 1303 (citing the legal hurdles plaintiffs face, including: justiciability, international comity, statutes of limitations, jurisdictional issues, forum non conveniens, difficulties in proof, and certification of a class of heirs).

Paragraph 7 of the Agreement also states that:

The United States takes no position here on the merits of the legal claims or arguments advanced by plaintiffs or defendants. The United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal, but will reinforce the point that U.S. policy interests favor dismissal on any valid legal ground.

Id.

¹¹² *Id.* at annex B, ¶ 8, 39 I.L.M. at 1303.

¹¹³ *Id.*

¹¹⁴ See Eizenstat Decl., *supra* note 39, at ¶ 2 (“[The] United States government believes that concerned parties . . . should act to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation, rather than subject victims and their families to the prolonged uncertainty and delay that accompany litigation.”).

¹¹⁵ See, e.g., *Schenker v. Assicurazioni Generali S.p.A.*, 98 Civ. 9186 (S.D.N.Y. 2002) (providing an example of an insurance case dismissed for lack of personal jurisdiction over the defendant insurance company); *In re Assicurazioni Generali S.p.A. Holocaust Insur-*

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United States courts' are simply not fit to resolve this political issue.¹¹⁶ In dismissing such Holocaust claims, judges have stated:

It goes without saying that the events which form the backdrop of this case make up one of the darkest periods of man's modern history. Those persecuted by the Nazis were the victims of unspeakable acts of inhumanity. At the same time, however, it must be understood that the law is a tool of limited capacity. Not every wrong, even the worst, is cognizable as a legal claim.¹¹⁷

No amount of money could ever restore life to the tens-of-millions whose lives were taken, or compensate the millions of survivors whose lives were destroyed. This Court must dismiss Plaintiff's claims, but not because he is undeserving of relief. This Court must dismiss Plaintiff's claims because the magnitude of World War II has placed claims such as this beyond the province of this Court, and into the political realm.¹¹⁸

In recognition of the inherent fallacies in the law for addressing plaintiffs' claims, the processing method adopted by the ICHEIC was developed to be advantageous to plaintiffs and to help them recover the compensation to which they are entitled.¹¹⁹

ance Litigation, 2004 U.S. Dist. LEXIS 20569 (S.D.N.Y. 2004) (dismissing plaintiff's insurance claims in light of the Supreme Court's decision in *Garamendi*).

¹¹⁶ See *supra* notes 42-44 and accompanying text; see, e.g., *In re Nazi Era Cases against German Defendants Litig.*, 129 F. Supp. 2d 370, 389 (2001); *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 177 (S.D.N.Y. 2000) (explaining being done by judges for their dismissal of such litigation. They are emphasizing that the courts are not the proper forum to resolve these issues.); see generally Ratner, *supra* note 55, at 225 (stating that while the Statement of Interests issued by the United States government in the Nazi-era claims filed in the United States are not binding, these Statements "rarely fail to prompt dismissal."). So it seems the courts have left the resolution of such claims to the mechanisms established by the German Foundation Agreement.

¹¹⁷ *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 177 (acknowledging the factual difficulties and legal defenses the plaintiff's face establishing their claims. Also pointing out that the defendants have many legitimate legal defenses and that they only need one to succeed in order to defeat the plaintiff's claim.).

¹¹⁸ *In re Nazi Era Cases against German Defendants Litig.*, 129 F. Supp. 2d at 389 (explaining that the Foundation Agreement and the Statement of Interest issued by the United States government were not the grounds for dismissal of this case. However, they both do indicate "that a commitment has been made by the Executive branch to resolve [Holocaust-era] claims . . . on an intergovernmental level.").

¹¹⁹ See Press Release, International Holocaust Era Insurance Commission Launches Worldwide Outreach to Unpaid Policy Claimants (Feb. 15, 2000) available at http://www.icheic.org/pdf/2000-0216-us_canada.pdf (last visited Feb. 25, 2004) (having the insurance companies agree to apply "relaxed standards of proof" when processing applications should help in the investigation of the claims. Eagleburger was quoted as saying "our direct responsibility is to pay insurance claims belonging to Holocaust era victims through-

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First, the ICHEIC employs a currency formula to value the insurance policies at the exchange rate in effect in 1938, before hyperinflation slashed the value of many European currencies.¹²⁰ Second, the ICHEIC's use of relaxed standards of proof¹²¹ effectively allows plaintiffs to present evidence involving the insurance policies that they would not be allowed to submit in a court.¹²² Moreover, the insurance companies participating in the ICHEIC have waived many legal defenses that they have against plaintiffs' claims, in effect removing many of the hurdles of litigation.¹²³ These legal defenses include the political question doctrine, forum non conveniens, statute of limitations, international comity, successor corporate liability, failure to join indispensable parties, inadequate particularization pleading, and restitution.¹²⁴ Certainly, these de-

out the world . . . cooperation among insurance regulators and government entities has resulted in an unprecedented process to swiftly investigate and pay legitimate claims.”).

¹²⁰ See *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 354 (S.D.N.Y. 2002) (describing such arguments of the defendant insurance companies who pointed out the benefits of the ICHEIC processing methods instead of the plaintiffs becoming immersed in litigation).

¹²¹ See *Annex B: Relaxed Standards of Proof for Life Insurance Policies*, at <http://www.icheic.org/pdf/agreement-GFA-annexB.pdf> (last visited Feb. 16, 2004) (describing the relaxed standards of proof used in the claims process:

The insurance companies will review claims pursuant to Relaxed Standard of Proof based on the information provided by the claimant as well as information, discovered during the insurer's investigation of its files, records, archives, together with documents and records recovered the search of appropriate archives by the ICHEIC. The Relaxed Standards of Proof have been established to make it as easy as possible for a claim to be assessed, taking into account all relevant information.);

see also ICHEIC, *Standards of Proof*, at http://www.icheic.org/pdf/ICHEIC_SP.pdf (last visited Mar. 1, 2004) (offering a further description of the Standards of Proof espoused by the ICHEIC).

¹²² See *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d at 354. But see *Government Reform Committee hearing on "Insurance Era Restitution after AIA v. Garamendi: Where Do We Go From Here?"*, 108th Cong. 3-4 (2003) [hereinafter *Hearings: Michael J. Bazylar*] (statement of Michael J. Bazylar, Professor of Law, Whittier Law School, on the status of insurance restitution for Holocaust victims and their heirs) available at http://www.house.gov/reform/min/pdfs_108/pdf_com/pdf_com_holocaust_insurance_claims_sept_16_testimony_bazylar.pdf (last visited Feb. 23, 2004) (explaining that the ICHEIC adopted a number of principles, including the "relaxed" standard of proof. In 1999, some claims were processed according to the "Fast Track" process, which encountered many problems and discrepancies due to the way the insurance companies interpreted the meaning of "relaxed standards." Moreover, this problem worsened when the main claims process began and today, the meaning of "relaxed standards" is still in dispute.).

¹²³ See *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d at 354.

¹²⁴ See *In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 177 (S.D.N.Y. 2000) (listing the defendant's defenses which would create hardship for the plaintiffs in pursuing their claims. Class action lawsuits against Austrian and German

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fenses could stand to defeat a plaintiff's recovery in court.¹²⁵ Finally, the ICHEIC makes its presence known to plaintiffs through its "global advertising and outreach program,"¹²⁶ which includes its website¹²⁷ and its mechanisms to help plaintiffs file their claims by offering toll-free telephone numbers with operators who speak various languages.¹²⁸ The ICHEIC's autonomy derives from its "independent auditing process and a right to appeal the Commission's ruling to an independent arbitrator or panel of arbitrators."¹²⁹

IV. CRITIQUE OF THE FOUNDATION'S ALLIANCE WITH THE ICHEIC

The idea behind the ICHEIC was to resolve disputes over unpaid insurance policies more expediently and in a less costly way than courts could.¹³⁰ While it may still be too early to see the results of the Agreement, its early years have yielded mixed results.¹³¹ While it is without a doubt that the German Foundation

banks, plaintiffs alleged that the banks committed "various torts and violations of international law arising out of the activities of the Nazis . . .").

¹²⁵ See generally German Foundation, *supra* note 7, at annex B, ¶ 7, 39 I.L.M. at 1304 (pointing out that plaintiffs in Holocaust-era related cases face many "legal hurdles." In removing these hurdles, via the Foundation Agreement, a plaintiff is able to have a chance at receiving some sort of compensation. Without this Agreement, such a plaintiff would most likely have his or her claim dismissed.).

¹²⁶ *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 354-55 (S.D.N.Y. 2002) (offering background information on the ICHEIC, including details of ICHEIC's attempts to reach out to possible claimants).

¹²⁷ See <http://www.icheic.org> for the official website of the International Commission on Holocaust Era Insurance Claims. The website allows anyone to easily conduct a search and to also read information about the ICHEIC.

¹²⁸ See *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d at 354-55.

¹²⁹ *Id.* at 355.

¹³⁰ See Agreement Concerning Holocaust Era Insurance Claims, *supra* note 78, at § 1 ("Section 1: Scope of the Agreement" that the claims processing method is to be "efficient, effective and responsive to claimants."); see also Easton, *supra* note 22, at 61 (explaining that the idea behind the ICHEIC "was to resolve long-running disputes faster and more cheaply than courts would.").

¹³¹ See Easton, *supra* note 22, at 62 (commenting that there is a return to using the courts to resolve these claims. Easton explains that it is especially possible for cases against Generali to be brought in the United States courts since Generali is a large Italian insurer, not German, who sold many policies in Eastern European countries before the war. Generali is not covered by the German Foundation Agreement since it operated outside Germany.); cf. Ratner, *supra* note 55, at 230-31 (comparing the two different models used for settling Holocaust and Nazi-era litigation. The first model being the Judicial Branch for the Swiss Bank cases compared to the Executive Branch for settling property

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Agreement is a “tremendous step forward,”¹³² it still does not “resolve the issue.”¹³³ A major deficiency has been the inability of the ICHEIC to process and to successfully pay out the insurance claims it receives, making the terms of the Foundation Agreement ineffective in regard to the payment of insurance policies.¹³⁴ Part of the ICHEIC’s difficulty stems from the trouble it is having in trying to get insurance companies to submit the names of insurance policy holders.¹³⁵ Since the ICHEIC terms are non-binding, it cannot force its members to publish the lists of unpaid claims.¹³⁶ While 350,000 names were published, as was required under the

claims. The author states that the “early indication is that settlements achieved through the Judicial Branch are better at guaranteeing the due process rights of and fairness to victims who are the intended beneficiaries of these settlements.”).

¹³² Friedman, *supra* note 5, at Headline News section.

¹³³ *Id.* (quoting Leslie Tick, senior counsel for the California Department of Insurance. Tick explains that this does not resolve the issue since most Holocaust survivors cannot access an all-encompassing list that would allow them to determine if their family name were among them.).

¹³⁴ See *Government Reform Committee hearing on “Insurance Era Restitution after AIA v. Garamendi: Where Do We Go From Here?”*, 108th Cong. 3-4 (2003) [hereinafter *Hearings: testimony of Gideon Taylor*] (testimony of Gideon Taylor, Status of Insurance Restitution for Holocaust Victims and Heirs) available at http://www.house.gov/reform/min/pdfs_108/pdf_com/pdf_com_holocaust_insurance_claims_sept_16_testimony_taylor.pdf (last visited Feb. 23, 2004). The ICHEIC passes the claims it receives to the insurance companies to process. Processing delays have been partly attributed to the lack of qualified staff within the insurance companies to process the claims. *Id.* at 4. In some instances, the staff hired to process the claims do not completely understand the rules adopted by the ICHEIC. *Id.* The ICHEIC has recently issued new processing guidelines with the hope that they will assist the companies to process the claims more effectively. *Id.*

¹³⁵ See Anita Ramasastry, *When does a State’s Regulation of Private Companies Interfere with Foreign Affairs? A recent Supreme Court ruling gives the wrong answer*, FINDLAW, July 2, 2003, available at <http://writ.corporate.findlaw.com/ramasastry/20030702.html> (last visited Feb. 24, 2004) (offering a background of the Holocaust Era Insurance Claims and related agreements they caused. She writes in response to the Supreme Court’s decision *Garamendi.*); see also *Hearings: testimony of Gideon Taylor, supra* note 134, at 3-5 (explaining, in defense of the insurance companies, for the delay in the publication of many of the lists. The delay is partly attributed to the Data Protection laws in Europe. For, while the names of unpaid policies may be available, a “complex system” has been set up so that the publications of such list do not breach relevant Data Protection laws, making the lists slow to be published. Another issue that aggravates the process is the fact that a large number of the claims on policies issued in Germany must first be checked in the German Indemnification archives to determine if a payment had been made on that policy in the past, according to the guidelines of the Federal Indemnification Law (BEG). If such a payment was made during the 1950s, and it is in compliance with the Indemnification Law, then the company does not have to follow the ICHEIC procedure to pay the claim. Often-times, companies wait a great deal of time for a response from the BEG, depriving the claimants of hearing a result.).

¹³⁶ See Ramasastry, *supra* note 135.

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Agreement, the insurance companies are still fighting full disclosure.¹³⁷

Therefore, despite all of the intensive negotiations, most survivors of the Holocaust and their heirs still cannot attain a “comprehensive list of policy holders to find out if their families are among them.”¹³⁸ Such inability is very disturbing since many of the survivors are simply “running out of time.”¹³⁹ Without a more comprehensive list, these survivors will never know if they are entitled to compensation.¹⁴⁰

A. Processing Problems

It is questionable whether the ICHEIC is reaching its goal of swiftly processing the insurance claims.¹⁴¹ While the ICHEIC has

¹³⁷ See Treaster, *supra* note 15, at A26 (using the Supreme Court case of *Garamendi* to illustrate how the insurance companies are still fighting the disclosure of names. In *Garamendi*, the companies challenged the constitutionality of the California Law (HVIRA) which required the companies to publish up to ten million Holocaust era claims, the court held that this law was unconstitutional); see also Scholz, *supra* note 13, at 318 (pointing out that a problem that survivors face is that “eighty percent of claimants do not know which insurer held their relatives’ policies.” Unfortunately, it has been difficult for ICHEIC to have the insurance companies produce names on unpaid policies. The author points out that by the close of 2000, Generali published roughly “11,000 names of an estimated 340,000 . . . [and] German-based conglomerate Allianz has an even worse record: out of an estimated 1.5 million unpaid policies, they have released only 380 names . . . the total number of policies published by ICHEIC as of April 2001 was only about 45,000, out of at least 2.5 million known to exist.”).

¹³⁸ Friedman, *supra* note 5, at Headline News section; see *Hearings: testimony of Gideon Taylor*, *supra* note 134, at 5 (explaining that part of the problem in obtaining comprehensive lists is that there is simply a lack of information available about the policies. Often, claimants do not have documentation or some sort of credible knowledge of their parent’s assets, and many times, the claimant is unable to name an insurance company. Therefore, the processing of the claims is very difficult due to claimant’s lack of information and the insurance companies incomplete records of such policies.)

¹³⁹ Friedman, *supra* note 5, at Headline News section.

¹⁴⁰ See Scholz, *supra* note 13, at 319 (explaining that many survivors or heirs do not know which insurance company their policy was bought from, therefore, publishing the lists are crucial in guiding them in their search).

¹⁴¹ See Andrew Bibby, *Cash: Insurance claims: Half a century later, Holocaust survivors still await their money: Of the 88,000 claims submitted to the international body set up in 2000 to deal with unpaid insurance policies for Jewish victims of Nazi atrocities, only 2,000 have led to actual offers of cash*, THE OBSERVER, Dec. 15, 2002, at 7 (referring to Philip Francis, chief of staff of the ICHEIC’s commission office in London, view that the delay in the processing of claims is due to the fact that the ICHEIC has received many more claims than it ever expected and as a result, has had to spend two years catching up. “The commission regrets enormously the delay it has taken to investigate claims’ . . . but he adds that the investigation process now is more comprehensive than it was. He says that 30,000

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received many claim applications, it has settled just a small number.¹⁴² The ICHEIC has received 79,732 claims¹⁴³ that fall within its jurisdictional purview and over 32,000 additional inquiries which do not.¹⁴⁴ Of these 79,732 claims it has only made payment on about 4,492.¹⁴⁵ The payments have totaled about 70.9 million dollars for these 4,492 offers.¹⁴⁶ Yet, while it is true that the many of the payments made thus far would most likely never have been paid without the Foundation Agreement and the processing method of the ICHEIC, it cannot be ignored that the ICHEIC has spent 56 million dollars on itself, “60 percent more than the \$35 million that the insurance companies had offered to settle the 2,600

claims have turned out to be outside the organization’s remit . . . [and] only 13,000 of the claims gave a named insurance company.”).

¹⁴² See *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 427 (2003) (Ginsburg, J., dissenting) (offering an overview of the creation of the ICHEIC and commenting that ICHEIC has “settled only a tiny proportion of the claims it has received”); see also *Aging Victims of Nazis Sue Holocaust Commission*, *The Daily News of Los Angeles*, Sept. 26, 2003, at N1 (describing the testimony of Lawrence Eagleburger, the Chairman of the ICHEIC, at a congressional hearing during September 2003). *But see* Lawrence S. Eagleburger, *Subject: The Economist Magazine*, Aug. 8, 2003 available at www.icheic.org/eng/LSEEconomistL.TR.pdf (last visited Sept. 30, 2003) (on file with the Benjamin N. Cardozo School of Law Journal of Conflict Resolution). Eagleburger responds to Tom Easton’s articles “Line to nowhere” and “Too late, too slow, too expensive” in the August 2, 2003 Edition of the *Economist Magazine*. These articles were critical of the ICHEIC. As chairman of the ICHEIC, Lawrence S. Eagleburger claims that the source Easton chose to quote, Frank Kaplan, was the lawyer on the losing side of the Supreme Court *Garamendi* case; he argues that neither he, nor his staff, promulgated these views. *Id.* While Eagleburger points out that the “ICHEIC has made approximately 2,600 offers to a total value of \$35 million”, this number of offers seems small. Eagleburger tries to justify the number by arguing that Easton made a “false comparison between the number of policyholder names published on the ICHEIC website (440,000-500,000) and the number of claims (3,000) paid” since the names appearing on the “website include all potentially relevant policies in effect during the Holocaust era, from the sources available, including paid, restituted and unpaid policies. The number of policies . . . paid through the ICHEIC is a consequence solely of claims made to ICHEIC and bears no resemblance to the number of names . . . on the website.” *Id.* Eagleburger goes on to write that the “number of policies paid by the ICHEIC pertains only to the number of claims (54,000) received by the ICHEIC, many of which are still in the processing phase.” *Id.* The difficulty stems from the fact that there seems to be a great disparity between the 54,000 claims received and the fact that only about 3,000 claims have been paid out, something seems amiss.

¹⁴³ See *ICHEIC Statistical Report*, Sept. 17, 2004 available at <http://www.icheic.org/pdf/stats-040917.pdf> (last visited Oct. 24, 2004). This number represents the total claims/inquiries received which are eligible under the ICHEIC claims process.

¹⁴⁴ See Eagleburger, *supra* note 139. This number must be higher since Chairman Eagleburger wrote in 2003 that, at that time, the total number of claims that were eligible under the ICHEIC claims process were 54,000.

¹⁴⁵ See *ICHEIC Statistical Report*, *supra* note 143.

¹⁴⁶ See *id.*

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claims.”¹⁴⁷ Critics argue that such European insurers have “spent a fortune trying to avoid paying the rightful beneficiaries” instead of simply paying out the policies.¹⁴⁸

B. A Return to the Courts

Furthermore, the ICHEIC does not seem to be fulfilling the Agreement’s goal of keeping the issue outside of the courts.¹⁴⁹ On September 25, 2003, the ICHEIC was sued by two Holocaust survivors who alleged that the ICHEIC “has worked to deny decades-old claims” and accused it of unfair business practices.¹⁵⁰ One of the survivors said he is not seeking monetary compensation, but justice.¹⁵¹ He views it that Generali, the insurance company, has “fattened itself with profits” while in the process, denying legitimate claims.¹⁵² This lawsuit, as well as the twenty other federal lawsuits that Generali is facing in this country today,¹⁵³ represents the shortcomings of the ICHEIC and the German Foundation. These lawsuits were the ones that were hoped to be diminished after the signing of the 2000 Agreement.¹⁵⁴ Unfortunately, not

¹⁴⁷ *Aging Victims of Nazis Sue Holocaust Commission*, *supra* note 142, at N1. This percent and number correlates to 2003 when the ICHEIC had paid only \$35 million for 2,600 offers. *Cf.* Henry Weinstein, *Spending by Holocaust Claims Panel Criticized*, *LOS ANGELES TIMES*, May 17, 2001, at A1 (“international commission created to resolve Holocaust-era insurance disputes has spent 10 times more on administrative costs, including salaries, hotel bills and newspapers, than the insurers have paid out to survivors.”).

¹⁴⁸ Treaster, *supra* note 15, at A26.

¹⁴⁹ *See supra* notes 127-28 and accompanying text. For examples of cases filed in 2002 regarding Holocaust insurance claims *see, e.g.*, *Haberfeld v. Assicurazioni Generali, S.p.A.*, 2000 U.S. Dist. LEXIS 4391 (S.D.N.Y. 2002); *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348 (S.D.N.Y. 2002).

¹⁵⁰ *Aging Victims of Nazis Sue Holocaust Commission*, *supra* note 142, at N1.

¹⁵¹ *See id.*; *see also* Greenhouse, *supra* note 14, at B1 (stating that for the Plaintiff, who was made sterile by the Nazi medical experiments, this lawsuit is a means to achieve justice. He is not out for monetary compensation since he says that any money he collects he will donate to Israel.).

¹⁵² *Aging Victims of Nazis Sue Holocaust Commission*, *supra* note 142, at N1 (bringing the suit, Manny Steinberg, 78 years old, and Jack Brauns, 79. Steinberg says that after spending 6 years in concentration camps located in Poland and Germany, he was turned away for decades by Generali when he tried to get them to pay out his father’s policy; he was told that the policy didn’t exist. “This has been going on for years and years and years They said I didn’t have a policy. They denied it, not only to me, but to all the camp survivors.”).

¹⁵³ *See id.*

¹⁵⁴ *See supra* notes 45, 147 and accompanying texts.

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enough has been done;¹⁵⁵ many Holocaust survivors believe that the commission has not paid the claimants since the commission is funded by “the same insurance companies that stand to lose money through the payouts to survivors.”¹⁵⁶

C. Some States Would Rather Use “Iron Fists”¹⁵⁷ Than the “Kid Gloves”¹⁵⁸ of the Federal Government

Some states are finding the government’s chosen method for resolving these claims as being inefficient, too slow, and denying too many of the submitted claims.¹⁵⁹ In their demands for compensation for their citizens, these states are taking legislative actions.¹⁶⁰ California did just that with the passing of the Holocaust Victim

¹⁵⁵ See *Hearings: Michael J. Bazylar*, *supra* note 122, at 6 (explaining why the ICHEIC claims process has been a “major disappointment.” He states that “ICHEIC’s mission – establishing a just process that will expeditiously address the issue of unpaid insurance policies issued to victims of the Holocaust – has not been fulfilled.”).

¹⁵⁶ *Aging Victims of Nazis Sue Holocaust Commission*, *supra* note 142, at N1; see also Scholz, *supra* note 13, at 319 (citing a considerable problem with the ICHEIC – that it is the insurance companies who control the review of the claims submitted to the ICHEIC. Explaining that even with ICHEIC’s guarantee that their

process would ‘allow for relaxed standards of proof,’ some insurers are still rejecting or severely undervaluing survivors’ claims. Currently, Allianz has processed some 15,000 claims submitted to them through ICHEIC, yet only four resulted in settlement offers. Another insurer, Winterthur, has processed 6,500 claims and made no offers at all. In total, less than two percent of 40,000 claims submitted to insurers through ICHEIC have resulted in settlement offers Even those who have received offers found them ridiculously undervalued: one claimant was offered only \$500 for two life insurance policies.)

¹⁵⁷ *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 427 (2003) (quoting from the majority opinion:

The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves. We have heard powerful arguments that the iron fist would work better, and it may be that if the matter of compensation were considered in isolation from all other issues involving the European allies, the iron fist would be the preferable policy. But our thoughts on the efficacy of the one approach versus the other are beside the point).

¹⁵⁸ *Id.*

¹⁵⁹ See Friedman, *supra* note 5, at Headline News section (quoting Representative Henry Waxman of Los Angeles. Waxman proposed federal legislation in 2002 that was similar to California’s HVIRA bill. He presented this legislation to try to force insurance companies to list the unpaid Holocaust-era insurance policies and if they failed to comply, they would risk losing their license to operate in the state.). Waxman proposed similar legislation in 2003, see *infra* pp. 167-69.

¹⁶⁰ See, e.g., CAL. INS. CODE § 13805 (Deering 2004); MINN. STAT. § 60A.053 (2003); WASH. REV. CODE ANN. § 48.104.050 (West 2004). The latter statutes seek to elicit from the European insurance companies lists of policies sold during the World War II era.

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Insurance Relief Act of 1999 (HVIRA).¹⁶¹ HVIRA mandated that any insurer conducting business in California must release information about all policies sold in Europe from 1920 to 1945 “by the company itself or any one ‘related’ to it.”¹⁶²

California passed the legislation because, as the home of 20,000 Holocaust survivors, it felt that it needed to protect its citizens.¹⁶³ California tried to ensure compensation to its citizens by passing a law which mandated California companies to publish information on Holocaust-era insurance policies which they, or their affiliates, issued.¹⁶⁴ If the insurance firm refused to comply with the statute, it would risk losing its license to conduct business in the state.¹⁶⁵ The legislation also enabled citizens of California to bring suit in state court on Holocaust era insurance claims.¹⁶⁶ HVIRA specifically required “‘any insurer currently doing business in the state’” to disclose details of “‘life, property, liability, health, annuities, dowry, educational, or casualty insurance policies’ issued ‘to persons in Europe, which were in effect between 1920 and 1945.’”¹⁶⁷

The valiant efforts of California to protect its citizens soon came under the criticism of the Federal government.¹⁶⁸ Stuart Eizenstat, in a letter to the insurance commissioner of California, said that while HVIRA “reflects a genuine commitment to justice for Holocaust victims and their families, it has the unfortunate ef-

¹⁶¹ CAL. INS. CODE §§ 13800-13807 (West 2003) (requiring the disclosure of insurance policies sold in Europe between 1920 and 1945); *see also Garamendi*, 539 U.S. at 401.

¹⁶² CAL. INS. CODE §§ 13800-13807 (West 2003); *see also Garamendi*, 539 U.S. at 417 (overturning the HVIRA in July 2003, the Supreme Court found that HVIRA “interferes with the National Government’s conduct of foreign relations” and as such, the state statute was preempted).

¹⁶³ Friedman, *supra* note 5, at Headline News section (according to the Holocaust Museum in Washington, D.C., California has about 20,000 Holocaust survivors living within its borders).

¹⁶⁴ *See* CAL. INS. CODE §§ 13800-13807 (West 2003) (trying to use this law to force the European insurance companies doing business in California to disclose names).

¹⁶⁵ Friedman, *supra* note 5, at Headline News section.

¹⁶⁶ *See* American Ins. Ass’n v. Garamendi, 539 U.S. 396, 427 (2003) (outlining California’s legislation and explaining the parts of Assembly Bill No. 600, 1999 Cal. Stats. Ch. 827).

¹⁶⁷ *Id.*; *see* CAL. INS. CODE § 13804(a) (West 2003).

¹⁶⁸ *Garamendi*, 539 U.S. at 411 (explaining the criticism California’s law immediately came under, the court quotes the Deputy Secretary Eizenstat as saying:

[T]hat ‘actions by California, pursuant to this law, have already threatened to damage the cooperative spirit which the [ICHEIC] requires to resolve the important issue for Holocaust survivors,’ and he also noted that ICHEIC Chairman Eagleburger had expressed his opposition to ‘sanctions and other pressures brought by California on companies with whom he is obtaining real cooperation.’).

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fect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period, the [ICHEIC].”¹⁶⁹ In a letter to the Governor of California, Eizenstat also wrote that “HVIRA could possibly derail the German Foundation Agreement.”¹⁷⁰

D. Overturning California’s HVIRA Law

The Supreme Court in July of 2003 overturned the California law by a 5-4 vote in *American Insurance Association v. Garamendi*.¹⁷¹ The majority held that the “federal government’s interest in tackling . . . [this] problem trumped the state’s legislative efforts.”¹⁷² The legislation was found to be both injurious to the ICHEIC and the German Foundation Agreement, threatening to bring the Foundation to a stop.¹⁷³ The law was also seen to undercut “the President’s diplomatic discretion and the choice he has made in exercising it.”¹⁷⁴ In essence, the court found that the law “‘compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments’ to resolve claims against European companies arising out of World War II.”¹⁷⁵ The Supreme Court found that laws like HVIRA and the suits that continue to be brought against the insurance companies

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (“Clearly, for this deal to work . . . German industry and the German government need to be assured that they will get ‘legal peace,’ not just from class-action lawsuits, but from the kind of legislation represented by the California Victim Insurance Relief Act” (quoting Stuart Eizenstat’s letter to the California Governor)).

¹⁷¹ *American Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003). *Accord* Grossman, *supra* note 53, at 8 (citing the issue in *Garamendi*, with the Supreme Court overturning the California law, as being “parallel” to the issue raised in a Florida suit). In the referenced Florida case, Ungaro-Benages, a United State District Court Judge for the Southern District of Florida, sued two prominent German financial institutions. While the case was dismissed, according to the suggestion of the Statement of Interest issued on the part of the Federal government, Ungaro-Benages now appeals, questioning “how far a U.S. President can go for the sake of good relations with another country” and asserting that the Agreement by the President was unprecedented.

¹⁷² Grossman, *supra* note 53, at 8.

¹⁷³ *See generally* *Executive Agreements*, *supra* note 75, at 98 (discussing the Federal government’s immediate response to California’s passage of the HVIRA, that the law would “injure” the ICHEIC and “might bring GFA’s voluntary operations to a sudden stop.”).

¹⁷⁴ *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003).

¹⁷⁵ *Id.*

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in the United States have the cumulative effect of undermining the work of the ICHEIC and the German Foundation Agreement.¹⁷⁶

V. STATUS OF CLAIMS TODAY: RESULT OF THE SUPREME COURT'S DECISION IN *GARAMENDI*

Today, many insurance policies remain unpaid.¹⁷⁷ California's law "might have highlighted the injustice of unpaid policies and expedited the process," but unfortunately, the court's decision in overturning the law may only "foreshadow . . . more delay in claims that should have been paid long, long ago."¹⁷⁸ It should be recognized that what lies "[b]ehind California's fight is a sense that a broader approach, endorsed by the federal government, the German government, European insurers and many victims' groups, is failing."¹⁷⁹ Unfortunately, as the Supreme Court points out, that while California's approach, the use of an "iron fist"¹⁸⁰ may be superior to the President's use of "kid gloves,"¹⁸¹ it was not for the Court to decide which method is best for dealing with this issue.¹⁸²

¹⁷⁶ See *id.* (stating that such letters from Eizenstat to the officials of California demonstrate:

how the portent of further litigations and sanctions has in fact placed the Government at a disadvantage in obtaining practical results from persuading 'foreign governments and foreign companies to participate voluntarily in organizations such as ICHEIC'. . . In addition to thwarting the Government's policy for repose for companies that pay through the ICHEIC, California's indiscriminate disclosure provisions place a handicap on the ICHEIC's effectiveness (and raise a further irritant to European allies) by undercutting European private protections.)

¹⁷⁷ See H.R. 1210, 108th Cong. § 2 (2003). Proposed bill, titled the "Holocaust Victims Insurance Relief Act of 2003," for the establishment of a Holocaust Insurance Registry, which would require certain disclosures by insurers to the Secretary of Commerce. The bill comments that in the five years since the founding of the ICHEIC in 1998, insurance companies have failed to produce the thousands of names on dormant accounts. Furthermore, the bill states that as of February, 2003, "more than 80 percent of the 88,000 claims filed with the ICHEIC remained unresolved because the claimants could not identify the company holding the policy." *Id.* But see *infra* notes 222-23, 261-62 and accompanying texts.

¹⁷⁸ Ramasastry, *supra* note 135.

¹⁷⁹ Easton, *supra* note 22, at 61.

¹⁸⁰ See *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003).

¹⁸¹ See *id.*

¹⁸² See *id.* (quoting from the majority opinion:

[O]ur thoughts on the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the National Government's policy; dissatisfaction should be addressed to the President or, perhaps, Congress. The question relevant to preemption in this case is conflict, and the evidence here is 'more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives.')

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Instead, the President should take heed what this litigation represents: that the aims of the German Agreement are not all being met, that many survivors remain uncompensated, and that the government should take action and respond to protect its citizens.¹⁸³ California can serve as an example, as a state recognizing the needs of many of its residents and taking an affirmative action to try to deal with the situation and secure compensation.

A. Does *Garamendi* Preclude Private Litigation?

Despite the Supreme Court's decision in *Garamendi*, are the insurance companies really off the hook? While the court invalidated a state law, the opinion does not seem to preclude all possibilities of private litigation. The opinion should not be read to take the restitution claims completely outside of the courts. While opponents will argue that the German Foundation Agreement was enacted specifically because the courts were a deficient forum for plaintiffs, and so they have no alternative but to turn to the German Foundation's mechanisms to deal with restitution claims,¹⁸⁴ it truly is not that simple.

¹⁸³ See generally H.R. 2693, 107th Cong. § 2 (2001) (referencing in paragraph 10 that: Insurance companies doing business in the United States have a responsibility to ensure the disclosure of insurance policies of Holocaust victims that they or their related companies may have issued, to facilitate the rapid resolution of questions concerning these policies, and to eliminate the further victimization of policy holders and their families.).

The legislation proposed in 2001 was partially due to the inadequacies of the ICHEIC, specifically being too slow in the processing of its claims and denying too many of them. See Friedman, *supra* note 5, at Headline News section. Proposed federal and state legislation is the result of a "long campaign by Holocaust survivors to force European companies to disclose long-hidden information about bank accounts, insurance policies, and other assets stolen or lost during the Nazi era." *Id.* Such legislation has been criticized for its potential to hinder or even prevent the work of such organizations like the ICHEIC, who are seeking to help Holocaust survivors and their families receive some measure of justice. See also *To provide for the establishment of the Holocaust Insurance Registry by the Archivist of the United States and to require certain disclosures by insurers to the Secretary of Commerce: Hearing on H.R. 2693 Before the House Comm. On Government Reform*, 107th Cong. (2002) (statement by Ambassador Randolph M. Bell, Special Envoy for Holocaust Issues, U.S. Department of State, Washington D.C.) available at http://www.house.gov/reform/min/pdfs/pdf_com/pdf_holocaust_hearing_sept_24_bell_testimony.pdf (last visited Mar. 1, 2004).

¹⁸⁴ See *supra* notes 115-29 and accompanying text.

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1. Comparison to the Swiss Settlement: Are the Insurance Companies Off the Hook?

The Swiss Settlement played out largely in the courts,¹⁸⁵ while the German settlement was negotiated by government officials and private companies beyond the auspices of the courts.¹⁸⁶ This was no coincidence.¹⁸⁷ The German government, unlike the Swiss government, wanted to take action and undertake settlement discussions for not only insurance claims, but also a settlement for forced and slave labor during the Nazi era.¹⁸⁸ The Swiss government chose not to partake in any of the negotiations, leaving the Swiss banks to fend for themselves.¹⁸⁹

The Swiss settlement included a full release for all Swiss banks from all current and future claims,¹⁹⁰ while the German Foundation Agreement ostensibly did not.¹⁹¹ The apparent difference between the two settlements was that under the Swiss Settlement, a plaintiff could no longer try to recover from the Swiss banks through private litigation and had to accept the court drawn settlement whereas a plaintiff trying to recover under the German Foundation

¹⁸⁵ The Swiss settlement was no easy feat. This note, focusing on the German settlement, will not go into the intricacies of the Swiss settlement. The author uses the comparison to highlight some significant points in both settlement processes. For a fuller understanding of the Swiss settlement, *see, e.g.*, EIZENSTAT *supra* note 32, at 165-186; Holocaust Victims Asset Litigation (Swiss Banks), at <http://www.swissbankclaims.com/index.asp> (last visited Nov. 14, 2004) (official website for the Holocaust Victim Assets Litigation against Swiss Banks and other Swiss Entities).

¹⁸⁶ *See* EIZENSTAT, *supra* note 32, at 257 (explaining the German companies' refusal to take the route of a class action settlement, which was claimed to be their "best protection against future suits." The Germans felt such a settlement would be an "admission of guilt that would create a precedent for even more lawsuits.").

¹⁸⁷ *See supra* notes 55-58 and accompanying text.

¹⁸⁸ *See supra* notes 35-41 and accompanying text.

¹⁸⁹ *See generally* EIZENSTAT *supra* note 32, at 126 ("Swiss politicians were simply unwilling to risk their political capital on the most challenging issue to face the country since World War II . . . the Swiss government . . . refused to serve as a negotiating partner.").

¹⁹⁰ *See In re* Holocaust Victim Assets Litig, 105 F. Supp. 2d 139, 142-43 (E.D.N.Y. 2000) (addressing, by Judge Korman, the fairness of the \$1.25 billion settlement of Holocaust Victims Assets Litigation against two leading Swiss banks, the Judge sets forth the key terms of the Settlement Agreement, including the release clause. "In exchange for the settlement amount . . . settling plaintiffs and settlement class members have agreed to irrevocably and unconditionally release from any and all claims relating to the Holocaust, World War II and its prelude and aftermath . . .").

¹⁹¹ *See In re* Assicurazioni Generali S.p.A. Holocaust Ins. Litig., 2004 U.S. Dist. LEXIS 20569, *19-21 (S.D.N.Y. 2004) ("Although the Government declined to guarantee that its foreign policy interests would 'in themselves provide an independent legal basis for dismissal,' it agreed to tell courts 'that U.S. policy interests favor dismissal on any valid legal ground.' . . . (quoting German Foundation Agreement, 39 I.L.M. at 1304).").

could still turn to the courts. Thus, the Swiss Settlement contained a broad release which was agreed to by both sides. The United States government on the other hand, would not agree to such a broad release in the Foundation Agreement. In fact, the German government's mandate for such a release became an issue that almost prevented the signing of the Agreement altogether.¹⁹² Stuart Eizenstat recounts that "[t]he Germans and their lawyers knew full well from months of explanation that . . . [the United States] would not take a formal legal position barring U.S. citizens from their own courts"¹⁹³ In place of a bar, the final terms of the Agreement were that when the United States is notified of a claim that comes within the purview of the Agreement, it will "inform its courts through a Statement of Interest . . . that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies . . . and . . . dismissal . . . would be in its foreign policy interest."¹⁹⁴ This language alone does not preclude a plaintiff from seeking out a claim in the courts.

2. No Release: Only in Substance, Not Interpretation

With the Supreme Court's decision in *Garamendi* and a subsequent interpretation by a New York court, it seems that a plaintiff has nowhere to turn except to the ICHEIC and its arguably faulty and slow processing mechanisms. The recent decision by Judge Mukasey, who has been overseeing much of the Holocaust era insurance claim litigation in the Southern District, seems to have taken the alternative to the ICHEIC claim process, litigation, off the table.¹⁹⁵ He stated that:

[t]he Supreme Court's decision in *Garamendi* compels dismissal of plaintiffs' claims seeking damages for Generali's non-payment of policy benefits. . . the Court's decision requires dismissal . . . of the benefits claims arising under generally applicable state statutes and common law as well as customary international law.

¹⁹² See EIZENSTAT, *supra* note 32, at 269.

¹⁹³ *Id.* at 269 (explaining that in the further negotiations, during the Solicitor General, Seth Waxman's, first meeting with German industry at the Justice Department, Waxman was quite understandably "aghast" when "one of the lawyers from Germany said they wanted a 'final solution' to their legal problems, insensitively evoking Hitler's Final Solution.").

¹⁹⁴ German Foundation, *supra* note 7, Article 2, ¶ 1, 39 I.L.M. at 1300. See *supra* notes 70-75 and accompanying text.

¹⁹⁵ See *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 2004 U.S. Dist. LEXIS 20569 (S.D.N.Y. 2004).

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Litigation of Holocaust-era insurance claims, no matter the particular source of law under which the claims arise, necessarily conflicts with the executive policy favoring voluntary resolution of such claims through ICHEIC In short, following *Garamendi*, it appears that plaintiffs cannot use the courts to obtain recovery of benefits due under Holocaust-era policies, regardless of the theory of recovery.¹⁹⁶

Yet the same judge, only two years earlier found that the ICHEIC was an “inadequate alternative forum for litigation of plaintiffs’ claims.”¹⁹⁷

Today, despite plaintiffs’ pleas that the ICHEIC “continues to be an inadequate forum for addressing their claims” the judge points out that the Supreme Court “ruled that concerns about the adequacy of the ICHEIC are irrelevant to the preemption analysis.”¹⁹⁸ Instead, as the Supreme Court stated, “dissatisfaction [with the ICHEIC] should be addressed to the President or, perhaps, Congress.”¹⁹⁹ Yet, it seems rather absurd, in light of the United States heated negotiations with Germany, that a plaintiff’s only place to turn, if he or she is not happy with the ICHEIC processing mechanisms, is the President or Congress.²⁰⁰ Therefore, it seems that the German companies got what they wanted, a full release from Holocaust era related claims, just like the Swiss banks received in the Swiss settlement.

¹⁹⁶ *Id.* at *20 (explaining that “[i]n light of the Supreme Court’s decision in . . . [*Garamendi*] . . . it appears that the laws supporting litigation of plaintiffs’ benefits claims are preempted by a federal Executive Branch policy favoring voluntary resolution of Holocaust-era insurance claims through ICHEIC.”).

¹⁹⁷ *See id.* (referring to *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litig.*, 228 F. Supp. 2d 348, 355-58 (S.D.N.Y. 2002), where he found that in response to defendant’s motion to dismiss based on forum non conveniens, that the ICHEIC was not an adequate alternative and so refused to dismiss the suit).

¹⁹⁸ *See id.* at *39.

¹⁹⁹ *See American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 427 (2003).

²⁰⁰ *See In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 2004 U.S. Dist. LEXIS at *38 (“Even assuming that ICHEIC’s rules grant plaintiffs the simultaneous right to obtain relief in the courts, the policy favoring ICHEIC resolution of Holocaust-era insurance claims requires dismissal of their claims”).

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B. Consideration by Congress of Whether There Is a Need for Congressional or Executive Branch Action in Light of the Supreme Court's Decision²⁰¹

The Supreme Court's decision in *Garamendi* left open the opportunity for Congress to take action.²⁰² There has in fact been some effort by Congress to try to force the European insurers to disclose more names in order to expedite the claims process.²⁰³ Two bills were introduced by Congress to address this issue.²⁰⁴ The proposed legislation would authorize states to pass laws that would "require companies to make Holocaust-era names public"²⁰⁵ and to also require insurance companies doing business in the United States to publish some basic information about insurance policies from the Nazi era.²⁰⁶ This would undoubtedly aid ICHEIC in their effort to pay out insurance claims. Unfortunately, as to date, this legislation has not been passed, and "with the Supreme Court's recent decision, ICHEIC is pretty much the only game in town for resolving Holocaust era insurance claims."²⁰⁷

²⁰¹ See *Government Reform Committee hearing on "Holocaust Era Restitution after AIA v. Garamendi: Where Do We Go From Here?"*, 108th Cong. (2003) available at http://www.house.gov/reform/min/pdfs_108/pdf_com/pdf_com_holocaust_insurance_claims_sept_16_notice.pdf (last visited Feb. 23, 2004). This congressional hearing was held to look at the impact of the Supreme Court's decision in *Garamendi*. The committee considered: whether there was a need for action by the congressional or executive branches and if the ICHEIC was achieving its goal of addressing the claims of Holocaust victims and their heirs. Both bill H.R. 1210 and bill H.R. 1905 were introduced as possible congressional action. *Id.*

²⁰² *Government Reform Committee hearing on "Holocaust Era Restitution after AIA v. Garamendi: Where Do We Go From Here?"*, 108th Cong. (2003) [hereinafter *Hearings: opening remarks*] (opening remarks by Chairman Congressman Tom Davis) available at <http://reform.house.gov/GovReform/Hearings/EventSingle.aspx?EventID=407> (last visited Feb. 27, 2004).

²⁰³ See H.R. 1210, 108th Cong. (2003); H.R. 1905, 108th Cong. (2003). If passed, this legislation illustrates the power states would have in placing conditions on insurance companies conducting business within their state. Specifically, the legislation addresses Holocaust era insurance policies and enables the state's to create a federal cause of action for payment of claims regarding such policies. *Id.*

²⁰⁴ *Id.*; see *Hearings: opening remarks, supra* note 201; see also H.R. 1905, 108th Cong. § 2 (2003) (stating in paragraph 7, that the ICHEIC's success rate is less than 3%; and the stating in paragraph 8, that there is a need to expedite the insurance payments, so that "victims of the most heinous crime of the 20th Century . . . do not become victims a second time.").

²⁰⁵ Treaster, *supra* note 15, at A26. Treaster is referring to H.R. 1905, 108th Cong. § 2 (2003).

²⁰⁶ See *Hearings: opening remarks, supra* note 201.

²⁰⁷ *Id.*

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VI. WHOSE INTERESTS IS THE AGREEMENT REALLY BENEFITING? THE GERMAN & UNITED STATES GOVERNMENTS'?

While *Garamendi* is suggested to be a signal to the government to take action, unfortunately, the government may wish to ignore it and may not pass any of the proposed legislation.²⁰⁸ It has been argued that the German Foundation Agreement was a neat way for the United States and Germany to efficiently dispose of a major problem.²⁰⁹ In negotiating the Agreement, the United States realized that it shared interests with Germany, namely “bringing a measure of justice to Holocaust victims as promptly as possible and removing an irritant from relations with an important ally.”²¹⁰ In essence, was the United States motivated by keeping favorable relations with Germany? Was the United States too

²⁰⁸ See *Hearings: testimony of Randolph M. Bell*, *supra* note 17, at 5-7 Bell explains that mandating the publication of more names would not help in the endeavor of getting more claims paid out, instead, it would halt the process. *Id.* He contends that the millions of names that would be published would have no relation to the Holocaust. The result of such publication, he believes would “derail the ICHEIC . . . [b]ecause . . . [the ICHEIC] is an integral part of the German Foundation . . . that would in turn seriously undercut the functioning of a body which is attempting to . . . rapidly . . . pay out more than \$5 billion dollars not only to insurance claimants, but . . . to forced laborers and other deserving recipients.” *Id.* at 6.

While this argument contends that the publication of more names would be counterproductive to the German Foundation and the ICHEIC, it can also be argued that the publication of more names would have the desirous effect of enabling more claimants to match their alleged policy to an insurance company and therefore have their claim processed and paid out at a faster rate.

²⁰⁹ See Burt Neuborne *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615, 619 (2003) (stating that Holocaust related litigation:

although couched as traditional litigation, and carried on in classical legal terms, the litigation was as much about politics as it was about law . . . The German government’s decision to establish a German Holocaust Foundation and the decision of German industry to share in its funding was driven by concerns over potential liability, but also concerns about diplomatic relations with Germany’s Eastern neighbors and fears of American boycotts of German products. In short, the Holocaust litigation was an untidy mixture of law, politics and raw emotion . . .);

cf. Ratner, *supra* note 55, at 225 (offering an explanation of the negotiation process for the German Agreement, as well as the Austrian and French Agreements. While the discussions were “often principled”, they “were also affected by political issues and pressures.” An example is the United States government’s support of the ten billion DM settlement amount, as a suitable amount for the “settlement of all Nazi-era claims against any German entity.” However, this amount was neither suggested by the plaintiff’s counsel nor does it have any relationship to the actual value of the plaintiff’s claims. Yet, when this amount was accepted during the negotiations, it became a ceiling, “mooting much of the discussion about the true value of property claims.”).

²¹⁰ Bettauer, *supra* note 2, at 10.

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quick to include insurance into the larger settlement of the German Foundation which addressed the needs of forced and slave laborers?

A. The Amount Allocated to Insurance Claims in the Foundation Agreement Is Inadequate

Arguably, the amount allocated to insurance claims was hastily calculated. Unlike the Swiss settlement, where the parties came to a 1.25 billion dollar settlement and left it for the court to allocate the money, the parties to the German settlement negotiated the distribution of the 10 billion DM amongst themselves.²¹¹ Not only were there painstaking and heated negotiations to arrive at the 10 billion DM settlement figure, there was also much impassioned debate on how to carve up the 10 billion DM.²¹² The final result included: 8.1 billion DM plus an additional 50 million in anticipated earnings allocated to the pay claims of slave and forced laborers;²¹³ the remaining 1.9 billion DM was divided up with 1 billion DM allocated to property and insurance claims, including property and insurance humanitarian funds, 700 million to go into a “Future Fund,”²¹⁴ and 200 million for the administration of the German Foundation.²¹⁵ Of the original 1 billion DM, only a mere 550 million DM was allocated for insurance policies, and of that 550 million, 200 million DM was earmarked for payment of insurance policies and 350 million DM to be used for humanitarian purposes.²¹⁶

While such intense negotiations went into arriving at the 550 million DM to allocate to insurance policies, there was no mathematical formula used to derive this 550 million DM number.²¹⁷ As

²¹¹ See EIZENSTAT, *supra* note 32, at 262.

²¹² See *id.* at 247 (demonstrating how intense the negotiations became over dividing up the 10 billion sum, Lamsdorff states, “It is unbelievable that we can agree to 10 billion DM and not agree how to divide it up. No one group can take so much that there is not enough left for others . . .”).

²¹³ See Fact Sheet: Chronology of Events in Slave and Forced Labor Talks, *at* http://www.usembassy.it/file2000_07/alia/a0071709.htm (last visited Oct. 23, 2004).

²¹⁴ *Id.* (explaining that the Future Fund’s “purpose . . . [is] to promote tolerance and advance social programs, taking into account the heirs of forced laborers.”).

²¹⁵ *Id.*

²¹⁶ See ICHEIC, PROCESSING GUIDE: HOLOCAUST ERA INSURANCE 7 (June 23, 2003), available at http://www.icheic.org/pdf/ICHEIC_CPG.pdf (last visited Oct. 23, 2004).

²¹⁷ Letter from Samuel J. Dubbin, attorney, to Honorable Janet Reno, U.S. Attorney General, U.S. Department of Justice, 5 (Sept. 18, 2003) (on file with the Benjamin N. Car-

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such, not much consideration was given to the “insurers’ total liability for policies sold throughout Europe at the end of the war by all companies covered under the agreement.”²¹⁸ Insurance was not given adequate attention because it was only one element of a much larger settlement.²¹⁹ It seemed that all parties to the Agreement were anxious to put the entire issue of all possible Holocaust related claims to rest. This is not to say that the parties involved in the settlement were not trying to do right by the survivors,²²⁰ but with their main focus being such an all encompassing settlement, they did not consider the potential values for the life insurance policies. Thus, in arriving at this arbitrary 550 million DM number for insurance claims, the total number of outstanding policies or their possible worth was not considered. They came to this number because the overall settlement had already been negotiated at a cap of 10 billion DM,²²¹ and after dividing up settlement among equally worthy claims, this was the number chosen for insurance.

Consequently, the amount allotted to insurance claims by the Foundation Agreement is arguably inadequate and problematic because it bears no relation to the actual value of the claims. While the ICHEIC uses set formulas in valuating an insurance claim so as to provide a close to current value of an insurance policy,²²² the policy is only gauged in traditional terms; this valuation does not consider all possible relevant factors that should be taken into account. The payouts seem low even with the allowance for inflation. To demonstrate, for the 74.49 million dollars paid on 4,644 claims,²²³ this is roughly 15,945 dollars paid out per claim.²²⁴

dozo School of Law Journal of Conflict Resolution) (expressing that this “total was clearly a politically-driven deal, rather than an assessment of actual loss.”).

²¹⁸ *Id.*

²¹⁹ *See id.* at 6 (“There is also a bitter irony about the fact that insurers . . . were dealt into the German ‘Slave Labor’ settlement at the eleventh hour.”).

²²⁰ *Cf. EIZENSTAT, supra* note 32, at 268 (quoting Chancellor Schroeder at the signing ceremony in Berlin on December 17, 1999 for the 10 billion DM settlement, “[h]e hoped this would be a fitting end to a ‘bloody century [when] Germany inflicted suffering on the world and perpetrated the Holocaust, a scare that cannot be healed.’ Germans could only hope to alleviate some of the pain, and legal closure would matter less than historical significance.”).

²²¹ *See id.* (reaching the decision, Eizenstat writes “[e]veryone had to compromise [in coming to the settlement] and they did, particularly the victims’ side, which swallowed the bitter pill of including insurance claims inside the 10 billion DM ceiling.”).

²²² *See supra* notes 119-20 and accompanying text.

²²³ These numbers reflect the number of policies paid as of October 29, 2004, *see* <http://www.ICHEIC.org> for the most current numbers.

²²⁴ Significantly more or less may have been paid out per claim, this is just an average.

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Therefore, a person in 1930 would have invested about 1,500 dollars for it to be worth 15,945 dollars today.

1. Mutual Insurance Company Consideration in
Valuating an Insurance Policy

The ICHEIC valuations do not take into account the possibility that dividends may have been paid, or the stocks may have been issued, due to one's ownership of a life insurance policy. During the early part of the twentieth century, many insurance companies were organized as mutual insurance companies.²²⁵ A life insurance mutual is a corporation which is organized by policyholders.²²⁶ A unique characteristic of the mutual company is that a large amount of the money that remains after the company's operating expenses is "returned to policyholders as a dividend on their premium."²²⁷ The policyholder in a mutual company is not a stockholder; he is entitled to dividends as long there is a surplus left over from operating expenses, while his policy is in force.²²⁸

The alternative organization for an insurance company is a stock insurance company.²²⁹ Recently, it has become popular for mutual insurance companies to convert into a stock company, termed "demutualization."²³⁰ Under the traditional method for demutualization the company would liquidate itself.²³¹ A substantial amount of the company's accumulated profits from its years of operation was considered to belong to its policyholders; as such, the company turned its surplus into stock, and distributed the stock to its policyholders.²³² Because this technique for conversion proved to be extremely expensive and time-consuming for the insurance companies,²³³ a new method, termed "holding company

²²⁵ For a more detailed explanation of a mutual insurance companies, *see, e.g.*, Edward X. Clinton, *The Rights of Policyholders in an Insurance Demutualization*, 41 *DRAKE L. REV.* 657 (2002).

²²⁶ *See* S. B. ACKERMAN, *INSURANCE: A PRACTICAL GUIDE*, 677 (3d ed. 1948).

²²⁷ John B. Treaster, *Cold Shoulder to Insurance Customers*, *N.Y. TIMES*, June 8, 1997, sect. 3, at 1.

²²⁸ *See* ACKERMAN, *supra* note 226 at 679.

²²⁹ James A. Smallenberger, *Insurance Law Annual: Restructuring Mutual Life Insurance Companies: A Practical Guide through the Process*, 49 *DRAKE L. REV.* 513, 516 (2001) (offering an explanation of the differences between a mutual life insurance company and a stock insurance company).

²³⁰ *See, e.g.*, Clinton, *supra* note 225. *See generally* Smallenberger, *supra* note 229 for an account of why mutual insurance companies go through demutualization.

²³¹ *See* Treaster, *supra* note 227.

²³² *See id.*

²³³ *See id.* (using such examples as Equitable Life Insurance company's conversion where it distributed "about \$320 million to 2.2 million policyholders in cash and stock that

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conversion,” has become popular. Holding company conversion was developed for the conversion of a mutual to a stock company that avoided the need to liquidate the company.²³⁴ For the policyholder, they are not issued shares but continue to receive the “same policy dividends they got when the company was mutually owned.”²³⁵

The impact of a company being either a mutual company or a demutualized company under the traditional method or the holding company method has significant ramifications for the valuation of insurance policies covered by the Foundation Agreement. If a policy is held by a company that still remains as a mutual insurance company, or was converted to a stock company under the “holding company” method, the claimant is entitled to all of the dividends paid out over the sixty years. If a company converted under the traditional method to a stock company, a policyholder not only has a right to all the dividends that were paid out before the conversion, but also has a right to the stock distributed to mutual policyholders.

In applying these considerable dividends and stocks paid out over the last sixty years to policies from the World War II era, we can see that ICHEIC valuations for such policies are, at a minimum, severely deficient. The ICHEIC valuations fail to take into account the dividends paid out by the mutual insurance companies or the stocks issued from the demutualization of a company. Furthermore, the valuations do not reflect that the companies themselves may have grown significantly in worth by way of their multiple investment opportunities, making their stock even more valuable. The government may have acted too quickly to sign away these stock interests and valuable dividends to which a policyholder is entitled. The 550 million DM allocated for insurance policies in the Foundation Agreement is nowhere near enough when viewed through this lens.

gave them a 22 percent stake in the company. Equitable, now majority owned by Axa, the huge French insurer, spent an additional \$42 million on administrative costs.”).

²³⁴ *See id.*

²³⁵ *See id.* (converting under the “holding company conversion” method entails “the mutual company swaps its insurance business and its accumulated profits for some of the stock in a new holding company . . . [t]he remainder of the stock in the new holding company can be sold to investors and the proceeds used for acquisitions or other purposes. The new stock holding company owns and receives profits from the insurance business . . . Shares owned by new investors pay dividends, but the policyholders get no monetary benefit from the stock their mutual company holds . . .”).

2. Common Law and Statutory Remedies That Arise from an Insurance Contract

Furthermore, the ICHEIC valuation does not take into account the rights a claimant gives up by submitting a claim to the ICHEIC. These rights arise because an insurance policy is a private contract between the insurer and the policy holder. In the United States, insurance practice is mostly regulated by the states under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015.²³⁶ State laws offer claimants both common law and statutory remedies against insurers who do not honor policies.²³⁷ When an insurer is found to be guilty of bad faith or egregious misconduct, the laws often allow for treble or punitive damages.²³⁸ In this instance, the punitive damages claim goes beyond an insurer's refusal to make payments on a policy. Punitive damages include the egregious misconduct of the insurance company for confiscating insurance policies from Jews,²³⁹ forcing Jews to cash in their insurance policies,²⁴⁰ and conspiring with the Nazis.²⁴¹ When a claimant submits a claim to the ICHEIC, they "give up rights to sue for 'contractual damages, extra-contractual damages, and punitive damages.'"²⁴² The claimant may not even be aware of these rights, and so they "settle claims for far less than their true value through

²³⁶ See Letter from Samuel J. Dubbin to Honorable Janet Reno, *supra* note 217, at 17.

²³⁷ See *id.*

²³⁸ See generally *id.* at 7.

²³⁹ See *supra* notes 19-27 and accompanying text; see also Michael J. Bazylar & Amber L. Fitzgerald, *Trading with the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOKLYN J. INT'L L. 683, 702 (2003); Deborah Senn, Wash St. Ins. Comm'n, Private Insurers & Unpaid Holocaust-Era Insurance Claims 16 (1999), available at http://www.insurance.wa.gov/publications/holocaust/Rev_report.pdf (explaining the requirement for Jews in Germany to report a list of their assets, including their insurance policies, to the German government. This enabled the government to seize their assets).

²⁴⁰ See Bazylar & Fitzgerald, *supra* note 239, at 703 (describing that Jews were "forced to cash in their policies on a mass scale, both to pay Nazi taxes assessed especially against them and also for the costs of emigration from Germany.").

²⁴¹ See Senn, *supra* note 239, at 17 (operating in Nazi occupied lands, insurers "surrendered" many policies to the Nazis before and during the war. The proceeds were placed in "Nazi-controlled bank accounts in Germany"); see also Bazylar & Fitzgerald, *supra* note 239, at 706 ("Allianz's CEO, Kurt Schmidt, was Hitler's Minister of Economy. Allianz also insured a number of concentration camps, including Auschwitz and Dachau.").

²⁴² *Haberfeld v. Assicurazioni Generali, S.p.A.*, 2002 U.S. Dist. LEXIS 4391, *2 (2002) (dismissing plaintiff's motion for injunctive relief against insurance company. Plaintiff sought to enjoin defendant from "misleading potential claimants in California as to the strength of their claims for both contractual and extra-contractual damages, including punitive damages.").

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a formula developed by the ICHEIC.”²⁴³ A valuation for the rights that a claimant gives up is also not considered in the 550 million DM settlement. In sum, the insurance companies were certainly not going to agree to pay a value over and above the value of an insurance policy.

The exorbitant worth of an insurance policy viewed as a mutual insurance policy, coupled with the value of punitive damages that could be attached for bad faith on part of the insurance company, amounts to a huge number that surely exceeds the 550 million DM allocated to insurance by the Foundation Agreement. The reality is that we really do not know enough about the insurance claims from this era to say that the amount allocated to settling insurance claims is sufficient. It seems as if there should have been a more calculated study to arrive at this number because these truly are worthy claims that have seemingly been disregarded.

B. Was This Just “Politics” at the Expense of Victims?

The German government and German companies settled for “political and public relations reasons.”²⁴⁴ Not only was the disclosure of 350,000 names not even close to a disgorgement, but there was also a lack of information and accountability of what occurred²⁴⁵ and certainly not enough funds allocated for potential value of all the possible insurance claims. It is said that the Germans got “legal peace”²⁴⁶ for a very low amount of capped money.²⁴⁷ The cap seems ridiculous since there was no guarantee that the information that would enable families to submit a claim would be available.²⁴⁸ Without the availability of such information, without publishing more names, families of victims would never

²⁴³ *Id.*

²⁴⁴ *Monetary Restitution*, supra note 1, at 239 (quoting Samuel J. Dubbin).

²⁴⁵ See *id.* (believing that the negotiations did not result in a “morally satisfactory outcome.” Dubbin believes that one of the exceptions is the “German apology.” However, he says that the Germans settled for “political and public relations reasons.”).

²⁴⁶ *Id.*

²⁴⁷ *Id.*; see *infra* pp. 169-74.

²⁴⁸ *Id.* (believing that the cap was ridiculous since with an insurance policy, it is a contract that has a name and number on it, and that many of these records are still in the possession of the insurance company. Since we are able to obtain the policy and then determine what it is worth, it seems unfair not to allow victims to reclaim all the money that is rightfully theirs. This is a reason why he believes the negotiations did not lead to a “satisfactory outcome”).

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know that they were owed benefits under such life insurance policies. So it was stated that:

The Swiss, the Germans, and the U.S. Government have all gotten what they wanted. They got legal peace, and they got it for pennies on the dollar. The U.S. government got what it wanted: it eliminated the messy diplomatic problems that were interfering with international trade . . . They were embarrassed that their trading partners were facing these kinds of public relations disasters, and so they intervened to get a deal.²⁴⁹

Yet, this is not an issue where the governments should have put themselves first. Instead, they should have carefully examined the needs of the survivors, estimated the true value of the insurance policies, and then acted accordingly. They should have devised a more rigorous way to force companies to disclose the names and relevant information pertaining to policy holders from the Nazi era and to effectively process these claims. Only if all the names are published, and the claims true value ascertained, can the claims be processed, enabling the survivors to be compensated.

C. What Role Did the Survivors Play in Coming to the Terms of the Agreement?

The Agreement has also been criticized since the victims lacked an active role in negotiating its terms.²⁵⁰ The interests of the victims were represented by “non-survivor organizations.”²⁵¹ There was no occasion for either comment or participation by the great number of victims affected by this Agreement.²⁵² While ide-

²⁴⁹ *Id.* at 240 (characterizing the survivors as being at the “bottom on the totem pole” for all of the deals).

²⁵⁰ *Id.* (explaining, by Samuel J. Dubbin, that as a group, survivors did not partake in the negotiations in deriving a monetary figure of how much the German companies and German government should pay and how the money was to be distributed).

²⁵¹ *See id.* (explaining that the survivor’s interests were mostly represented by such non survivor groups as the Claims Congress – a philanthropic organization, the World Jewish Congress, and the WJRO).

²⁵² *See Ratner, supra* note 55, at 231 (comparing the development of Foundation Agreement to cases where Rule 23 governs settlements. Argues for the superiority of the Rule 23 model since it is more democratic by offering affected class members, in such cases like the Swiss Bank, to comment on and also change some of the critical terms of the agreement. With the Foundation Agreement, on the other hand, the affected victims had “no input into the allocation process, except through implementing bodies erected by governments in connection with the settlements, such as the German Foundation Board, whose connection with the victim groups can be described as attenuated at best.”).

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ally the survivors would have played a pivotal role in the drafting of the terms of the Agreement, there simply is no uniformity in the “survivor world.”²⁵³ This would make it very difficult to find a voice to speak for the survivors since survivors live in over forty countries across the world.²⁵⁴

VII. CONCLUSION: THE AGREEMENT HAS NOT LIVED UP TO ITS PROMISES

Stuart Eizenstat uses the term “rough justice” to describe the settlements outside of the courts by administrative mechanisms.²⁵⁵ Through this lens, individual justice would be extremely difficult, costly, and in most cases, unfruitful.²⁵⁶ While this might be the case, it seems that the shortcomings revealed in the early years of the Foundation Agreement and its alliance with the ICHEIC for the processing of insurance policies, are far too great for it to be “the only game in town.”²⁵⁷ While it is admirable for the Agreement to offer all survivors and their heirs an opportunity for some amount of compensation, these claims are not being resolved quickly and efficiently²⁵⁸ and, many of the offers made by the insurance companies are insubstantial.²⁵⁹ The pressure put on the ICHEIC, through lawsuits such as *Garamendi* and the legislation presented in Congress, should hopefully force the ICHEIC and the insurance companies to better conduct at least the processing of the claims,²⁶⁰ but the reality is that they most likely will not. Today, in light of *Garamendi* and the recent New York decision, it

²⁵³ See *Monetary Restitution*, *supra* note 1, at 243 (responding to the comments made by Samuel J. Dubbin that the survivors were left out of the agreements, Gideon Taylor says that while it would have been ideal for survivors to have played an active role, it simply was unrealistic).

²⁵⁴ See *id.* (explaining, by Gideon Taylor, the survivor world); *cf.* Scholz, *supra* note 13, at 304-05 (stating that the “renewed” interest in Holocaust restitution came after the 1993 release of Steven Spielberg’s film “Schindler’s List.” The United States came to realize that they had a significant interest in the matter since of the “estimated 700,000 survivors of the Holocaust still living, there are believed to be at least 150,000 residing in the United States. In addition, many of the survivors are extremely elderly (the median age of survivors as of 1998 was 82 ½) . . .”).

²⁵⁵ Eizenstat, *supra* note 6.

²⁵⁶ *Id.*

²⁵⁷ See *supra* note 206, and accompanying text.

²⁵⁸ *But see id.*

²⁵⁹ Weinstein, *supra* note 147, at A1 (reporting that some proposed payments are purportedly as low as \$500).

²⁶⁰ See *Hearings: Michael J. Bazzyler*, *supra* note 122, at 6.

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does not seem like claimants have much of a choice besides relying on the Foundation Agreement's mechanisms and this seems unjust.

It is too narrow a view to say that the German Foundation Agreement may provide the best chance for "some measure of justice to Holocaust victims, survivors, and their heirs and beneficiaries"²⁶¹ given the limitations of the United States courts. While the research and creation of the comprehensive list of Jewish insurance policies alone is a great accomplishment, more needs to be done because after four years, the reality is that only 4,644 offers have been made²⁶² out of the 79,836 claims received by the ICHEIC.²⁶³ Many maintain that the Agreement is the best method since time is running out due to the ages of the survivors.²⁶⁴ But in truth, what is the need to hurry? Many of the claims for the life insurance policies are brought not by the survivors, but by their heirs. Survivors' estates are entitled to these funds.

The defects that plague the ICHEIC process can no longer be ignored. Perhaps the German Foundation's alliance with the ICHEIC to handle the processing of life insurance policies was not the most efficient and equitable means for dealing with these meritorious claims. The government should reevaluate this situation and allow claimants to be afforded the opportunity to seek their claims in court. Such a course proved successful early on with the settlement of individual lawsuits in California; in fact, five of such lawsuits were settled for amounts much higher than those being paid by the ICHEIC.²⁶⁵ In one such settlement that was supposed to remain confidential, it was reported that Assicurazioni Generali

Bringing to light these problems . . . plays an important function in putting pressure on the ICHEIC and its companies to move the process forward. As various settlements of other Holocaust restitution claims have shown, constant and vigilant attention to these issues, by both federal and state officials, activist groups, and the media can play a critical role in a fair and expeditious resolution of long unrecognized World War II historical claims.

Id.

²⁶¹ *California Law Undermines Federal Government Ability to Conduct Foreign Affairs, AIA Says*, INSURANCE JOURNAL, Apr. 29, 2003, at 26; see *supra* notes 42-44, 113-115 and accompanying texts.

²⁶² The number of offers made as of October 15, 2004 is 4,644, for a total of \$73.45 million. See *supra* note 222.

²⁶³ See Statistical Report available at <http://www.icheic.org/pdf/stats-041029.pdf> (last visited Nov. 14, 2004).

²⁶⁴ See Ratner, *supra* note 55, at 225 (pointing out that German Foundation "may ultimately prove to have fair implementation procedures. However, the process has been painful, and there is no single arbiter such as a judge, who has ultimate control over the process with an eye towards ensuring fairness to the claimants and the victims.").

²⁶⁵ See Bazyley & Fitzgerald, *supra* note 239, at 708.

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agreed to the payment of \$1.25 million to the heirs of a single Nazi victim.²⁶⁶

The opportunity to recover through litigation was dismissed too quickly because the German companies and government did not want to defend lawsuits in the United States and the U.S. government thought that they were doing right by their citizens by developing an alternative mechanism to deal with claims relating to the Holocaust. Class action lawsuits could have proven effective in resolving these issues. Such class action lawsuits were not given a fair chance and the Foundation Agreement has effectively made them almost impossible to bring. It can not be denied that litigation can be a lengthy and uncertain process, as it was in the Swiss Bank cases. Yet, given the inadequacies inherent in the Foundation's alliance with the ICHEIC, how could we not allow for this alternative forum? If few claims are being paid out, and if the true values of the life insurance policies are not being realized, how can we argue that claimants are better off under the Foundation? Would we not want to allow the chance to get this right, rather than not get it right at all? If class action suits were allowed to go forward, they would take the burden off the individual plaintiff of having to pay for litigation and it would force the lawyer to present the best case because he would not get paid unless he is successful. The treatment of the payment of life insurance policies from the World War II era must be revisited, and it might be time for the United States government to step up and accept that this Agreement has not realized its goals and try to find an alternative way to do right by its citizens, by allowing litigation to take its course.

²⁶⁶ See *id.*; *Holocaust Era Insurance Settlement Reported*, N.Y. Times, Nov. 25, 1999, at A4 (exposing the settlement in *Stern v. Generali*).