

05-5602

including Consolidated Appeal No. 04-6161-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: ASSICURAZIONI GENERALI S.P.A. HOLOCAUST
INSURANCE LITIGATION

On Appeal from the United States District Court
for the Southern District of New York

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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I.

INTRODUCTION

Appellants' Supplemental Opening Brief established that the district court erred in holding that the foreign policy interest of the United States extended to Generali, an Italian insurer specifically licensed to transact insurance business in California since 1958. Appellants demonstrated that the district court's reliance on *American Insurance Associated v. Garamendi* 539 U.S. 396 (2003) was misplaced. Most significantly, the Department of State ("DOS") expressly stated it has no interest in *appellant's lawsuits against Generali*. In holding that the Executive Branch's interest preempted appellants' actions, the district court quite simply overlooked the undisputed fact that the Executive Branch has said exactly the opposite.

After opening briefs were filed, Generali settled the class actions that were part of this coordinated proceeding. The appeal in those actions has been stayed. Generali and the class plaintiffs have requested that the district court approve and supervise a class action settlement and the cases have been remanded to the district court. Generali has now filed a consolidated opposition to the remaining individual actions, including appellants here.¹

¹ The class actions are *Cornell v. Assicurazioni S.p.A.* – 97 Civ. 2262 (MBM); *Schenker v. Assicurazioni S.p.A.* – 98 Civ. 9186 (MBM); and *Smetana v. Assicurazioni S.p.A.* – 00 Civ. 9413 (MBM).

As to appellants, Generali's lengthy Proof Brief is primarily notable for what it fails to address. Generali fails to even refer to the DOS's statement that its interests do not extend to this litigation. In fact, Generali's omission is all the more remarkable because it does cite another part of *the same letter* in which the DOS made its position clear. Of course, ignoring a dispositive argument does not render it any less dispositive.

Further, Generali's argument that the United States supports the International Commission on Holocaust Era Insurance Claims ("ICHEIC") as the exclusive forum for resolving Holocaust insurance claims is predicated on its implicit mischaracterization of the relationship between ICHEIC and the German Foundation Settlement ("GFS"). Pursuant to the GFS, the United States and Germany agreed to settle all American Holocaust claims against *German* companies. ICHEIC is a consortium of European insurers that was created to informally resolve insurance claims arising from the Holocaust. The United States and Germany designated ICHEIC as the forum to resolve insurance claims *against German companies arising under the GFS*. However, Generali has no connection whatsoever to the GFS. Generali has not contributed even one cent to the \$5 billion GFS settlement, yet Generali wants to reap all the benefits of the "legal peace" secured by *German companies* with the GFS executive agreements. The fact that

Generali contributed \$100 million to ICHEIC is of no consequence to the central issue of whether legal peace secured by the GFS extends to Generali. ICHEIC is a voluntary organization founded by European insurers and has no connection to any executive agreement entered into by the United States. Thus, the fact that Holocaust-era insurance claims against *German* insurance companies under the GFS are to be resolved through ICHEIC in no way supports the conclusion that insurance claims against Generali, an Italian insurer, must be resolved through ICHEIC. Generali's leap of logic should be rejected.

While the DOS's statement of non-interest should dispose of the preemption argument, appellants also established that their California cases are distinguishable from the other Holocaust actions pending against Generali because they focus on current tortious conduct. The alleged "fresh bad faith" violates California's law and public policy. Immunizing Generali for such conduct does not vindicate any foreign policy interest of the United States, but it does frustrate long-standing California public policy that holds insurers licensed in California liable in tort for bad faith conduct. Generali's brief cursorily mentions appellants' argument but fails to refute it.

Finally, in light of Generali's settlement of the class actions, the Court should find that Generali is judicially estopped from asserting that appellants'

claims are not justiciable. By submitting the class action settlement to the district court for approval and supervision, Generali has invoked the resources and authority of the judiciary. The district court, and possibly this Court, will render decisions binding on Generali and all other parties to the settlement. Generali should not be permitted to avail itself of the full panoply of judicial authority in one proceeding, while it simultaneously asserts the court is barred from exercising the same authority in a parallel proceeding.

II.

THE EXECUTIVE BRANCH HAS STATED IT HAS NO INTEREST IN THIS LITIGATION AGAINST GENERALI

As established in appellants' opening brief, on August 15, 2001, counsel for appellants sent a letter to the DOS to clarify the government's position with respect to appellants' actions against Generali in light of the executive agreements that created the GFS. Counsel emphasized support for the GFS and for those individuals who wished to use ICHEIC as the mechanism to resolve their Holocaust-era insurance claims. However, counsel was concerned the government might take the position that appellants' legal actions against Generali were also precluded by the GFS and assert that ICHEIC was their exclusive remedy. (Opening Brief ["OB"] at 11-12.)

The DOS responded in a letter dated September 13, 2001. Writing on behalf of Deputy Secretary of State Richard Armitage, Ambassador J.D. Bindenagel, Special Envoy for Holocaust Issues, affirmed that the United States Government supports ICHEIC as a voluntary method of resolving Holocaust era insurance claims. However,

[i]n furtherance of this policy, the United States Government has not deprived Holocaust survivors or their heirs of their constitutional rights. As a result of executive agreements entered into with Germany and Austria, which led to the establishment of foundations that will make payments to certain victims of the Nazi-era, the United States is obligated to file Statements of Interest in all Nazi-era cases against German and Austrian companies. ... *neither this obligation, nor any other United States legal obligation, extends to lawsuits against non-German or Austrian insurers such as Generali whether or not they are members of ICHEIC. Thus, the United States has no obligation to file a Statement of Interest in the Nazi-era lawsuits brought against Generali.* (September 13, 2001 letter from Ambassador J.D. Bindenagel to William M. Shernoff, counsel for appellants; emphasis added [JA ____].)

Thus, the United States government clearly and unequivocally answered the specific question raised in this proceeding – whether the United States government’s foreign policy interests preempt this litigation against Generali? The answer was “no.” If anything, the government’s letter can be characterized as a “Statement of Noninterest” with respect to this litigation against Generali.

As indicated in appellants' opening brief (O.B. at 18), the district court quoted from the first page of Ambassador Bindenagel's letter, but omitted any reference to the portion of the letter quoted above. (*In Re: Assicurazioni Generali S.P.A. Holocaust Insurance Litigation*, 340 F. Supp. 2d 494, 504 (S.D.N.Y. 2004.) Generali does the same thing. (Proof Brief ["P.B.]) at 20.)

The district court's failure to recognize that the United States government has indeed taken the position that it has no interest in this litigation was critical to its erroneous holding that the actions are preempted by the government's foreign policy interests.

In its decision, the district court stated that the existence of executive agreements (like in *Garamendi* and unlike here) is not a determining factor in evaluating whether the government has foreign policy interests that preempt the judicial forum.

Plaintiffs argue that the executive agreements at issue in *Garamendi* do not address claims against Generali, and stress that the United States and Italy have not entered into a comparable agreement governing such claims. [Citations.] However, the *Garamendi* ruling strongly implies that an executive policy need not be formally embodied in an executive agreement in order for the policy to have juridical effect. As discussed above, although the Court found the executive policy favoring ICHEIC resolution to be "expressed unmistakably in the executive agreements signed by the President with Germany and Austria," it found further that "[t]his position, of which the agreements are *exemplars*, has also been consistently supported in the high levels of the Executive Branch, [citing

statements by executive officials].” 123 S.Ct. at 2390-91 (emphasis added). Although the agreements were said to be “exemplars” of the Executive's position on this issue, evidence of that position was not limited to the agreements. Thus, it was to the Executive's position, and not simply to the agreements, that the Court deferred. I believe that the Court's emphasis on the Executive's position rather than merely on the text of the agreements means that a court seeking to comprehend the substance of an executive policy should not confine its analysis to the text of executive agreements. As already discussed, the statements by executive officials concerning disposition of Holocaust-era insurance claims show uniformly that the policy favoring ICHEIC resolution applies to claims against Generali. (340 F. Supp. 2d at 505.)

Appellants believe the fact that the United States has not entered into an executive agreement with Italy is indeed significant and that the district court's analysis insufficiently took that fact into account. However, it is in any case clear the district court failed to apply its own principle that the proper analysis should focus on the policy underlying executive agreements and not on whether agreements exist in every circumstance. In the September 13, 2001 letter, the government in fact made clear its policy concerning lawsuits against Generali – *i.e.*, it has no interest in these lawsuits. Indeed, the government stated it had no obligation to file a Statement of Interest in Holocaust actions against Generali under the executive agreements with Germany and Austria or under “*any other United States legal obligation.*” (Emphasis added.) Thus, the government has emphasized it has no policy interest concerning Holocaust-era lawsuits

against Generali whether arising from executive agreements or arising from any other basis. What could be clearer? The district court unaccountably did not consider the government's expression of its policy.

Decisions of the Court of Appeals that were published after appellants filed their opening brief also support the conclusion that the district court failed to adequately consider the importance of the government's expressed *lack of interest* in appellants' litigation against Generali.

In *Sarei v. Rio Tinto, PLC*, 456 F. 3d 1069 (9th Cir. 2006), the plaintiffs were employees of the defendant mining company. The plaintiffs alleged they revolted against their "'slave-like' conditions,'" and that, during an ensuing civil war, they were victims of human rights abuses and war crimes committed by the government of Papua New Guinea at the request of the mining company. (*Sarei*, 456 F. 3d at 1075.)

The district court dismissed the plaintiffs' claims on the ground that the political question doctrine rendered them nonjusticiable. The district court primarily relied on a Statement of Interest filed by the government. The Ninth Circuit reversed.²

² *Garamendi*, and this case, involve the doctrine of preemption, not the political question doctrine. However, as a matter of logic, the effect of a Statement of Interest in determining whether a claim is justiciable should be the same irrespective of the particular justiciability doctrine in question. As the Ninth Circuit in *Sarei* stated, "different doctrines of justiciability contd. provide different ways of asking one central question: are United States courts the appropriate forum for resolving the plaintiffs' claims? The

In its Statement of Interest, the State Department did not specifically invoke the political question doctrine, but reported that “in our judgment, continued adjudication of the claims ... would risk a potentially serious adverse impact on the peace process, and hence on the conduct of our foreign relations,” and that PNG, a “friendly foreign state,” had “perceive[d] the potential impact of this litigation on U.S.-PNG relations, and wider regional interests, to be ‘very grave.’ ” Attached to the SOI was the PNG government's communique stating that the case “has potentially very serious social, economic, legal, political and security implications for” PNG, including adverse effects on PNG's 1076 international relations, “especially its relations with the United States.” (*Id.*, 1075-1076.)

Although the Ninth Circuit held it was required to give the Statement of Interest “serious weight,” it concluded that the political question doctrine did not apply.

Even if the continued adjudication of this case does present some risk to the Bougainville peace process, that is not sufficient to implicate the final three *Baker* factors, which require “the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government,” “an unusual need for unquestioning adherence to a political decision already made” or “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Baker*, 369 U.S. at 217, 82 S.Ct. 691. The State Department explicitly did *not* request that we dismiss

answer to this question turns in part on the weight to be given to a statement of interest submitted by the United States Department of State. ...” (*Sarei*, 456 F. 3d at 1074.)

this suit on political question grounds, and we are confident that proceeding does not express any disrespect for the executive, even if it would prefer that the suit disappear.[fn] Nor do we see any “unusual need for unquestioning adherence” to the SOI’s nonspecific invocations of risks to the peace process. And finally, given the guarded nature of the SOI, we see no “embarrassment” that would follow from fulfilling our independent duty to determine whether the case should proceed. (*Id.*, at 1082-1083; emphasis in original.)

Sarei illustrates that, even where the government files a Statement of Interest, a court is not bound to follow its conclusion that permitting litigation to continue risks a “potentially serious adverse impact ... on the conduct of [U.S.] foreign relations.” (*Id.* at 1075.) *A fortiori*, here the Court should find appellants’ claims to be justiciable *because the DOS affirmatively indicated it has no interest in this litigation against Generali*. (See Bindenagel *letter*, *supra*.)³

In another recent decision the Third Circuit found justiciable a claim actually arising from the GFS. In *Gross v. German Foundation Industrial Initiative*, 456 F. 3d 363 (3rd Cir. 2006), the plaintiffs were victims of Nazi slave labor policies and their descendants who were entitled to receive reparations under the GFS. The plaintiffs alleged that the participating German companies failed to contribute interest to the reparations fund as required by the settlement agreement. (456 F. 3d at 371-372.) The district court held that the claims concerned a nonjusticiable political question.

³Although *Sarei* appears to be relevant authority for the issue on this appeal, *Generali* does not cite it in its brief.

The Third Circuit reversed. Although the question presented “would undoubtedly impact foreign relations and foreign policy,” it was essentially a question of contract interpretation suitable for judicial resolution. (456 F. 3d at 387-388.) In addition, the Court found it significant the United States government did not file a Statement of Interest although the GFS requires it to do so in U.S. legal actions involving “all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II.” (*Id.* at 382.) Further, the government did not express an opinion on the interest question through any other communication to the court. (*Id.* at 384-385.)

Here, as in *Gross*, the government has not filed a Statement of Interest. But, unlike in *Gross*, Ambassador Bindenagel’s letter in fact expressed the government’s lack of interest in actions against Generali.

Generali asserts that *Gross* supports its argument that the claims here are nonjusticiable based on the Court’s comment that its “conclusion might be different” if the interest dispute concerned “the underlying reparations claims” arising from the GFS. (*Gross*, 456 F. 3d at 389; P.B. at 60.)

Apart from the fact that the Court’s comment is dicta, Generali’s contention illustrates its persistent attempts to confuse the real issue here by improperly linking itself to the GFS and thereby taking out of context

executive branch statements encouraging the use of ICHEIC to resolve Holocaust-era insurance claims. (*See, e.g.*, P.B. 15-22, 31-38, 41.)

The GFS is solely between the United States and Germany. It covers only German companies and was “funded with 10 billion deutsch marks contributed equally by the German Government and German companies.” (*Garamendi, supra*, 539 U.S. at 405.) The United States “Government agreed that whenever a German company was sued on a Holocaust-era claim in an American court, the Government of the United States would submit a statement that ‘it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims *against German companies* arising from their involvement in the National Socialist era and World War II.’” (*Id.* at 406; citation omitted; emphasis added.)⁴

With respect to insurance claims specifically, the United States and Germany agreed that insurance payments on behalf of German companies under the GFS would be distributed through ICHEIC. (*Id.* at 406-407.)

It is undisputed that Generali has no connection whatsoever with the GSF. The often-cited expressions by United States representatives that the

⁴ The GFS was the model for subsequent agreements between the United States and Austria and France. (*Garamendi* at 408.)

government supports ICHEIC as the mechanism to resolve Holocaust-era insurance claims are clearly made with reference to claims arising under the GFS, not Holocaust-era insurance against Generali. (*See, e.g.*, September 13, 2001 Bindenagel letter: “[N]either this [GSF] obligation, nor any other United States legal obligation, extends to lawsuits against non-German or Austrian insurers such as Generali whether or not they are members of ICHEIC.” JA ____.) Indeed, the Bindenagel letter makes the precise distinction between the government’s position and obligations for claims under the GFS and other claims, such as those against Generali.

In fact, remarkably, Generali’s brief refutes its own argument. Generali quotes former Deputy Secretary of the Treasury Stuart Eizenstat, who negotiated the GFS on behalf of the United States: Secretary Eizenstat “said that a central component of the agreement was that companies ‘not pay twice, once into this foundation and a second time into U.S. courts.’” (P.B. at 16.) But Generali never paid a penny to the GFS and seeks to avoid paying insurance claims through the U.S. courts. Indisputably, Secretary Eizenstat was referring to the *German companies* who contributed to the GFS and who were therefore entitled to “legal peace” in United States courts. Generali also quotes then-Secretary of State Madeleine Albright, who, at the time the GFS was announced, stated “[t]he United States is

agreeing to assist in providing *legal peace to German companies*, both in our courts and from state and local action.” (P.B., *id.*; emphasis added.) Clearly, the statements of the highest-placed representatives of the United States government concerning the scope of the GFS indisputably establish that the GFS does not extend to Generali. In fact, the government has not requested that any case against Generali be dismissed, while it has been the consistent position of the government that all cases against German companies be dismissed pursuant to the GFS.

Thus, General’s lengthy discourse on ICHEIC (P.B. at 17-26), and its self-congratulatory references to the \$100 million it contributed to ICHEIC (*Id.* at 21-22, 25) are wholly irrelevant here. ICHEIC was relevant to the GFS only to the extent it was the forum selected by the United States and Germany for resolving Holocaust insurance claims against *German companies*. But Generali has no connection to the GFS. Generali did not contribute one cent to the GFS. Ultimately, Generali’s fixation on ICHEIC reflects an attempt to bootstrap itself to the GFS and become a beneficiary of that settlement. Its conflation, and confusion, of the roles of the GFS and ICHEIC should be rejected.

Similarly, Generali’s overbroad, and erroneous interpretation of *Garamendi* is evident when it argues that the California law at issue in *Garamendi* was ruled unconstitutional. (P.B. at 50-51.) *Garamendi* addressed only one part of the

Holocaust Victim Insurance Relief Act of 1999 – California Insurance Code sections 13800 *et seq.*, which required California insurers to disclose information about policies sold in Europe between 1920 and 1945. The Supreme Court expressly noted it was not addressing the portion of the enactment that permitted Californians to file actions based on conduct occurring during the Holocaust, California Code of Civil Procedure § 354.5. (“C.C.P.”) (*Garamendi*, 539 U.S. at 409 and n. 4.) Thus, *Garamendi* did not address justiciability of claims issues or whether federal law preempts C.C.P. § 354.5. Consequently, the district court in this case should not have relied on *Garamendi* or its reasoning because *Garamendi* did not even *consider* preemption related to the claims appellants have brought.

III.

GENERALI’S RECENT CONDUCT IS TORTIOUS UNDER CALIFORNIA LAW

Appellants’ opening brief also distinguished their claims from those of other litigants in this proceeding on the ground that appellants’ allegations are in part based on Generali’s 1997 invitation to Holocaust victims to make claims on their Generali policies. (O.B. at 9-10.) Appellants allege that Generali’s “Open Letter to the Families of Holocaust Victims” made false and misleading statements concerning its history of failure to adjust claims and that Generali proceeded to engage in bad faith claims handling when appellants responded to the invitation. (*Id.*) Generali was unique in its

decision to make written contact with California survivors and instigate claims handling in California. Such recent tortuous conduct violates California's long-standing public policy. (*Id.*, at 14-15.)

Generali makes passing reference to appellants' argument, contending that the allegations of "fresh bad faith" are ultimately based on the same Holocaust-era policies and are therefore precluded by "the Executive Branch's established policy that *all* such claims be resolved through ICHEIC." (P.B. at 47, n. 19; emphasis in original.) Generali is doubly mistaken.

First, as shown above, the United States government has not shielded Generali from Holocaust-era litigation. To the contrary, the DOS made clear it has no interest in such litigation.

Second, appellants' allegations of current bad faith conduct "add to the mix" as to why Generali should be subject to liability under California law. Such recent tortuous conduct contravenes a strong public policy of the State. There is nothing in *Garamendi* that suggests the United States has an interest in immunizing a California-licensed insurer from liability for current tortuous conduct.

IV.

AS A RESULT OF THE CLASS ACTION SETTLEMENT, THE COURT SHOULD JUDICIALLY ESTOP GENERALI FROM CONTENDING CLAIMS AGAINST IT ARE NONJUSTICIABLE

Generali has vigorously asserted that *all* legal proceedings against it in United States courts are preempted. During the pendency of this appeal, Generali settled the three class actions that were part of these coordinated proceedings. The cases have been remanded to the district court and the parties are seeking district court approval and supervision of the settlement.

In the circumstances here, appellants submit this Court should find Generali is judicially estopped from asserting that appellants' claims are nonjusticiable. Generali should not be permitted to invoke the authority and protections of a United States court in one proceeding while simultaneously contending that the same court cannot assert its authority over the same subject matter in a different proceeding.

[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. This rule, known as judicial estoppel, generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.

The doctrine of judicial estoppel is intended to protect the integrity of the judicial process. The doctrine prevents parties from "playing fast and loose with the courts."

[S]everal factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. ... A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. (*New Hampshire v. Maine*, 532 U.S. 742, 749-751 (2001); citations and internal quotes omitted.)

Courts in this Circuit have not hesitated to apply judicial estoppel in circumstances where such a finding was required to protect the court's integrity. For example, in *Seetransport Wiking Trader chiffarhtsgesellschaft MBH & Co. Kommanditgesellschaft v. Republic of Romania*, 123 F. Supp. 2d 174 (S.D.N.Y. 2000), the district court supervised a settlement between a German shipping company and the government of Romania. After the settlement was concluded, Romania refused to honor its obligations, contending that its Finance Minister, who executed the agreement in question, did not have the authority to bind the government. (123 F. Supp. 2d at 185.) The district found Romania was judicially estopped to take that position because in the settlement proceedings it had represented to the court that the Minister had such authority. The court pointedly noted that it had expended considerable resources in the settlement proceedings based on the representation that the Minister had the requisite authority. Judicial estoppel

was required to protect the integrity of the court's rulings and to prevent Romania from obtaining unfair advantage. (*Id.* at 189-190.) In *Loral Fairchild Corp. v. Victor Company of Japan*, 911 F. Supp. 76, 80 (E.D.N.Y. 1996), the district court held that Loral was judicially estopped from altering its theory of liability in a patent infringement dispute where it was offered late in the proceeding and prejudiced the defendant.

Similarly, in *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d. 469 (6th Cir. 1988), the Sixth Circuit held that the IRS was judicially estopped from asserting that the plaintiff was liable for a capital gain tax where the IRS had asserted in an earlier bankruptcy case that the tax was owed by the plaintiff's former wife. The Court found the doctrine particularly applicable because in the bankruptcy proceeding the court had to approve any compromises between the former wife and her creditors and make legal determinations binding on all parties. Thus, IRS's changed position undermined the integrity of the courts. (861 F. 2d at 473-474.)

Here, the Court should not permit Generali to benefit from the court's authority and imprimatur at the same time it argues the court is without such authority in the individual actions. All three factors referred to by the Supreme Court in *New Hampshire, supra*, are present.⁵

⁵In *New Hampshire*, the Supreme Court noted that the factors it listed "do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations

First, Generali's submission to the authority of the court is clearly inconsistent with its earlier, and continuing, claim that it is not subject to the court's authority. At Generali's request, the district will have extensive involvement in the class actions. The district must conduct hearings, make findings and decide whether the class should be approved. If approved, the district court will remain involved to supervise the settlement. If not approved, or if objectors appeal certification, this Court will decide the matter. Thus, Generali is availing itself of the resources of the judicial system, which will adjudicate the rights and obligations of potentially thousands of parties. Why should Generali be permitted to use the courts for its own advantage while it concurrently asserts the courts have no authority over actions involving precisely the same claims?

Second, this Court granted a stay of the class actions and remanded to the district court, which will determine whether the class settlement will be approved. Thus, Generali has persuaded the Court to adopt its position that the judiciary will determine all matters raised in the class proceeding.

Third, Generali is obtaining an unfair advantage. The class settlement provides for opt-outs. (JA ____, ¶¶ 10., p., 9 c., 16.) Appellants are potential class members in the settling California class action, *Smetana v.* _____
may inform the doctrine's application in specific factual contexts." (532 U.S. at 751.)

Assicurazioni S.p.A. – 00 Civ. 9413 (MBM). If approved by the district court, appellants will have the opportunity to file a class claim or opt-out of the class settlement.⁶ In the usual class action, the point of opting-out is to preserve the right to proceed in an individual lawsuit. But, here, given Generali’s alternative position that individual actions are nonjusticiable, what will it mean to opt-out? In effect, Generali is putting the court in the position of approving a class settlement that does not protect opt-outs, but instead renders the opt-out remedy illusory if the court accepts Generali’s other position that the claims are not justiciable. Moreover, as the class action Settlement Agreement indicates (p. 5), ICHEIC is terminating its operations effective December 31, 2006. Therefore, ICHEIC will no longer be in existence as a remedy.⁷

⁶ The settlement agreement provides for a new claims period to February 27, 2007 with “claims evaluation and payment process,” subject to the district court’s supervision of claims administration. (JA ____, ¶ 11 b.) Some appellants may decide to file a class claim depending upon the benefits available through the settlement. Of course, appellants cannot make that determination until details of the claim evaluation process are better known.

⁷The fairness of the ICHEIC remedy was always under a cloud, as Judge Mukasey indicated. “ICHEIC is entirely a creature of the six founding insurance companies that formed [it] ...; it is in a sense the company store. Virtually all of ICHEIC's funding-not only for claims payments, but also for all administrative expenses-comes from those insurance companies. The concern that defendants could use their financial leverage to influence the ICHEIC process is not merely theoretical.” (*In re Assicurazioni Generali S.p.A. Holocaust Ins. Litigation*, 228 F. Supp. 2d 348, 356-357 (S.D.N.Y.2002).)

Thus, the Court should reject Generali's argument du jour approach to the United States legal system and judicially estop Generali from advancing its contention that appellants' claims are nonjusticiable.⁸

V.

CONCLUSION

The United States government has no interest in this litigation against Generali. Appellants' claims are not preempted by United States foreign policy, and the district court's Opinion and Order granting Generali's motion to dismiss should be reversed.

Dated: October __, 2006

Respectfully submitted,

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⁸ This is not the first time that Generali has advanced expedient arguments. After removing cases from state courts and having them consolidated in the MDL, General filed a motion which argued that New York was an inconvenient forum and that cases should be tried in Europe. Judge Mukasey commented: "Given defendants' inconsistent representations, I am skeptical that dismissal would really be more convenient for their purposes." (*In re Assicurazioni Generali S.p.A. Holocaust Ins. Litigation*, *supra*, 228 F.Supp.2d at 364-365.)

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By _____
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