



HOLOCAUST SURVIVORS' FOUNDATION – USA

Member Organizations (Partial List)

Amer. Assn. of Jewish Holocaust
Survivors of Greater Boston

Assn. of Holocaust Survivors from
Former USSR, Los Angeles

C.A.N.D.L.E.S., Terre Haute, IN
Child Survivors of Arizona

Child Survivors/Hidden Children of
The Holocaust

Coalition of Holocaust Survivor
Clubs in South Florida

Council of Nazi Holocaust Survivor
Organizations of So. California

Habonim Cultural Club, Miami

Holocaust Child Survivors &
Friends of Greater Hartford

Holocaust Survivors Club of
Boca Raton

Holocaust Survivors of
Greater Detroit

Holocaust Survivors of
Greater Pittsburgh

Holocaust Survivors of
South Florida

Holocaust Survivors Group of
Southern Nevada

Houston Council of
Jewish Holocaust Survivors

The Jewish Holocaust Survivors &
Friends of Greater Washington

Jewish Survivors of Latvia, Inc.
New York

National Assn. of Jewish Child
Holocaust Survivors, Inc.

New American Jewish Social Club,
Miami

New Cracow Friendship Society,
New York

Survivors of Atlantic City, NJ

Survivors of the Holocaust Asset
Recovery Project, Seattle

Survivors of the Holocaust of
New Mexico

Tikvah Acharay Hashoah,
San Francisco

Summary of Holocaust Insurance Issue – 2009

Summary

After extensive discussions with last year's lead co-sponsors of HR 1746 and the staffs of other members and Committees, Reps. Wexler and Ros-Lehtinen and the survivors seeking Congressional relief on the insurance issue seek to narrow the approach in the 111th Congress.

As explained below, the survivors' current loss of their basic right of access to courts is a result of the Supreme Court *Garamendi* decision holding that a "federal Executive policy" preempted California's disclosure statute even though the U.S.-German Executive Agreement did not expressly preempt such state laws, and Judge Mukasey's decision dismissing claims against Italian insurer Generali based on that same "executive policy" even though there is no agreement between the U.S. and Italy.

In the 110th Congress, Congressmen Tom Lantos, Ileana Ros-Lehtinen, and Robert Wexler were the principal co-sponsors of legislation to restore survivors' access to information and to the courts. HR 1746 combined two past efforts to resolve these adverse outcomes, i.e. Rep. Waxman's 2001 and 2003 proposals to create a federal registry of policy holder names, and 2003 legislation by several Senators and House Members to create a federal cause of action for survivors and heirs to bring cases in Federal court and restore the right to bring state law claims as well, and to provide a window of 10 years for such claims. The approach was criticized by some as possibly "federalizing" insurance and costing the Federal government money to have a registry of names.

After Tom Lantos's death and a setback in the House Financial Services Committee in the 110th Congress, Representatives Ros-Lehtinen and Wexler proposed an alternative position after these objections were raised but time ran out before the alternative could be considered. The alternative was a "states rights" approach which simply would provide that notwithstanding past court decisions, there is no "preemption" of any state law (a) requiring disclosure by insurance companies or (b) providing survivors and heirs a right of action to recover for policies purchased by family members who were in the Holocaust, and (c) allowing such suits to be brought within 10 years of the date of enactment. This approach would not only ameliorate some objections to previously proposed solutions, but would strike narrowly at the heart of the reason for the current legal landscape – the excessively broad interpretation of the Executive Branch's power to preempt state law without Congressional action.

In substance, the "states rights" approach would succeed in restoring survivors' and heirs' rights of access to courts under state law, and validate state disclosure requirements if they exist. While it is a different approach than the one used in 2007-2008, it is designed to benefit all survivors and heirs who believe they have valid claims. It is not intended or expected to pacify the insurance industry, the German government, or their allies who believe the status quo is acceptable.

Background

After World War II, as Holocaust survivors and their families struggled to reconstruct their lives, global insurance companies such as Generali, Allianz, AXA, RAS, Swiss Re, Swiss Life, Munich Re, Victoria, Winterthur, and others dishonored their obligations by demanding original policy documents and death certificates, denying the existence of policies or records, claiming its assets were nationalized, asserting statutes of limitations, and other fraudulent denials that frustrated Holocaust survivors and the heirs of Holocaust victims. When these facts came to light in the late 1990s, state insurance regulators held hearings and several states passed laws requiring insurers doing business there to disclose information about their Holocaust era policies, and ensuring survivors and heirs access to courts for extended time periods, in addition to the common law remedies available against insurance companies. Congress also held hearings on this issue.

In response, insurers created the International Commission for Holocaust Era Insurance Claims, or "ICHEIC." Under ICHEIC, insurers joined with state regulators and certain NGOs -- not survivors, survivor representatives, or claimants' attorneys -- to deal with the problem on a "non-binding, non-adversarial" basis. The monetary values offered for policies under ICHEIC were arrived at "by consensus," i.e. politically, not based on economics. Thus, values for policies from Germany and Eastern Europe were highly discounted – at about 10-15 percent of actual current value.

ICHEIC was chartered under Swiss law and headquartered in London to avoid the reach of U.S. public records laws and judicial subpoena powers. It was funded by the insurers. Its meetings were conducted in secret. Minutes were not published. Insurers interpreted ICHEIC's "consensus" governance to mean they could ignore or reject any ICHEIC decision which they regarded as "unfair or unjust."

During ICHEIC's tenure, Congress held several hearings in which survivors and their advocates reported stories of multi-year waits for responses, denials without any explanation, demands for information that no claimant could be expected to know, and denials of claims even where a policies were proven to have existed. Media from the *New York Times* to the *Los Angeles Times* to the *Baltimore Sun* and the *Economist* in London reported on ICHEIC scandals and disappointments.¹ In its first five years, ICHEIC spent more money on administrative expenses than it paid in claims. Chairman Lawrence Eagleburger told a Congressional Committee that ICHEIC's internal processes were "none of its [Congress's] business."

In 2000, the U.S. government and Germany entered into an executive agreement ("German Foundation Agreement") that addressed slave and forced labor cases against German manufacturers. At the insistence of German industry, the Agreement also addressed insurance claims against German companies, by providing that German insurers would participate in ICHEIC. While Germany asked President Clinton to immunize its insurers from litigation in return, the U.S. government *refused*. Instead it agreed to file "statements of interest" in U.S. courts that dismissal of claims against German insurers on available legal grounds was in U.S. foreign policy interests, but that *the Agreement itself did not call for dismissal* of non-assenting survivors' claims against any German insurer.

In the Foreign Affairs Reauthorization Act of 2003, Congress required the State Department to collect information on ICHEIC companies' claims practices and results. However, ICHEIC refused

¹ In 2002, Congressman Henry Waxman wrote: "Holocaust survivors have been waiting decades to reclaim Holocaust-era insurance policies. Unfortunately, the findings of an ongoing congressional investigation I initiated indicate that their wait is far from over. . . . The main cause of the failure to resolve claims appears to be the actions — and the inaction — of insurance companies. The majority of the companies that have agreed to the ICHEIC process have not lived up to their obligation to disclose policyholder lists. The ICHEIC member companies also appear to have wrongfully rejected, undervalued or left unanswered the claims of many survivors."

to comply with this requirement each year after the law's enactment. As the March, 2006 State Department Report stated: "The Department requested additional information from ICHEIC in an effort to meet the reporting requirements of Section 704(a)(3)-(7). ICHEIC Chairman Lawrence Eagleburger responded that he would not provide the Department of State any information regarding ICHEIC's undertakings."

When ICHEIC closed its doors in March 2007, it had paid fewer than 14,000 of the 800,000 life/annuity/endowment policies estimated to be owned by European Jews in 1938. The total paid on policies was \$250 million, less than three percent (3%) of the \$18 billion in outstanding values. These estimates, by Sidney Zabludoff, the economist who served as an ICHEIC consultant from 1998-2004, have never been seriously challenged. ICHEIC also issued 34,000 checks for \$1000 each which it termed "humanitarian" in nature, but which survivors considered insulting rejections. Yet ICHEIC and its supporters today take credit for having "paid 48,000 claims," which survivors rejected as an insulting palliative designed to make the process appear successful when it was not.

Unfortunately, a series of unprecedented court decisions held that even though the U.S.-Germany Executive Agreement did not expressly preempt state law, it was part of a "federal policy" of "nonadversarial resolution" of Holocaust victim's claims. The Supreme Court, in the *Garamendi* case, held that California's statute requiring insurers to publish policy holder names held by German insurers was preempted by that "policy." Later, Judge Michael Mukasey held that even there is *no executive agreement* between the U.S. and Italy, state law claims against Italian insurer Generali are preempted by the same "federal policy" that the Supreme Court held preempted the California disclosure law.

So today, based on these broad readings of the "federal preemption" doctrine, it is impossible for survivors to sue insurers over Holocaust era policies. But even those decisions recognize that **Congress has the authority to provide access to courts through appropriate legislation.** *American Insurance Association v. Garamendi*, 123 S.Ct. 2374 (2003), *In re Assicurazioni Generali, S.p.A., Insurance Litigation*, 240 F.Supp.2d 2374 (S.D.N.Y. 2004).

HR 1746, co-sponsored by a bipartisan group of House Members, led by Tom Lantos, Ileana Ros-Lehtinen and Robert Wexler, would have reversed *Garamendi* and other decisions and restored Holocaust survivors' rights (and the rights of heirs) to sue these insurers, and would also have required the companies to publish the names of policyholders in a federal registry.

The U.S. State Department, the German Government, the insurance industry, and the non-survivor NGOs who either participated on ICHEIC or receive money from the Claims Conference opposed the legislation despite universal support by survivors and survivor groups unaffiliated with the Claims Conference (see attached list).

Issues and Arguments Concerning Proposed Legislation

1. "Legal Peace"

Opponents argued initially that "a deal is a deal," and the insurance companies were promised "legal peace" if they participated in ICHEIC. The "legal peace" argument is the bedrock argument against legislation such as HR 1746. However, the argument is a distortion of what President Clinton agreed to and was specifically rejected by the Clinton Justice Department in court filings and correspondence with Members of Congress.

In point of fact, the U.S. government did not promise insurance companies immunity from litigation or "legal peace" for participating in ICHEIC. In general, the Executive Branch does not have the authority to negotiate away any citizen's right of access to the courts, except in the rare case of a truly catastrophic foreign policy crisis. Yet, the Germans asked for such immunity but were told it

was impossible. Even Stuart Eizenstat has admitted this in his book and his Congressional testimony.

To emphasize this point, immediately after the U.S. German Agreement was signed in the summer of 2000, the Clinton Justice Department filed a brief in the Ninth Circuit making it clear that the German-U.S. Executive Agreement did not preempt survivors' rights of access to courts under state law. DOJ's brief stated:

- The United States "has not undertaken a duty to achieve legal peace for German companies against state litigation and regulatory action." (p. 8)
- The Foundation Agreement itself "does not preclude individuals from filing suit on their insurance policies in court" (p. 8)
- The Foundation Agreement does not "mandate that individual policyholders or beneficiaries bring their claims in ICHEIC." (p. 8-9)
- The American Insurance Association "is mistaken in asserting that the Foundation Agreement is in 'direct conflict' with California law, if by this AIA means to suggest that the Agreement by its terms preempts the California statute." (p. 9).
- The District Court "overestimated the Agreement's ultimate legal effect when it predicted that the Agreement would make the Foundation on 'exclusive remedy' as a matter of U.S. law." (p. 9, note 4).

In addition, after the signing of the German-U.S. Agreement, several members of Congress raised the issue with Attorney General Janet Reno, opposing any inclusion of insurance in the German agreements:

[W]e reject the notion that insurance claims estimated to be worth billions could be satisfied by the arbitrary DM 300 million (\$150 million) set aside in the German Foundation Fund.

Letter of September 11, 2000, from Congressmen Waxman, Berman, Lantos, et al. to the Honorable Janet Reno. Later, on September 29, 2000, forty six (46) members raised concerns about ICHEIC's poor performance noting: "ICHEIC never belonged in the slave labor settlement"

In response, the Clinton Justice Department confirmed in a letter to the members that the U.S. Government never purported to waive survivors' claims. While DOJ stated that it was obligated to take the insurers' side against the California *disclosure law*, it confirmed that the United States never agreed that private suits were legally barred: "The [position of] the United States . . . does not suggest that private claimants who wish to pursue suite against German companies are foreclosed from doing so." September 29, 2000 Letter from Assistant Attorney General Robert Raben to Henry Waxman, et al.

Unfortunately, when Reps. Ros-Lehtinen, Wexler, Lantos, and dozens of other members advanced HR 1746 in the 110th Congress, the opponents relied heavily on the "legal peace" argument, ignoring the official position of the President who signed the Agreement, and overstating what the U.S. government supposedly agreed to. For example, in testifying against HR 1746, State Department Special Envoy for Holocaust Issues Christian Kennedy stated:

In order to achieve a settlement scheme that ICHEIC grew out of, we had to promise legal peace to the companies involved in the scheme, the Austrian and German insurance companies. That was the quid pro quo."

House of Representatives Committee on Foreign Affairs, Europe Subcommittee, October 3, 2007, at 12. He later stated:

In order to get to that settlement which paid concrete benefits to 48,48,000 survivors and heirs, we had to make certain undertakings in our agreements, and one of those undertakings was that we would seek legal peace on behalf of the insurance companies involved in Austria and Germany.

Europe Subcommittee Hearing, October 3, 2007, at 16.

Stuart Eizenstat, whose own Congressional testimony when he was Clinton's Special Representative for Holocaust Issues was quoted in the Clinton DOJ brief in 2000 rejecting the "legal peace" argument, nonetheless made the following statements in Congress in 2008 contradicting what the Clinton Justice Department said in Court:

Eizenstat: ICHEIC was ultimately successful. . . . Now, as a consequence, if we pass legislation similar to what the House does it would upset all the work we did, all the reliance that companies paid money for in Austria, in Germany, in Switzerland. *They paid money to get legal peace. If they hadn't gotten legal peace and an assurance from the Executive Branch of that, they wouldn't have paid these \$8 billion that we were able to achieve. Please don't upset that assurance.*

Senate Foreign Relations Committee Hearing, May 6, 2008, at 48 (Emphasis supplied). He also testified:

[T]he reason that I say that we can't start from a clean slate is that in the German case *we made a commitment on behalf of the President of the United States, with the full knowledge of the Congress, that there would be legal peace for all German companies, including German insurers, for all Austrian companies, including Austrian insurers, for all French companies, including French insurers, if they paid the amount of money they paid.*

Senate Foreign Relations Committee Hearing, May 6, 2008, at 94 (Emphasis supplied).

Similarly, in 2008 the Department of Justice submitted a letter brief in the current *Generali* litigation (Second Circuit Appeal No. 05-5602, et al.), stating that litigation by American citizens against Generali conflicts with U.S. foreign policy. DOJ's 2008 letter brief makes sweeping statements that "it would be in the foreign policy interests of the United States that ICHEIC be regarded as the exclusive forum for resolution of insurance claims against companies like Generali that participated in the ICHEIC process" (page 1); "it is contrary to settled United States foreign policy for plaintiffs' claims to be adjudicated in the courts of the United States" (page 9-10); and "[a]ccordingly, it would be in the foreign policy interests of the United States that such claims not be pursued through the courts." (page 11).

The Bush Administration's 2008 statements via Kennedy and DOJ directly contradict the position of the U.S. Department of Justice in 2000, immediately after the agreements at issue were signed by President Clinton, and correspondence between Members of Congress and the Clinton Justice Department.

For convenience, here is the text of the DOJ Ninth Circuit Brief from the year 2000:

In view of the importance of the Foundation Agreement, we wish to correct some misunderstandings reflected in the brief of the American Insurance Association (“AIA”) concerning the undertakings of the U.S. Government and the impact of the procedures established by the Agreement on existing legal remedies available to American citizens against private corporations. AIA states that “[t]he federal government . . . has committed to give affected insurers legal peace, including against state litigation and regulatory action,” AIA Br. 1, and that the Foundation Agreement “imposes a duty on the United States to achieve ‘all-embracing and enduring legal peace’ for German companies.” AIA Br. 2. The United States has committed to various unprecedented undertakings in the Agreement. As discussed, the United States has committed to file a Statement of Interest in private suits against German companies explaining 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,” Foundation Agreement, Art. 2(1), and has committed to “use its best efforts, in a manner it considers appropriate, to achieve the objectives” of the Agreement, Art. 2(2). It has not, however, undertaken a “duty . . . to achieve” legal peace for German companies against state litigation and regulatory action.

Nor does the Foundation Agreement itself preclude individuals from filing suit on their insurance policies in court. Cf., e.g., AIA Br. At 2 (stating that the Agreement “creates an exclusive remedy and forum”); id. at 12 (stating that the Agreement “mandates that insurance claims that come within the scope of . . . ICHEIC ‘shall be processed . . . on the basis of such procedures’”). . . . Although the Agreement obligates the German Foundation to process insurance claims against German companies according to ICHEIC procedures, Foundation Agreement, Art. 1(4), it does not mandate that individual policyholders or beneficiaries bring their claims in that forum. And while the Agreement states that it is in the national interest of the United States that the Foundation be the exclusive forum for such claims, it does not “create” an exclusive remedy; rather, it specifically declares that “[t]he United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent basis for dismissal” of private claims. Foundation Agreement, Annex B, ¶ 7. [footnote].

Brief for Amicus Curiae the United States of America in Support of Affirmance in *Gerling Global Reinsurance Corp. v. Kelso*, Case No. 00-16163, etc. in the United States Court of Appeals for the Ninth Circuit, at 7-9. DOJ added that the AIA (insurance industry) was “mistaken in asserting that the Foundation Agreement is in ‘direct conflict’ with California law (AIA Br. 4), if, by this, AIA means to suggest that the Agreement by its terms preempts the California statute.” *Id.*, at 9. (Emphasis supplied).

Further, the Bush Administration 2008 positions contradict assurances that several members of Congress received from the Clinton Justice Department immediately after the signing of the Executive Agreements. Several members of Congress protested the decision to include insurance claims within the German Foundation settlement, which was always believed to be limited to slave and forced labor. They also expressed their concern that the Executive branch’s

defense of German interests in the *Garamendi* litigation might undermine citizens' state law rights to pursue claims in the courts:

[W]e are writing to urge you not to file a brief in the case of [*Garamendi*]. We are deeply concerned that doing so could ruin the chance for many of our constituents to reclaim Holocaust era insurance policies. . . .

[T]hese companies should not be immunized without full accountability for repaying what they owe. As you know, the insurance companies have dragged their feet in opening their files, and the California Holocaust Victim Insurance Relief Act (HVIRA) challenged in this case is one of the only remaining sources of leverage to pressure them to cooperate. *We are especially concerned that a brief filed by the U.S. government against HVIRA could help set a precedent for prematurely dismissing other class action suits brought by Holocaust survivors and cut off the viability of individual claims.*

Letter of September 11, 2000, from Congressmen Waxman, Lantos, and Berman, et al. to Mr. Seth Waxman, Solicitor General of the United States. (Emphasis supplied).

Their letter criticizes ICHEIC and cites news articles that reported on the scandals, excessive expenditures, and extremely low success rates of ICHEIC claimants. The Members of Congress concluded: "We were shocked, therefore, to learn that the recent slave labor settlement reached between the U.S. and German governments would also resolve claims settled by ICHEIC and undermine viable class action suits."

In response to these concerns, this Department emphasized that the President had *not* agreed to immunize any insurance companies from lawsuits nor waive any American citizen's right to sue. Assistant Attorney General Robert Raben informed the Members of Congress that the pending litigation "concerns the assertion of new regulatory authority by the State and its insurance commissioner, not the assertion of private claims in court under whatever preexisting law might be applicable."

Mr. Raben further added that the Executive Agreement did not purport to eliminate Holocaust survivors' legal claims against German insurers, and assured the members of the limited scope of the Statement of Interest:

With respect to suits by individual victims or classes of victims, . . . the United States has undertaken (in the Executive Agreement) to file a Statement of Interest informing the courts in which those cases are filed "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," and "*that the United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal of private claims against German companies.*

Id. (Emphasis supplied).

2. Argument that passage of insurance legislation will cause Germany to cut funding for survivors.

When it became evident that the “legal peace” argument was really not defensible on the merits, opponents of HR 1746 adopted a new argument, that passage of insurance legislation would cause the German government to cut some of the limited programs in existence today that help survivors. This argument was formalized in a letter from the Claims Conference to Judiciary Committee Chairman Conyers, which stated that passage of HR 1746, would “jeopardize critical ongoing negotiations with Germany and other governments for the continuation and expansion of hundreds of millions of dollars in crucial funding, immediately required, for survivors in need in the United States and worldwide.”

The first and most obvious response is that there is no logical or moral connection between allowing individual Holocaust survivors access to courts to vindicate their property rights, and the German government fulfilling its moral obligation to improve the lives of the remaining thousands of Holocaust survivors whose lives were destroyed by Hitler and who continue to struggle today. The linkage is logically flawed and morally perverse.

However, more disturbing is that the argument is untrue.

In December 2008, the Holocaust Survivors Foundation USA, Inc. (HSF) wrote a letter to German Ambassador Klaus Scharioth asking for clarification of the government's position on the effect of insurance legislation on the German government's provision of funding for survivors' programs. The response, dated Feb. 10, 2009, is attached. Though the letter repeats Germany's opposition to insurance legislation because of “legal peace,” (clearly invalid based on the Clinton Administration statements), the Embassy stated that there was no truth to the argument that Germany would cut benefits for survivors if insurance legislation became law:

However, while we continue to oppose HR 1746 and any similar bills, Germany has never threatened to respond by cutting benefits to poor survivors, and we have no intention to do so in the future. Pension payments under the Federal Compensation Act (BEG) and support to existing JCC (Claims Conference) programs, including pensions and one-time payments, will, of course, continue as provided for under the law and international agreements.

February 10, 2009 Letter from German Ambassador Scharioth to David Schaecter, President of the Holocaust Survivors Foundation USA, Inc.

So, the two central arguments against insurance legislation made by opponents do not stand up to analysis.

3. Cost/Benefit Analysis of HR 1746

Another argument raised against HR 1746 was that it might not generate enough actual payments to Holocaust survivors to justify the political opposition mounted by the insurance companies and the governments seeking to protect them. The analysis above demonstrates that more than 60 years after the end of WWII, only three percent (3%) of the funds owed by these insurers to Holocaust victims' families has been repaid, after an excruciating eleven- (11) year hiatus in which ICHEIC was given sway to allow global insurers to fly below the radar screen and still succeed in holding onto over 97% of their unjust enrichment.

The proposed legislation to provide that state law rights of survivors and heirs to seek redress in the courts against insurers who failed to pay family policies represents common sense and

common decency, in allowing Holocaust survivors and families to control their own right to obtain information from culpable insurers, seek the truth about their families financial history, and recover the funds they might be owed. Given the shortcomings in ICHEIC names disclosure record and claims payment record, such legislation is necessary to allow all victims' families a fair chance to recover their financial due. The status quo creates one subclass of Americans who cannot go to court to sue insurers that pocketed their hard-earned money – Holocaust survivors. This is an untenable position for America in the year 2009.

The evidence that multinational insurers profited from the Holocaust to the tune of some \$18 billion in today's dollars is overwhelming. Making them pay for their unjust enrichment – even 63 years after the end of the war – sends a message to other enterprises that might turn a blind eye to murder, and thereby save lives and prevent future atrocities.

As Holocaust survivor Jack Rubin stated before the Europe Subcommittee in October, it is indeed possible and even likely that tens of thousands of Jews' insurance policies went up in the smoke of Auschwitz. But why should the companies be able to retain the billions in unjust enrichment due to their greed and cynicism? Even if only a few additional policies are repaid to individuals, there is no plausible reason to allow the financial culprits from the Holocaust rest easy in 2009 or ever, until they have disgorged their ill-gotten gains. Their unjust enrichment is tainted and must be returned, to the owners or to survivors in need if necessary.