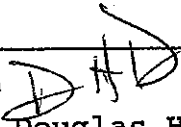


Memorandum



Subject	Date
<u>In re Assicurazioni Generali,</u> Nos. 05-5610, 05-5612 (2d Cir.)	August 20, 2009
To	From
The Solicitor General	 Douglas Hallward-Driemeier

TIME

In a letter dated July 29, 2009, the Second Circuit invited the United States to file a submission amicus curiae informing the court whether the foreign policy interests of the United States are today the same as those articulated in an amicus brief we filed with the court on October 30, 2008, concerning adjudication of claims against defendant Generali relating to Holocaust-era insurance policies. The court of appeals asked the government to inform the court by August 28 whether the government intends to file a brief and to file any such brief sixty days thereafter, by October 27. We received the Civil Division's memorandum on August 20, 2009.

RECOMMENDATIONS

The Department of State, United States Attorney's Office, and Civil Division recommend amicus participation. I recommend **AMICUS PARTICIPATION.**

I recommend **AMICUS PARTICIPATION, SUBJECT TO APPROVAL OF THE LETTER BRIEF.**

Ms. Hallward-Driemeier's memo contains an excellent account of the United States' involvement in efforts to bring about a resolution of Holocaust-era claims -- including, as relevant here, claims against insurance companies. Insurance claims were to be resolved through ICHEIC, an entity created through the efforts of some state insurance commissioners in the U.S., European governments, Israel, Holocaust survivor groups, and others. Last October, the U.S. submitted an amicus letter, at the request of CAZ, stating that it continued to be in the foreign policy interest of the United States -- as it has been since 2000 -- that Holocaust-era insurance claims be resolved through ICHEIC, but did not take a position on whether ~~an~~ Executive Agreements between Germany and Austria and the U.S. preempted such claims. CAZ has now asked whether, in light of the new Administration, that continues to be the U.S.'s foreign policy. The State Department recommends that

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QUESTION PRESENTED

Whether it is the foreign policy of the United States that Nazi-era claims for unpaid insurance policies brought against an Italian company that voluntarily participated in the International Commission on Holocaust Era Insurance Claims (ICHEIC) should be resolved exclusively by voluntary means such as ICHEIC rather than through litigation in the courts of the United States.

STATEMENT

1. In the late 1990s, after numerous suits were filed in the United States asserting claims arising out of the Holocaust era, the United States facilitated discussions between the representatives of the plaintiffs and defendants, the governments of Germany, numerous Eastern European countries, and Israel, and other groups representing Holocaust survivors and the heirs of Holocaust victims regarding non-litigation resolution of claims from the Holocaust era. These discussions culminated in the issuance of a Joint Statement by the participants in the discussions and the July 2000 signing of an Executive Agreement between the United States and Germany establishing a foundation funded with 10 billion DM, contributed jointly by the German Government and German companies, to be used to compensate individuals who suffered at the hands of German companies during the Nazi era. Agreement Concerning the Foundation 'Remembrance, Responsibility and the Future,' (Foundation Agreement), 39 Int'l Legal Materials 1298, 1303 (2000). A similar Executive Agreement was signed by the United States and Austria, see Agreement between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace and Cooperation" (Reconciliation Fund Agreement), 40 Int'l Legal Materials 523 (2001), and another agreement addressing Holocaust-era claims was signed between the United States and France, and a Joint Statement was issued by the United States and Switzerland. See American Ins. Ass'n v. Garamendi, 539 U.S. 396, 406-408 & nn. 2-3 (2003).

As part of the Foundation Agreement, the United States agreed to inform its courts that "it would be in [its] foreign policy interests \* \* \* for the Foundation to be the exclusive remedy and forum for resolving [Holocaust-era] claims asserted against German companies." The United States also agreed to "use its best efforts" to promote the objectives of the agreement, including the

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The government file a submission saying that that does continue to be the policy, and Civil, Mr. Hallward-Driemeter and I agree. We also agree that the long-articulated policy applies to insurance claims against Generali, an Italian company, even though the U.S. did not enter into an Executive Agreement with Italy.

All of the class actions and all but two of the individual claims that were consolidated in SDNY and were one before CA2 have settled. There is reason to think

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achievement of an "all-embracing and enduring legal peace" with respect to such claims. The Reconciliation Fund Agreement and accompanying Joint Statement similarly establishes that the United States believes Austria's General Settlement Fund (GSF) should be the exclusive remedy for all Holocaust-era claims against Austrian companies and that the United States' foreign policy supports an "all-embracing and enduring legal peace" for Austria and Austrian companies in favor of the remedy provided by the GSF. The United States did not maintain in the Foundation Agreement or Reconciliation Fund Agreement that its foreign policy interests would "in themselves provide an independent legal basis for dismissal," but the United States did undertake to file statements of interest informing United States courts "that U.S. policy interests favor dismissal on any valid legal ground." Garamendi, 539 U.S. at 406 (quoting Foundation Agreement).

With respect to insurance claims, the Foundation Agreement specified that such claims against German insurance companies were to be handled according to the procedures established by the International Commission on Holocaust Era Insurance Claims (ICHEIC), with a total of DM650 million allocated to paying approved claims as well as a "humanitarian fund" to be administered by ICHEIC. The Austrian GSF also covered insurance claims. See Garamendi, 539 U.S. at 408 n.3. Although the German and Austrian agreements expressed the United States' foreign policy that the ICHEIC process should be the exclusive remedy for Holocaust-era insurance claims against German and Austrian companies, those agreements did not create ICHEIC. Rather, ICHEIC was "a voluntary organization formed in 1998 by several European insurance companies, the State of Israel, Jewish and Holocaust survivor associations, and the National Association of Insurance Commissioners, the organization of American state insurance commissioners," and was chaired by former Secretary of State Lawrence Eagleburger. Id. at 406-407. ICHEIC was set up "to provide information about unpaid insurance policies issued to Holocaust victims and settlement of claims brought under them," and the organization established "procedures for handling demands against participating insurers," including a system for researching and publishing unpaid policies, investigating the current status of policies for which claims were made, a valuation process for paying claims, and "relaxed standards of proof." Id. at 407.

Generali, an Italian insurance company that is the defendant in this litigation, was one of the founding participants in the ICHEIC process. Generali committed \$100 million to pay Holocaust-

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this litigation in U.S. courts is almost over, and there is no reason to change course now.

Yesterday, after a meeting with counsel for one of the plaintiffs' counsel, we discussed with the legal adviser and civil what such a filing should look like, and there was general agreement on its contents. See pp. 7-8, intra. We must notify CA2 by August 28 whether the U.S. intends to file. I recommended that we inform

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era claims through ICHEIC, and, through ICHEIC, Generali published information relating to 43,000 unpaid policies of Holocaust victims. Generali's participation in ICHEIC was voluntary, and no executive agreement was entered into between the United States and Italy. Nonetheless, Deputy Secretary of the Treasury Stuart Eizenstat and other high-ranking government officials have repeatedly stated that the United States' policy that ICHEIC "should be considered the exclusive remedy for resolving insurance claims from the World War II era." In re Assicurazioni Generali, 340 F. Supp. 2d 494, 504 (S.D.N.Y. 2004) (Generali II) (quoting Eizenstat statement to House Committee on Banking and Financial Services); ibid. (Eizenstat testimony to Senate Committee on Foreign Relations that a company's participation in ICHEIC should give it "'safe haven' from sanctions subpoenas, and hearing relative to the Holocaust period"); ibid. (Letter of Deputy Secretary of State Richard Armitage that the U.S. "continues to support the ICHEIC and believes it should be viewed as the exclusive remedy for unresolved insurance claims from the National Socialist era and World War II").

2. Several class actions and some 27 individual suits filed against Generali in United States courts (some of which were filed in state court and removed on the basis of diversity jurisdiction), were consolidated before then-Judge Mukasey in the Southern District of New York. The complaints allege a variety of causes of action, including under state laws that create causes of action and extend statutes of limitation for claims on Holocaust insurance policies in particular, state unfair business practices statutes, international law, and common law principles of contract, unjust enrichment, and the duty of good faith and fair dealing. See Generali II, 340 F. Supp. 2d at 508 (Appendix).

In 2002, Judge Mukasey considered and denied Generali's motion to dismiss on forum non conveniens grounds. In Re Assicurazioni Generali, 228 F. Supp.2d 348 (S.D.N.Y. 2002) (Generali I). He held that ICHEIC was not an adequate alternative forum because it was a "private, nongovernmental form that [the defendants] both created and control," id. at 355, 356, and because "there are questions about ICHEIC's continued viability as a forum," id. at 357.

In 2003, the Supreme Court issued its opinion in Garamendi. In that decision, the Court held that California's Holocaust Victims Insurance Relief Act was preempted because it conflicted with the foreign policy of the Federal Government as demonstrated in the Executive Agreements. 539 U.S. 420-425. The Court reasoned that its recounting of "negotiations toward the three settlement agreements is enough to illustrate that the consistent Presidential foreign policy has been to encourage European governments and

CA2 that we do intend to file. CA2 has allowed 60 days after that to actually file a brief. I recommend that you authorize a filing, subject to approval of the brief as the details are worked out in the drafting.

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companies to volunteer settlement funds in preference to litigation or coercive sanctions." Id. at 420. The Court relied on the Executive Agreements as "exemplars" of the government's position, but cited as well the more general statements of Deputy Secretary Eizenstat quoted above that "[t]he U.S. Government has supported [the ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era." Id. at 422. The majority specifically took issue with the dissent, which criticized the majority for relying on "Executive Branch expressions of the Government's policy" other than formal Executive Agreements or statements by the President. Id. at 423 n.13.

Following the Garamendi decision, the Judge Mukasey ruled on Generali's motion to dismiss on preemption grounds. The district court ruled 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" and because "[p]laintiffs' ancillary claims, in turn, are not actionable because it appears that they do not allege any cognizable injury other than that caused by Generali's non-payment of benefits, redress for which is committed to ICHEIC." Generali II, 340 F. Supp.2d. at 497. The court held that the Executive's stated policy not only preempted state laws specific to Holocaust claims, but also to "the benefits claims arising under generally applicable state statutes and common law as well as customary international law. 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." Id. at 501. The court also held that the Executive's policy and Garamendi decision extended to Generali, despite the fact that there was no Executive Agreement with Italy. The court noted that Generali was one of the petitioners in Garamendi, that the Supreme Court had frequently referred to "European insurers," rather than German and Austrian insurers, and that senior Executive Branch officials, including Deputy Secretary Eizenstat and State Department officials had stated the United States' policy in terms of support for ICHEIC as the exclusive remedy for unresolved insurance claims, not just for companies covered by the Foundation Agreement or Reconciliation Fund Agreement. Id. at 503-504. The court noted that the United States had not filed a statement of interest in the case, but attributed that fact to "an unwillingness to act on behalf of a private company absent a government-to-government agreement encompassing claims against the company in question." Id. at 506-507. The court observed that Executive Branch officials had said that "the U.S. government could not be

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expected to intervene in the U.S. courts on behalf of Generali, since there was not governmental connection." Id. at 507.

3. Plaintiffs appealed. While the case was pending on appeal, ICHEIC discontinued its operations, because its claims date had long passed and the filed claims were resolved. Also during the appeal, Generali reached a settlement agreement with counsel in the class actions under which Generali agreed to reopen the period for filing claims, which would be resolved under the same terms as ICHEIC processed claims, but with ultimate supervision by the district court, and that Generali would pay an additional \$35 million to compensate the new claimants. The district court, after a remand from the court of appeals, approved the settlement, and the court of appeals affirmed. As a consequence of the class settlement, only twenty-seven individual claimants' cases remained pending. Subsequently, all but two of the remaining individual claimants settled. (In addition to the two plaintiffs whose appeals remain pending, an approximate 200-300 individuals who opted-out of the class action settlement might still seek to file individual claims, especially if the court of appeals reverses the district court's order).

On August 1, 2008, after oral argument in the case had already been held, the Clerk of Court sent a letter to the Secretary of State asking for the Executive Branch's advice on "whether court adjudication of these Holocaust era claims against Generali would conflict with the foreign policy of the United States." 8/1/2008 Letter of Catherine O'Hagan Wolfe 1; see id. at 2 ("whether adjudication of these suits by a court of the United States would conflict with the foreign policy of the United States"). The court acknowledged the United States' statement in its Garamendi amicus brief that ICHEIC "should be recognized as the exclusive remedy for all insurance claims that date to the Nazi era," but questioned "whether this continues to be Government policy, whether Government policy on this question is influenced by the fact that ICHEIC is no longer accepting claims, and whether that policy today encompasses insurers from countries (like Italy) not covered by executive agreements, as against companies from countries (like Germany and Austria) that are." Ibid.

Your predecessor, Solicitor General Garre, authorized an amicus filing to respond to the Second Circuit's inquiry. The government's October 30, 2008, amicus letter brief explained that the United States' policy continued to favor regarding ICHEIC as the exclusive forum for claims within its purview, that the fact that ICHEIC was no longer accepting new claims did not alter that policy, and that the government's foreign policy extended to Generali, which participated in ICHEIC voluntarily rather than

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pursuant to an Executive Agreement. 10/30 Br. 1. The letter brief expressly took "no position on whether plaintiffs' claims are preempted by [the United States'] foreign policy in light of" Garamendi, except to state our view that state statutes creating Holocaust-specific causes of action were preempted. 10/30 Br. 1-2.

Counsel for one of the plaintiffs submitted a supplemental filing in response to the government's brief arguing that the brief's statement of the government's policy was contradicted by the government's characterization of the German Foundation Agreement in a 2000 amicus brief filed in the Ninth Circuit (shortly after the German Foundation Agreement was signed).

On July 20, 2009, the Second Circuit Clerk issued a further letter on behalf of the panel inquiring "whether, in the new administration, the answer of the Executive Branch would be the same as communicated in the October 30, 2008 letter."

DISCUSSION

I agree with the unanimous recommendations that the United States should file a response to the inquiry from the court of appeals informing it that the foreign policy of the United States remains the same as that articulated in the October 30, 2008 letter. As the State Department recommendation makes clear, the United States is continuing its extensive efforts to "engag[e] countries and other relevant parties in voluntary compensation programs." 9/18/2009 letter of Legal Adviser Koh at 1. Indeed, in June 2009, the United States engaged in a Holocaust assets conference in which the United States and other participants agreed to establish the European Shoah Legacy Institute to facilitate intergovernmental efforts to develop restitution and compensation programs in Central and Eastern Europe. As the State Department explains, "[o]ur ability to continue to negotiate and facilitate successful compensation agreements and other alternative programs to settle Holocaust-era claims would be undermined if litigation eroded the status of ICHEIC as the exclusive remedy for Holocaust-era insurance claims." Ibid.

The Civil Division recommends filing a short submission with four elements: (1) an affirmation that the United States' foreign policy continues to be that ICHEIC should be regarded as the exclusive forum and remedy for claims within its purview, including claims against Generali, despite the absence of an executive agreement; (2) a brief additional explanation of the basis for government's foreign policy; (3) a discussion of the June 2009 Holocaust assets conference as further evidencing and supporting the government's foreign policy; and (4) a brief explanation why

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the government's October 2008 letter brief is not inconsistent with the 2000 brief to the Ninth Circuit.<sup>1</sup>

I agree that a limited filing along those lines is appropriate. I recommend that the filing not attempt to be as extensive as the October 2008 filing, for fear that we will otherwise risk the Second Circuit trying to read significance into every discrepancy between the two briefs. I also believe that the letter should again refrain from addressing the question whether the government's foreign policy provides a basis for holding the plaintiffs' claims preempted. We did not address that issue in our October 2008 brief, and the supplemental request appears to be limited to asking the government to confirm that the foreign policy itself remains in force.

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<sup>1</sup> The relevant statements in the government's 2000 brief responded to and contradicted contentions by the insurance company plaintiffs that in the German Foundation Agreement the United States had undertaken a "duty to achieve legal peace for German companies" or "itself \* \* \* preclude[s] individuals from filing suit on their insurance policies in court." See Jan. 8, 2009 letter of Samuel Dubbin to Catherine O'Hagan Wolfe 2 (quoting government's 2000 brief at 7-9). It is hard to see how the October 2008 letter brief could be inconsistent with the quoted language from the 2000 brief. The quoted language spoke to the legal consequences of the German Foundation Agreement, whereas the 2008 letter brief addressed only the foreign policy of the United States and disavowed taking a position on the question whether plaintiffs' claims were foreclosed as a legal consequence of that policy. To the extent the 2008 letter brief did address the legal consequences of the German Foundation Agreement, it quoted the language of that Agreement (as the 2000 brief did) as providing that "[t]he United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal." October 2008 Letter Br. at 5. In Garamendi, the Supreme Court noted that provision in the German Foundation Agreement and characterized it as merely recognizing that the determination whether there was a legal basis for dismissal was "an issue for the courts." 539 U.S. at 406.



U.S. Department of Justice  
Civil Division

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AUG 20 2009

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MEMORANDUM FOR THE SOLICITOR GENERAL

Re: In re Assicurazioni Generali, Nos. 05-5612-cv, 05-5310-cv (2d Cir.)

TIME LIMITS

For the second time in this appeal, the court of appeals invited the government's views, and it asked the government to notify it by August 28, 2008, whether it would file a supplemental amicus brief. If the government chooses to file a supplemental brief, any brief would be due by October 27, 2009.

RECOMMENDATIONS

The State Department recommends in favor of further amicus participation.

The U.S. Attorney's Office recommends in favor of further amicus participation.

I recommend in favor of further amicus participation.

QUESTIONS PRESENTED

Whether the government continues to adhere to the position it took in the October 30, 2008 letter brief it previously filed in this case.

STATEMENT

More background is available in the attached letter brief we filed in this case in October 2008. In short, this consolidated multi-district litigation involves claims brought by Holocaust survivors, or their heirs, seeking to recover on insurance policies issued in Europe before or during the Nazi era. The defendant, Assicurazioni Generali ("Generali"), is a large Italian insurance company that sold numerous policies in that era. The district court held that plaintiffs' claims were preempted by federal foreign policy, which favors exclusive resolution of such claims by the International Commission on Holocaust Era Insurance Claims (ICHEIC).

Plaintiffs appealed and the case was argued to a panel of the Second Circuit. In August 2008, after argument, the court sent a letter to the government asking whether “adjudication of these suits . . . would conflict with the foreign policy of the United States.” We filed a letter brief on October 30, 2008, confirming that adjudication of these suits conflicted with U.S. foreign policy.<sup>1</sup> However, with one narrow exception, we declined to take a position on whether that meant that plaintiffs’ claims were preempted.<sup>2</sup>

After we filed our letter brief, plaintiffs were given the opportunity to provide a supplemental submission, which they did in December 2008. One plaintiff also filed an additional supplemental filing, in which he claimed that our October 2008 brief was inconsistent with the position DOJ took in a brief filed in 2000 in *Gerling v. Low*, 240 F.3d 739 (9th Cir. 2001). Counsel for that plaintiff also sent a letter to Attorney General Holder, and Acting Solicitor General Kneeder, asking them to withdraw the government’s October 2008 brief in light of the alleged inconsistency. DOJ and the State Department both believed that there was no inconsistency, and the government did not withdraw its brief or make any further court filings.

Roughly six months later, on July 29, 2009, the court sent follow-up letters to the government. (One was addressed to the Solicitor General’s Office, the other addressed to Secretary of State Clinton). In the letters, the court stated that it wished to know “whether, in the new administration, the answer of the Executive Branch would be the same as communicated in the October 30, 2008 letter.” Within 30 days, the court asked to be notified whether the government will respond. If the government elects to respond, the court has requested that we submit something within 60 days thereafter.

I recommend that you authorize the government to submit a response to the court’s question. If you so authorize, we will promptly notify the court that we will be filing something within the next 60 days.

As the State Department explains in its recommendation, U.S. foreign policy on this issue has not changed since the October brief was filed. Nonetheless, the State Department would like us to respond to the court’s letter, which would allow us to discuss additional developments and confirm that our policy remains the same. We agree with the State Department that some sort of further submission would be helpful to the panel.

It is anticipated that our ultimate submission would include the following:

- An affirmative statement that the government’s foreign policy has not changed.

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<sup>1</sup> There was one minor exception to that statement. See U.S. Letter Br. at 9 n.5.

<sup>2</sup> The narrow exception pertained to those few claims based on special state Holocaust laws that singled-out and gave special treatment to claims involving events in a foreign country. See U.S. Letter Br. at 9-10.

- A brief additional explanation of why the government believes that its foreign policy is likely to advance the interests of Holocaust survivors and their heirs.
- A discussion of the results of the June 2009 Holocaust assets conference, and why those results further confirm our foreign policy.
- A short discussion of the government's 2000 brief in *Gerling*, and an explanation of why the statements in that brief are entirely consistent with the position we took in the October 2008 brief.

To be sure, the issues involved are somewhat nuanced, and how we phrase these points will require careful editing and further discussions between the Department of Justice and the State Department. Nonetheless, there is agreement that some sort of additional filing is called for, and we therefore ask that you authorize an additional filing, and allow us to then notify the court of our intention to do so.

CONCLUSION

For the foregoing reasons, I recommend that you authorize an additional amicus filing.

TONY WEST  
Assistant Attorney General  
Civil Division

By:



Beth S. Brinkmann  
Deputy Assistant Attorney General