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Nuremberg in America: Litigating the Holocaust in United States Courts

Michael J. Bazyler

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ARTICLE

NUREMBERG IN AMERICA: LITIGATING THE HOLOCAUST IN UNITED STATES COURTS

Michael J. Bazyler *

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* Professor of Law, Whittier Law School; Research Fellow, Holocaust Educational Trust, London, U.K.; Associate, Davis Center for Russian Studies, Harvard University. B.A., 1974, University of California, Los Angeles; J.D., 1978, University of Southern California Law Center. Portions of this article were delivered on April 12, 1999 at the Seventh Annual Austin Owen Lecture at the University of Richmond School of Law, Richmond, Virginia. See Michael J. Bazyler, Litigating the Holocaust, 33 U. RICH. L. REV. 601 (1999).

This article is dedicated to the members of The "1939" Club, that heroic group of Holocaust survivors who, with their youthful energy and passion, provided me with the inspiration and motivation for this project.
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"The Holocaust was not only the greatest murder, it was the greatest theft in history."

–Deborah Senn, Washington State Commissioner of Insurance and former chair of the Working Group on Holocaust and Insurance Issues of the National Association of Insurance Commissioners.¹

"There can be no moral closure on the worst crime of this century, of this millennium and possibly of all world history. There can only be an effort to make some moral recompense to do imperfect justice to those who still survive."

–Stuart E. Eizenstat, U.S. Deputy Treasury Secretary and Special Representative of the President and the Secretary of State for Holocaust Issues.²

I. INTRODUCTION

The phrase “opening the floodgates of litigation” connotes a pejorative meaning in American legal argument. Most often, it is used by courts as a reason not to allow a certain case to proceed for fear that it would overburden both courts and society with a new class of lawsuits.³


In this article, the term has a positive meaning. It accurately describes a recent—and surprising—phenomenon of suits suddenly being brought in U.S. courts by survivors of the Holocaust and their heirs to recover compensation for losses suffered on the eve of, or during, World War II.

The beginning date of this phenomenon can be traced to October 1996, when Holocaust survivors and their heirs filed a federal class action lawsuit in New York against the three largest Swiss banks stemming from the defendant banks' alleged failure to return monies deposited with them during World War II.

Since then, the floodgates of litigation have opened, with over fifty additional civil lawsuits filed in both federal and state courts against various foreign and American defendants—both corporate and individual—arising from Holocaust-era events.

4. The “Holocaust” is:
   the term that Jews themselves have chosen to describe their fate during World War II. At the most superficial level, the word “holocaust” means a great destruction and devastation, but its etymological substratum interposes a specifically Jewish interpretation. ... The Holocaust, then, becomes another link in the historic chain of Jewish suffering.


5. The term “on the eve of, or during, World War II” is used in this article to refer to events between 1933 and 1945, specifically the period from January 1933 (when Hitler became Chancellor of Germany), to May 1945 (when Germany unconditionally surrendered).

6. As more fully described infra in Part III, the claims made against the Swiss banks were not only for their allegedly wrongful withholding of monies belonging to Holocaust survivors and their heirs, but also included claims for disgorgement of profits allegedly earned by the banks in receiving assets looted by the Nazis from their Jewish victims and goods produced by Nazi slave labor.

7. For a list of the lawsuits filed as of February 1, 2000, see infra Appendix A. The author has been informed by plaintiffs' attorneys in the various cases already filed that additional lawsuits are forthcoming. According to New York attorney Edward Fagan, one of plaintiffs' attorneys: "The same way the Nazis marched across Europe and plundered from all the survivors, we're going to march back across Europe in the opposite direction and take all that money back." Michael Hirsh, After 50 Years, A Deal, NEWSWEEK, Aug. 24, 1998, at 41. For a general discussion of such suits both in the United States and abroad, see Josh Karlen, WWII Suits Clog Courts Worldwide, Nat'l L. J., Aug. 31, 1998, at 1.

   In 1998, two legal conferences were held to discuss the ongoing Holocaust-era
The filing of such lawsuits only now—over one-half century after the events took place—is astounding. In the history of American litigation, a class of cases has never appeared in which so much time had passed between the wrongful act and the filing of a lawsuit.

In contrast to the recent flood of lawsuits, only ten suits were filed in American courts from 1945 to 1995 stemming from damages suffered during the Holocaust-era.


8. See David Rohde, Atrocities of the Past Now Mined by Some Seeking Justice, Profits, HOUS. CHRON., Sept. 20, 1998, at 34. (“Fifty-three years after it ended, the Second World War is spawning a new form of international justice that victims hail as long overdue.”).

9. American litigation dealt with this phenomenon of a long time-lag between the wrongful act and the filing of suits in the DES litigation in the 1970s and 1980s. See generally Sindell v. Abbott Lab., 607 F.2d 924 (Cal. 1980). In the DES litigation, daughters were suing drug manufacturers for injuries suffered by them as a result of their pregnant mothers taking the drug DES. See id. at 925. The DES daughters were able to discover the danger of the drug to them (cervical cancer) only upon reaching adulthood. See id. The courts used the “discovery rule” to toll the statute of limitations and, thereby, hold that the claims of the adult daughters were not time-barred. See, e.g., Diamond v. E.R. Squibb & Sons, Inc., 397 So. 2d 671, 671-72 (Fla. 1981). The case precedent established by the DES litigation is now being used by Holocaust survivors and their heirs to file the lawsuits discussed here. See discussion and notes infra Part III. (discussing claims against the Swiss).

10. The question of why so few suits were filed by Holocaust victims in the first fifty years after World War II is beyond the purview of this article. It is noteworthy, however, that an important factor that makes a Holocaust lawsuit brought in the United States viable is the victory achieved by the human rights bar in the last two decades that convinced American courts that human rights victims injured abroad can sue in the United States. That step began with Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), the landmark Second Circuit opinion that held the Alien Tort Claims Act (“ATCA”), 28 U.S.C. § 1350 (1994), can allow a victim of state-sanctioned torture to bring suit against the torturer in the United States, even though the torture took place on foreign soil. See Filartiga, 630 F.2d at 878.


Without the groundwork laid out by these cases and the TVPA legislation, the recently-filed Holocaust suits, seeking compensation for damages inflicted in Europe over one-half century ago and sometimes filed by foreigners, would have been "laughed out of court."

Political and social changes also have had a great deal to do with the timing being
The filing of such suits at the close of the twentieth century presents the last opportunity for the elderly survivors of the Holocaust to have their grievances heard in a court of law. Since the Holocaust took place in Europe, courts in European countries may appear on first blush to be the logical choice for such Holocaust-era suits. However, as with almost all transnational litigation, the highly-developed and expansive system of justice in this country suggests that the United States remains the best forum for the disposition of such claims. It is a tribute to the U.S. system of right for filing the Holocaust-era suits. As explained in an interview by Abraham Foxman, head of the Anti-Defamation League and himself a Holocaust survivor:

We have to remember why . . . we're dealing with it now . . . . [T]here are some practical reasons, and that is, after 50 years, the British opened some of their books. The Soviet Union's disarray has made more documents available . . . .

But there's another reason that we didn't deal with this issue for 50 years—because the trauma of the human tragedy was so tremendous, so enormous, so gargantuan, that nobody wanted to talk about material loss for fear that it would lessen the human tragedy. Because when you begin talking about property, then what about life? And so for at least two generations—yeah, Israel decided to take reparations, it needed it—but individually we didn't deal with it. Not that we didn't know that there were bank accounts, that there was insurance, that there was property. My mother's family had a factory in Warsaw. My father had some stores in Baranowicz. But nobody ever raised it. Nobody ever said, look what we lost. I don't remember conversations of material loss. Now I realize how significant the loss was, but nobody talked about it. Because what they talked about was that they lost 16 members of their family.


11. See Martin Rosenberg, Papers Show Nazi Misuse of Treasures, KAN. CITY STAR, May 15, 1998, at C3 ("New attention is being focused on Nazi robbery of Jewish and European assets as the century draws to a close and Holocaust victims become fewer."). There are approximately 100,000 survivors of the Holocaust still alive in the United States, and 360,000 more in Israel. See Tom Tugend, Jewish Leaders Optimistic about Swiss Settlement Offer, JERUSALEM POST, Aug. 14, 1998, at 5. The average age of the survivors is 81. See John J. Goldman, Insurer OKs $100-Million Holocaust Payoff, L.A. TIMES, Aug. 20, 1998, at A7.

According to the World Jewish Congress, Jewish losses during World War II ranged from $23 billion to $32 billion as of 1945. See Marilyn Henry, U.S. Report on Neutral Countries' War-time Conduct Due Tomorrow, JERUSALEM POST, June 1, 1998, at 3. However, according to Neil Sher, former director of the Justice Department's Office of Special Investigations that investigates Nazi war crimes, all estimates of losses should be suspect, since "it's impossible to know how much was plundered. We can only make rough estimates." Henry Weinstein, This is a Campaign for Truth . . . for Justice; Conference: Efforts to COMPENSATE Holocaust Survivors for Financial Losses Are Discussed, L.A. TIMES, Mar. 2, 1998, at A3 (reporting on the Nazi Gold and Other Assets of the Holocaust Conference held at Whittier Law School).

12. From the point of view of defendants, such an expansive and sophisticated system of justice makes courts of the United States overly "plaintiff-friendly," providing large awards in cases where a foreign forum would provide either a nominal remedy or no remedy at all. See GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS, COMMENTARY AND MATERIALS 3-5 (3d ed. 1998). Defendants, therefore, even domestic ones, will invariably attempt to shift the suit to a foreign forum. "The choice of forum has . . . become a key
justice that our courts can handle claims that originated over fifty
years ago in another part of the world. Long-established principles
of judicial jurisdiction, choice-of-law, equity, our independent
judiciary, the American system of jury trials, and American-style
discovery, make the United States the most attractive (and, in most
cases, the only) forum in the world where Holocaust-era claims can
be heard today.

This article examines the major lawsuits filed to date, in U.S.
courts, involving claims for lost assets or wrongful activities that
took place in Europe during World War II. 13

strategic battle fought to increase the chances of prevailing on the merits." Allan R. Stein,
Forum Non Conveniens and the Redundancy of Court-Access Doctrine, 133 U. PA. L. REV. 781,
783 (1985).

As a British jurist wryly observed: "As a moth is drawn to the light, so is a litigant
drawn to the United States. If he can only get his case into their courts, he stands to win a

For a short comment on the differences between law in the United States and Europe
in dealing with Holocaust-era claims, see Detlev F. Vagts, Restitution for Historic Wrongs,

13. Outside the purview of this article are the lawsuits now being brought in U.S. courts
against Japanese corporations for their use of slave labor during World War II, and claims
being made against Japan for its wartime atrocities in Asia. For a list of the lawsuits as of
January 1, 2000, filed by victims of wartime Japan, see Japan, U.S. and World War II: The
lawsuit.htm>. The claims being made against Japan appear to be the next wave of litigation
in U.S. courts arising out of World War II. As one article states,

Justice or extortion? The transpacific perception is widening as stunned
Japanese corporations confront a tsunami of lawsuits filed in U.S. courts by
Allied prisoners of war and others who say they were used as forced laborers
during World War II.

And the hostilities over history are likely to bring more bad blood in
the coming months as some of the attorneys [involved in the Holocaust
litigation] turn their legal guns on the Japanese corporations that allegedly
profited from the crimes of the imperial war machine.

Sonni Efron, Pursuit of WWII Redress Hits Japanese Boardrooms, L.A. TIMES, Jan. 10, 2000,
at A1; see also Abraham Cooper, Tokyo Must Address the Actions of Its Wartime 'Killing
Machine', L.A. TIMES, Apr. 26, 1999, at B3 (providing an op/ed editorial by the Associate
Dean of the Simon Wiesenthal Center); Shirley Leung, Suit Will Test State Law on War Labor,
WALL ST. J., Oct. 27, 1999, at CA1; Doug Struck & Kathryn Tolber, WWII Vets Revive
Grievances with Japan, WASH. POST, Jan. 19, 2000, at A17; Mike Tharp, Past-due Bills for
Japan, U.S. NEWS & WORLD REP., Feb. 7, 2000, at 30; Teresa Watanabe, Japan's War Victims
of the plaintiffs' attorneys in the Japanese litigation, see Japanese WWII Claims (visited Feb.

Without a doubt, the lawsuits against the Japanese multinationals for their wartime
activities came as a direct result of the earlier litigation against the European corporations.
Aging victims of Japan's wartime activities began filing their lawsuits in U.S. courts only
after seeing the successes achieved by their counterparts in the Holocaust litigation.
Part II will discuss the civil cases filed after World War II through 1996. As will be shown, the number of such cases filed for the first fifty years after the Second World War are few, less than one dozen.

Cases filed beginning in 1996, with the emergence of modern Holocaust-era litigation, can be divided into five types. Part III will discuss the first type: claims filed against Swiss governmental and private entities. Three categories of claims were made against the Swiss. First, private Swiss banks were accused of failing to return
monies deposited with them for safekeeping by victims of World War II. These depositors were primarily, but not exclusively, Jews.\footnote{15}

3, 2000) <http://www.milberg.com>. Many of these law firm Web sites contain useful links to other private and government sites dealing with Holocaust restitution.


The evidence exposing Switzerland's role during World War II has transformed its image throughout the world, and especially in the United States. See John-Thor Dahlburg, The Alpine Glow Fades for Swiss, L.A. TIMES, Sept. 29, 1998, at A1. Switzerland is no longer viewed as a "land populated by peace-loving burghers and peasants, watchmakers, bankers and hoteliers, committed to upholding Switzerland's 'everlasting neutrality,'" as stipulated by the Congress of Vienna in 1815. . . . [and] the land of Heidi and the home of the International Red Cross, 'Europe's pharmacy' and perpetual first-aid station." Amos Elon, Switzerland's Lasting Demon, N.Y. TIMES MAG., Apr. 12, 1998, § 6, at 40. Rather, it is now perceived as a nation that, as a result of its financial dealings with the Nazis, is guilty of profiting from the deaths and misery of others, and for prolonging the war by at least one year, if not longer. See id. (citing U.S. Undersecretary of State Stuart Eizenstat, the leading U.S. official on the Holocaust-assets issue, and Swiss sociologist Jean Ziegler). As chillingly put by one commentator: "History has caught up with William Tell and exposed him as a pimp." Id. at 43 (quoting economist Gian Trepp).

In June 1999, Switzerland unexpectedly lost its bid for the 2006 Winter Olympics, and the loss was blamed on negative publicity generated by the Holocaust-era events. "I never even dreamed that we had such a bad reputation. I heard delegates say they wanted the Swiss to lose. People don't like Switzerland." Clare Nullis, Swiss at Loss Losing 2006 Bid, AP ONLINE, June 22, 1999, available in 1999 WL 17816671 (quoting Swiss Sports Minister Adolf Ogi).


15. The commonly-used term for such lawsuits is the "dormant account" cases, referring to the fact that such accounts have laid dormant in the Swiss private banks with no account activity for the last 55 years. For other law review articles discussing the dormant account claims, including the Swiss bank litigation, see Anita Ramasastry, Secrets And Lies? Swiss Banks and International Human Rights, 31 VAND. J. TRANSNAT'L L. 325 (1998); Stephanie A. Bilenkei, Comment, In re Holocaust Victims' Assets Litigation: Do the U.S. Courts Have Jurisdiction over the Lawsuits Filed by Holocaust Survivors against the Swiss Banks?, 21 MD. J. INT'L L. & TRADE 251 (1997); Jodi Berlin Ganz, Note, Heirs without Assets and Assets without Heirs: Recovering and Reclaiming Dormant Swiss Bank Accounts, 20 FORDHAM INT'L L.J. 1306 (1997).

In December 1999, an independent committee of experts, created by the Swiss Bankers Association and headed by Paul Volcker, the former head of the U.S. Federal Reserve Board, concluded a three-year study of the World War II-era dormant accounts held by the Swiss banks. See INDEPENDENT COMMITTEE OF EMINENT PERSONS, REPORT ON DORMANT ACCOUNTS OF VICTIMS OF NAZI PERSECUTION (1999) [hereinafter INDEPENDENT COMMITTEE OF EMINENT PERSONS]. The so-called Volcker Committee found 53,886 accounts in Swiss banks linked to people persecuted by the Nazis. See id. at 10. The Committee report
Second, both Swiss private institutions and the Swiss government were alleged to have profited during World War II from trading in gold and other assets stolen by the Nazis and from goods made by cautioned, however, that its numbers were imprecise because "[t]here can be no assurance that all possible accounts have been identified or that some have not been misidentified as those of victims." Id. at 6. Nevertheless, even this figure was much higher than the number of dormant accounts the Swiss banks originally claimed to have uncovered. In February 1996, the Swiss Bankers Association announced that it knew of only 775 unclaimed bank accounts opened by foreign clients before 1945. See Veil Lifted on Holocaust Accounts in Swiss Banks, AGENCE FR.-PRESSE, Dec. 6, 1999, available in 1999 WL 26158568.

Moreover, the figure issued by the Volcker Committee (estimating 53,886 accounts) is probably underestimated. As the Israeli newspaper Ha'aretz pointed out, the Committee auditors were "able to examine only four million out of a total of 6.7 million accounts in Swiss banks at the end of the war. Details of the remaining accounts were not kept." Yair Sheleg, Israel: Volcker Panel Numbers Too Low, Ha'aretz (Israel), Dec. 7, 1999, available in 1999 WL 29286184. The auditors then matched the names of holders of the discovered dormant accounts to lists of those who perished in the Holocaust kept by the U.S. Holocaust Museum and the Yad Vashem Holocaust Center in Israel. See id. Both these victims' lists, however, are incomplete. For example, "the list of victims maintained by Yad Vashem includes only about half of all those who died in the Holocaust." Id.

While the Volcker Committee report cleared the Swiss banks of any criminal wrongdoing, the actions of the banks "led the Committee to question whether their duty of due care in their dealings with customers was observed by a number of banks and their officers in the special situations following World War II." INDEPENDENT COMMITTEE OF EMINENT PERSONS, supra, at 14.

In a section entitled "Concluding Comment," that report summarized its findings:

The record is clear, certainly by today's standards, that the handling of these funds was too often grossly insensitive to the special conditions of the Holocaust and sometimes misleading in intent and unfair in result. Our inquiry is one reflection of a willingness by Switzerland to deal with that heritage more forcefully and openly.

Id. at 23.

16. The commonly-referred term used here is "Nazi gold." The term is actually a misnomer, since it implies that the gold belonged to the Nazis. In fact, the gold was not Nazi gold, but gold stolen by the Nazis during their plunder of Europe. The term "Nazi gold," however, has entered such common usage that it will be used throughout this Article. See, e.g., BOWER, supra note 14; CARPOZI, supra note 14; Nazi Gold: The Biggest Heist in History, AGENCE FR.-PRESSE, Sept. 9, 1998, available in 1998 WL 16595258.

Two types of "Nazi gold" are at issue: (1) "monetary gold" stolen by the Nazis from the central banks of the countries they conquered; and (2) "private gold" forcibly taken from the Jewish victims killed by the Nazis during their plunder of Europe. Various reports recently have been issued to finally account for the gold stolen by the Nazis from occupied governments and both Jewish and non-Jewish victims. See WILLIAM SLANG, UNITED STATES AND ALLIED EFFORTS TO RECOVER AND RESTORE GOLD AND OTHER ASSETS STOLEN OR HIDDEN BY GERMANY DURING WORLD WAR II (May 1997 & June 1998) (report issued by the United States government); JONATHAN STEINBERG ET AL., THE DEUTSCHE BANK AND ITS GOLD TRANSACTIONS DURING THE SECOND WORLD WAR (July 30, 1998) (report issued by an independent historical commission created by Deutsche Bank, Germany's largest bank); Switzerland and Gold Transactions in the Second World War (visited Feb. 20, 2000) <http://www.vek.ch/eindex.htm> (report issued by the Swiss government).

The current value of the gold stolen by the Nazis from occupied nations and individuals is estimated to be worth approximately $6 billion. See Martin Rosenberg, Papers Show Nazi Misuse of Treasures, KAN. CITY STAR, May 15, 1998, at C3 (referring to an
slave labor under the Nazi regime. Such claims also have been

estimate made at the 43-nation Nazi gold conference held in London in November 1997).

Recent research has discovered that other nations, besides Switzerland, were involved in trading gold and other assets stolen by the Nazis. See, e.g., John J. Allen, Jr., *Digging for Gold in the Archives*, Nat'l Cath. Rep., Dec. 4, 1998, at 5, available in 1998 WL 14873534 (discussing possible link to the Vatican); Argentina: Seeking Nazi Gold, N.Y. Times, Apr. 27, 1999, at A6 (reporting that Argentina's central bank discovered to have dealt with Nazi-stolen gold during World War II); Anthony Faola, Argentinean Government Commission Lifts Veil of Nazi Activities, Jerusalem Post, May 12, 1999, at 6, available in 1999 WL 9002951; Norway to Pay Shoah Victims, Jewish J., May 5, 1999, at 9 (discussing Norway's creation of a $60 million fund to compensate its Jewish victims); see also Chesnoff, supra note 1, at 232-55 (containing chapter entitled "The Other Neutrals").

In June 1998, the United States government issued a 180-page report focusing on the wartime commercial dealings with the Nazis by the so-called "other neutrals" (besides Switzerland), specifically focusing on Argentina, Portugal, Spain, Sweden, and Turkey. According to then-Deputy Undersecretary of State Stuart Eizenstat, who was in charge of preparing the report:

"Each of the wartime neutrals made a substantial contribution to the economic foundations of the Nazi war effort.... Sweden was clearly among the most helpful of the neutral countries to the German war effort. Not only did it supply Germany with critical war supplies and receive substantial amounts of looted gold, but it gave the Germans significant transit rights across its territory to reach Finland in order to fight against Soviet forces, as well as to facilitate the occupation of Norway."


17. Two other types of accusations have been made against the Swiss for their activities during World War II.

First, Swiss insurance companies, like other insurance companies in Europe on the eve of, or during World War II, sold policies to Jews who eventually perished in the Holocaust. After the death of the victims, the companies refused to make payment on the policies to the victims' heirs. Suits have been filed against these insurance companies in the United States. For a discussion of the Holocaust insurance litigation, including litigation against Swiss insurance companies, see text and notes infra Part IV.

Second, the Swiss have been implicated in profiting from Nazi-stolen art that made its way to Switzerland. According to one source, A report by the [Swiss-government] Bergier commission, published in December, 1998, stated that Swiss dealers and collectors were important traffickers of artworks looted by the Nazis. No one was ever punished and a few even received government compensations when they were obliged to return the art. Some 71 artworks were returned to their legal owners... but Switzerland made no effort to trace other stolen artworks and, according to the report, placed considerable obstacles in the way of claimants.

Analytical Scene: Report on Nazi-Looted Artworks is Published, Economist Intelligence Unit Country Rep.—Switzerland, 1st Quarter, 1999, available in 1999 WL 10723809. For a detailed discussion of the Swiss role in Nazi-stolen art, see Joe Lauria, *A Silent Conspiracy*,...
made primarily, but not exclusively, by Jewish victims.\textsuperscript{18}

Third, the Swiss government was accused of expelling during the war Jewish refugees from Nazi-occupied Europe who sought safe haven in neutral Switzerland, or preventing their entry into the

\begin{footnote}
\textsuperscript{18} In August 1998, the two largest banks in Switzerland, Credit Suisse and Union Bank of Switzerland (UBS), settled the class action lawsuits against them for $1.25 billion, to be paid over three years. The figure represents the largest settlement of a human rights case in United States history. For a discussion of the settlement, see discussion and notes \textit{infra} Part III.C-D.
\end{footnote}
Almost all who were expelled, or were denied entry by Switzerland, died at the hands of the Nazis. Part IV will discuss the second type of Holocaust cases: claims made against various European insurance companies for failure to

19. The subject of Switzerland’s reaction to the plight of Jews seeking safe haven during the war is controversial, and subject to different interpretations. On the one hand, Switzerland admitted 28,000 Jewish refugees during the war, more than were admitted to the U.S. [On the other hand,] it turned away another 30,000. Historians insist that the number was far higher, probably more than 100,000. . . . [Moreover], Switzerland insisted in 1938 that the Nazis stamp Jewish passports [i.e., passports of German citizens who were Jews] with the [letter] “J,” to make it easier to identify Jews at the border and prevent them from entering.


Those Holocaust survivors who were allowed entry are grateful to Switzerland for almost surely saving their lives, as the author has witnessed that emotion in various conversations with such survivors. See generally KEN NEWMAN, SWISS WAR-TIME WORK CAMPS: A COLLECTION OF EYEWITNESS TESTIMONIES 1940-1945 (1999) (containing collection of letters by Holocaust survivors who were granted asylum by Switzerland, expressing their gratitude). The editor of this book, Ken Newman, obtained refuge in Switzerland from 1942-45. See id. at 146-47. Those who were expelled from Switzerland are bitter. See Henry, supra, at 7B (telling story of Samuel Schachne, expelled at age seven with his family from Switzerland to Nazi-occupied France: “[H]e is furious at Switzerland, and believes that Bern owes his family an apology.”). Id.

In December 1999, the Bergier historical commission, created by the Swiss government, issued its report on Swiss policy toward the Jews fleeing Nazi-occupied Europe during World War II. The report concluded:

For persecuted people, the journey to the Swiss border was already fraught with danger. When they reached the Swiss border, Switzerland was their last hope. By creating additional barriers for them to overcome, Swiss officials helped the Nazi regime achieve its goals, whether intentionally or not. There is no indication that opening the border might have provoked an invasion by the Axis, or caused insurmountable economic difficulties. Nevertheless, Switzerland declined the help people in mortal danger. A more humane policy might have saved thousand of refugees from being killed by the Nazis and their accomplices.


20. For further discussion of these claims, see infra note 343 and accompanying text. In January 2000, Switzerland’s highest court dismissed a lawsuit filed by a Holocaust survivor who, during World War II, was handed over by Swiss border guards to the Nazis and then deported to Auschwitz. See Clare Nullis, Swiss Court Rejects Holocaust Suit, AP ONLINE, Jan. 21, 2000, available in 2000 WL 9749442. Plaintiff Joseph Spring, age 73, survived the ordeal but his two cousins, also expelled by Switzerland, perished in the gas chambers. See id. The court, in a 3-2 decision, nevertheless, awarded plaintiff $63,000, the damages he requested, on ethical grounds. See id. Spring was disappointed with the judgment: “An apology is enough if you accidentally step on somebody’s toe when you’re dancing, but it’s a different matter when the active collaboration of Swiss border guards sends people to their death . . . . Justice in my case means recognition that a crime was committed against me.” See id. (quoting Joseph Spring).
pay on policies purchased by victims of the Holocaust during World War II. While the “dormant account” and “Nazi gold” cases against the Swiss have received the most publicity, it is estimated that the claims now being made on these European insurance policies exceed what was lost in monies deposited in Swiss banks.\textsuperscript{21}

Part V will discuss the third type of Holocaust cases: claims made by Holocaust victims and their heirs to art stolen by the Nazis that made its way into private collections and museums in the United States.\textsuperscript{22} The plaintiffs in these cases sought the return of such artworks from the defendants who possessed the pieces. These Nazi-stolen art cases were filed as individual lawsuits,\textsuperscript{22} in contrast to the previous categories, where both individual and class action lawsuits have been filed.

Part VI will discuss the fourth, and most recent, type of Holocaust cases: suits filed against major industrial companies for their use of slave labor during World War II. The slave labor cases present the latest category of Holocaust-era lawsuits filed in the United States. While the overwhelming number of these suits are against German enterprises, other nations' enterprises (including companies in the United States) have been accused of using slave labor in Nazi-occupied Europe during World War II.

\textsuperscript{21} See Marilyn Henry, supra note 11, at 3 (quoting Elan Steinberg, Executive Director of World Jewish Congress).

In August 1998, Assicurazioni Generali, Italy's leading insurance company and the issuer of the largest number of insurance policies to World War II Jewish victims, settled the class action lawsuit against it for $100 million. The settlement, however, was never consummated, and the action against Assicurazioni Generali continued. For a discussion of the settlement and its subsequent breakdown, see discussion and notes infra Part IV.A.2.a.


\textsuperscript{23} For a list of lawsuits, see infra Appendix A. Two cases were recently settled. See id.

In August 1998, the first case scheduled to reach trial for Nazi-stolen art, \textit{Goodman v. Searle}, 96 C 6459 (N.D. Ill. filed Sept. 24, 1996), settled on the eve of trial. The case involved a Nazi-stolen Degas that made its way into the United States and was held by a private collector. For a discussion of the case, see text and notes infra Part V.A.

In June 1999, the second individual lawsuit, \textit{Rosenberg v. Seattle Art Museum}, 42 F. Supp. 2d 1029 (W.D. Wash. 1999), filed in 1998 in federal court in Washington State, also settled at the pretrial stage. The case involved a Nazi-stolen Matisse painting that was being publicly exhibited at the Seattle Art Museum before its checkered history was discovered. For a discussion of the case, see text and notes infra Part V.B.
Part VII will discuss other lawsuits that do not fit within any of the above four categories. These include: (1) suits against German pharmaceutical companies alleging that they profited from cruel medical experiments conducted by the Nazis against Holocaust victims, including children; (2) a suit against Volkswagen for allegedly maintaining a “Nazi nursery” where infants of slave laborers were mistreated and perished; (3) suits against Austrian, German and French banks for allegedly profiting from assets stolen by the Nazis from Jewish victims; and (4) suits against American companies accused of profiting from the Holocaust.

The article concludes with appendices containing a complete list of Holocaust-era suits filed in the United States to date, and a description of recently-enacted federal and state laws dealing with Holocaust restitution. Most of these laws have been promulgated directly as a result of the recent spate of litigation.
As a general rule, victims of the Holocaust seeking compensation against alleged wrongdoers have not been successful in obtaining recovery in American courts.

A total of ten cases involving Holocaust-era claims were filed in the United States between the end of World War II and October 1996, the start of the new era of Holocaust-claim litigation.\(^2\)

This section reviews the most important cases filed during that time period.

A. Generali Insurance Litigation

In 1942, even while World War II was raging, the first Holocaust-era lawsuit was filed in the United States.

Interestingly, the lawsuit was an insurance case filed against Assicurazioni Generali S.p.A. ("Generali"), the giant Italian insurance company against whom numerous federal and state lawsuits are now pending for failure to honor pre-World War II policies purchased by Holocaust victims.\(^25\)

Max Buxbaum, a Czechoslovakian linen merchant, purchased eight life insurance policies from Generali.\(^26\) Generali conducted business throughout Europe and the United States.\(^27\) Each of the policies covered either Max Buxbaum or his sons and named members of the family as beneficiaries.\(^28\) The policies were payable at any of the locations where Generali conducted business, with the policy providing exact payment to be made by "dollar check New York."\(^29\)

Generali refused to pay on the grounds that additional requirements had been imposed by the German Reich government on the collection of life insurance policies by Jews.\(^30\) According to Generali,
the Buxbaums, a Jewish family, did not meet these additional requirements. The court ruled for the Buxbaums, requiring payment on the policies on the basis of standard contract principles.

B. Bernstein Cases

Much like the Generali insurance litigation, the Bernstein cases involved a contract dispute. Arnold Bernstein, a Holocaust survivor, sought compensation for the forcible transfer of his business to a Nazi trustee. Bernstein was the owner of a German shipping line. In January 1937, Bernstein was forcibly taken into custody by Nazi officials and detained in a Hamburg prison. While imprisoned, Bernstein executed documents purporting to transfer the shipping line to a Nazi trustee, Marius Boege. This transfer of interest was made under "duress and unlawful threats of bodily harm, indefinite imprisonment and death." Bernstein was released from prison in July 1939 after friends paid a ransom for his release.

Bernstein filed suit in the United States, seeking to attach the assets of the company that assumed ownership of his business after the illegal transfer. The U.S. Court of Appeals for the Second Circuit refused to address the substantive issues, stating that to do so would require it to pass judgment on the acts of the German government without a clear statement of intent from the U.S. executive branch. The Second Circuit, in a subsequent Bernstein suit, affirmed this decision.

31. See id.
32. See id. at 499-500.
34. See Van Heyghen Freres, 163 F.2d at 247.
35. See id.
36. See id.
37. See id.
38. Id.
39. See id.
40. See id.
41. See id. at 249.
42. See Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatstappij, 173 F.2d 71, 73 (2d Cir. 1949), amended by 210 F.2d 375 (2d Cir. 1954).
The court in both cases looked to the State Department for guidance. Finding none, the courts chose, on the grounds of the Act of State doctrine, not to address the issues.

Following the second Bernstein decision, the State Department issued a press release providing a definite expression of executive policy on the issues involved in the cases. The Second Circuit, on petition to amend its prior mandate, cited extensively from the press release, which reaffirmed U.S. opposition to:

"[F]orible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; stated that it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."

With American policy clearly defined by the Executive Branch, Bernstein's lawsuit could now proceed. The courts became free to address the underlying claims for conversion and damages alleged by Bernstein.

The Bernstein litigation has entered the lore of U.S. case law, with the case discussed in every standard international law text. The litigation has created the so-called "Bernstein exception" to the Act of State doctrine, holding that when the Executive issues a "Bernstein letter," giving a green light to ongoing litigation, a court will not dismiss the case on Act of State grounds.

43. See id. at 74; Van Heyghen Freres, 163 F.2d at 250.
44. The judicially-created Act of State doctrine "allows U.S. Courts to abstain from deciding a case involving an international transaction on the grounds that one of the actors in the transaction is a foreign state." Michael J. Bazyler, Abolishing the Act of State Doctrine, 134 U. Pa. L. Rev. 325, 327 (1986).
45. See N.V. Nederlandsche, 173 F.2d at 74; Van Heyghen Freres, 163 F.2d at 250.
48. See id.
49. For further discussion of the Act of State doctrine and the Bernstein exception, see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432 (1964); see also Bazyler, supra note 44, at 368-70.
C. Handel v. Artukovic

In the 1980s, the first Holocaust-era class action was filed in the United States.

Plaintiffs, elderly Holocaust survivors from Yugoslavia, alleged that defendant Andrija Artukovic, a former pro-Nazi Croatian official who emigrated to the United States after the war, persecuted them. Plaintiffs presented four causes of action before the federal court in California. All were based on international law or foreign law. Plaintiffs alleged violations of the Geneva and Hague Conventions, war crimes in violation of international law, crimes against humanity in violation of international law, and violations of the Yugoslavian Criminal Code.

The federal district court refused to address any of the claims, dismissing the international law claims for lack of subject matter jurisdiction and as barred by the statute of limitations. The Yugoslavian Criminal Code violations were dismissed for limitations problems and because they were in conflict with California law.

The court explained that plaintiffs' international law claims, like their treaty claims, must arise under the laws of the United States for jurisdiction to exist. The court found that plaintiffs may not infer a cause of action from the law of nations, stating that "while international law may provide the substantive rule of law in a given situation, the enforcement of international law is left to individual [nation] states."

Having limited its examination to whether state and federal law provided a remedy to the Holocaust victims, as opposed to international obligations entered into by the federal government, the court found that claims for war crimes and crimes against humanity were

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50. Artukovic served as Commissioner of Public Security and Internal Administration, and later Minister of the Interior, for the Nazi puppet government of wartime Croatia.
52. See id.
53. See id.
54. See id.
55. See id.
56. See id. at 1426.
57. Id. at 1427.
barred by the California statute of limitations. Consequently, the court never addressed the substance of the underlying claims.

D. Princz Litigation

Hugo Princz, a Jewish-American citizen, had the misfortune of living in Eastern Europe when World War II broke out. Princz was taken into custody by the Nazis. He and his family were engaging in business and living in Czechoslovakia when they were arrested. Princz was detained in concentration camps as a slave laborer, and forced on the death march from Warsaw to Dachau. He was rescued from a freight car by American troops at the end of the war, and was the only member of his family to survive.

In 1952, Germany passed the first reparations law, providing pensions for Holocaust survivors. Princz filed a claim for a pension, but was informed that he was not eligible based on a technicality: he was a U.S. citizen at the time of his enslavement and detention. Therefore, under German reparations law, he was not eligible for compensation.

In 1984, Princz sought assistance from U.S. Senator William Bradley in the hope that government intervention on his behalf would change the status of his claim. The German government responded that Princz did not qualify and refused to provide a reparation payment outside the scope of the reparations program.
Princz then sought adjudication in the German courts in 1986. The German Supreme Court held that the claims were barred by the statute of limitations. Not finding relief in German courts, Princz brought his claim against the German government in U.S. federal court.

The German government moved to have the action dismissed on the grounds that the court lacked jurisdiction over the acts of a sovereign state. The district court denied the motion. Judge Stanley Sporkin held that

a United States citizen, who was a victim of the Holocaust, has a constitutional right to proceed in a United States Court against the very nation that subjected him and his family to the most unspeakable and barbarous acts known to humankind. To hold otherwise would complete the stripping of Mr. Princz's most valuable rights of citizenship.

The German government appealed the decision and moved to stay the proceedings until the appeal was decided. In a sharply worded opinion, Judge Sporkin denied the request for the stay, stating that

[It is totally mystifying to this Court why the German Government not only wants to attack this Court's jurisdiction, but also wants to reserve the right to contest the substance of Plaintiff's claim in the event it loses on the jurisdictional issue. Of course, if the German Government wants to try the Holocaust, this Court has no choice but to accommodate its wishes.]

Again, the German government appealed. This appeal was successful, and Princz's case was dismissed.

In an opinion by Judge Ginsburg, the U.S. Court of Appeals for the District of Columbia Circuit first found that the Foreign Sovereign Immunities Act ("FSIA") provides the sole basis for

69. See id.
70. See id. at 25.
71. Id. at 27.
74. Id.
75. See Princz v. Federal Republic of Germany, 26 F.3d 1166, 1176 (D.C. Cir. 1994).
obtaining jurisdiction over a foreign state in federal court." Judge Ginsburg then addressed the applicable exceptions to foreign sovereign immunity found in the FSIA. Finding that neither the commercial activity nor the direct effect exceptions of the FSIA covered plaintiff's claims, the appellate court dismissed the lawsuit on sovereign immunity grounds.

Ultimately, however, Princz won, though not in court. In 1995, one year after dismissal, the German government settled the claim with him and ten other Holocaust survivors who were American citizens during the war for $2.1 million. The settlement came as a result of efforts in Congress to enact legislation that would allow Princz's claim to go forward. Facing prolonged litigation and negative public opinion, the German government wisely opted for settlement.

E. Cases against the Claims Conference

The Claims Conference, made up of the Conference on Jewish Material Claims Against Germany and the Committee for Jewish Claims on Austria, has sustained both bitter criticism and litigation in American courts. The Claims Conference was established in 1951 when West Germany agreed to pay hundreds of millions of dollars in reparations to survivors of the Holocaust. Monies were paid to Israel and to the Claims Conference, which was responsible for the distribution of funds to Holocaust survivors.

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77. Princz, 26 F.3d at 1169 (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989)).
78. See id.
79. See id. at 1172, 1176.
83. See Who We Are, UPDATE (Conference on Jewish Material Claims Against Germany), May-June, 1999, at 4. This newsletter states:

The Claims Conference is an international umbrella organization of 23 major Jewish organizations. Headquartered in New York with offices in Germany, Austria and Israel, it represents world Jewry in negotiations for compensation and restitution from the German and Austrian governments and other entities controlled by the Nazis. The Claims Conference, which was founded in 1951, also is an operating agency that administers compensation funds, recovers
The Agreement between Germany and Israel provided that 450 million Deutsche marks would be paid to the Claims Conference "for the relief, rehabilitation and resettlement of Jewish victims of National-Socialist persecution, according to the urgency of their needs as determined by the Conference."  

Jewish property and allocates funds to institutions that provide social welfare services to Holocaust survivors and preserve the memory and lessons of the Shoah.

Id.

In 1999, the long-time administrator of the Claims Conference, Saul Kagan, resigned after 47 years. See id. at 3. Kagan had been criticized during his tenure, and was replaced by Gideon Taylor, an Irish-born attorney, who aims to improve the performance of the organization. See id.

For criticism of the Claims Conference, see David A. Lash, Poor Justice, L.A. DAILY J., Sept. 19, 1992, at 6. The author, head of a Los Angeles-based legal aid service representing many Holocaust survivors, observes:

The claims conference, however, has not focused on the tens of thousands of faceless, voiceless, individual indigent Holocaust survivors who now so desperately need the safety and salvation that a few hundred dollars a month can bring. Instead, the claims conference finds itself immersed in high profile matters pushed to center stage by the rich and powerful . . . .

The claims conference currently takes more than three years to process claims. The cruel reality of this interminable delay is that many aged and suffering applicants simply do not survive.


In August 1999, the Claims Conference changed its long-standing policy of denying Jewish heirs some of the profits from the sale of Nazi-confiscated property. The above-cited Jerusalem Report articles exposed this policy, which led to its cessation. See After Years of Stonewalling, The Claims Conference Changes Policy, JERUSALEM REP., Aug. 16, 1999, at 4.

The same month, however, a New York state court judge dismissed another lawsuit against the Claims Conference by a Holocaust survivor. See Order Dismissing the Action on Grounds of Forum Non Conveniens, Hammerstein v. Conference on Jewish Material Claims Against Germany, Inc., No. 114355/98 (N.Y. Sup. Ct. filed Aug. 5, 1999). Plaintiff claimed that the Claims Conference unreasonably interfered with and converted property in Germany rightfully belonging to her family that was previously confiscated by the Nazis. See id. at 1-6. The Claims Conference argued that since the property was located in Germany, the suit should be dismissed on the grounds of forum non conveniens. See id. at 1. The court accepted this argument, forcing plaintiff to pursue her remedies, if any, in German courts. See id. Ironically, as the following sections of this article will show, the Claims Conference relied on the same argument that European corporate defendants have raised when sued by Holocaust survivors or heirs in the United States.

As early as 1958, survivors began bringing suits against the Claims Conference for alleged mismanagement of funds. As early as 1958, survivors began bringing suits against the Claims Conference for alleged mismanagement of funds.85 These suits were brought despite a provision in the Israeli-West German agreement requiring arbitration of disputes.86

In the first suit, Tullio Revici, a Holocaust claimant, brought suit in New York state court alleging that the Claims Conference had shown improper favoritism among the beneficiaries entitled to relief.87 Revici asked the New York court to subsume the role of the Claims Conference and to determine a fair and proper amount of compensation for his rehabilitation.88 The New York court refused to hear the claim, finding that Revici was "without a justiciable right capable of enforcement."89

This decision appeared to have settled the matter for several decades. In 1995, the same questions regarding management of the Claims Conference were raised in federal court by Irving Wolf, a Holocaust survivor who alleged that he was denied his rightful compensation by the Claims Conference.90 The district court held that the exceptions to the FSIA articulated by Wolf were not applicable, and that Wolf lacked standing to pursue the claim in federal court.91 The Court of Appeals for the Seventh Circuit affirmed the decision, finding that the agreements governing the Claims Conference failed to establish a legally-protected interest of the plaintiff that was subsequently invaded.92

Other aggrieved claimants attempted to collect from the Claims Conference, asserting more substantial harm. Jacob Sampson brought suit in federal court alleging that the Claims Conference had embezzled or converted funds intended for Holocaust survivors.93 Again, the court found that none of the exceptions to the FSIA were applicable, and that plaintiff lacked standing to pursue the claim.94

85. See Revici, 174 N.Y.S.2d at 827.
86. See id. at 828.
87. See id.
88. See id.
89. Id. at 829.
91. See id. at *13, 14.
92. See Wolf v. Federal Republic of Germany, 95 F.3d 536, 543 (7th Cir. 1996).
94. See id. at 1120.
In 1995, Holocaust survivors brought a class action suit against the Claims Conference, also alleging mismanagement and embezzlement. Plaintiffs sought $40 billion in damages. The complaint asserted that (1) Israel was liable for funds lost to mismanagement and embezzlement; and (2) newly-unified Germany was liable for the reparations that should have been paid by East Germany. The court held that none of the asserted exceptions to the FSIA were met, and that jurisdiction was not created under the Alien Tort Claims Act.

F. Early Nazi-Stolen Art Cases

The first lawsuit involving Nazi-stolen art was filed in the 1960s. Erna Menzel brought suit in New York state court to reclaim a painting by Marc Chagall that was pillaged from her home in Brussels in 1941. The painting was left in the apartment when she and her husband fled from the Nazis. The painting was seized by the Centre for National Socialist Ideological and Educational Research, an organ of the Nazi party. The whereabouts of the painting were unknown between the years 1941 to 1955.

In 1955, the Chagall painting was purchased by defendant Perls from a reputable Paris art gallery. Perls sold the painting to defendant List that same year. It was admitted by all parties that both Perls and List were bona fide purchasers for value. This status alone, however, did not protect the defendants.

First, the court found that even though defendant List purchased the painting in 1955, the statute of limitations did not begin to run until plaintiff asked defendant List for the return of the painting.

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96. See id. at 379.
97. See id.
98. See id.
100. See id. at 806.
101. See id.
102. See id.
103. See id. at 808.
104. See id.
105. See id. at 807.
106. See id.
107. See id. at 809. For severe criticism of this portion of the Menzel decision, see Ashton Hawkins et al., A Tale of Two Innocents: Creating an Equitable Balance between the Rights of Former Owners and Good Faith Purchasers of Stolen Art, 64 FORDHAM L. REV. 49, 71-76
Under this rule, plaintiff's claim for the return of the painting, stolen over two decades earlier, was not time-barred.

The court also found defendant's arguments regarding sovereign immunity inapplicable because the pillage was accomplished by individual Nazis, and not by a foreign sovereign, Nazi Germany. The court, therefore, ordered the Chagall returned to the plaintiff.

Another effort to recover stolen art involved watercolors painted by Adolf Hitler and a catalog of German photographs.

Heinrich Hoffman, Sr., was adjudged at the Nuremberg tribunal to be a profiteer. He was sentenced to jail, and was dispossessed of 80 percent of his property. He retained, however, ownership of the watercolors and photographs in question. These items were in the possession of the U.S. government at the time of the litigation. Previously, the U.S. government used them for evidence at the Nuremberg Tribunal, and later displayed them at the National Archives in Washington, D.C.

Hoffman's heirs discovered the whereabouts of the watercolors when they were advertised as part of a display by the U.S. Army. Plaintiffs sought their return and were denied.

The Hoffman heirs assigned their rights to plaintiffs, who filed suit and initially won. The district court found that when the photographs were originally taken by the U.S. government, the express agreement was that they were held in trust and would be returned when the U.S. government no longer needed them. When the heirs demanded the return of the photographs in 1982 and were denied, the U.S. government, according to the court's opinion,
converted the photographs. The district court held that both the photographs and the watercolors belonged to the Hoffman heirs, and ordered their return.

On appeal, however, the U.S. Court of Appeals for the Fifth Circuit reversed. The appellate court held that the district court was without subject matter jurisdiction to hear the case, and that the claims were also time-barred.

\[\text{119. See id. at 1472.} \]
\[\text{120. See id. at 1473.} \]
\[\text{121. See Price v. United States, 69 F.3d 46, 54 (5th Cir. 1995).} \]
\[\text{122. See id. at 52-53.} \]
III. CLAIMS AGAINST THE SWISS

The claims against the Swiss consisted of: (1) a consolidated federal class action against the three largest Swiss banks for failure to return monies deposited with them during World War II, and for other damages;123 (2) an individual action against the same Swiss banks filed in California state court,124 and (3) a suit against the central bank of Switzerland accusing the bank of accepting looted-assets from Nazi Germany.125

A. Federal Class Action against Swiss Banks

The modern era of Holocaust asset litigation began in October 1996 with the filing of a class action lawsuit against the three largest private Swiss banks—Credit Suisse, Union Bank of Switzerland (“UBS”), and Swiss Bank Corporation—in federal district court in Brooklyn, New York.126 Later that month, a second action was filed against the three banks.127 A third action, also against the same defendants and in the same court, was filed in early 1997.128 The three actions were consolidated in April 1997 and collectively titled In re Holocaust Victim Assets Litigation.129


126. See Weisshaus Amended Complaint, supra note 123, ¶ 1.

127. See Trilling-Grotch Amended Complaint, supra note 123, ¶ 1.

128. See World Council Complaint, supra note 123, ¶ 1.

129. The Weisshaus case was labeled the lead case on the court's master docket. The judge hearing the three cases is The Honorable Edward R. Korman, United States District Judge.
The three actions listed a total of ten plaintiffs and one institutional plaintiff. The ten plaintiffs were either Holocaust survivors or children of victims who perished in the Holocaust. The institutional plaintiff—World Council of Orthodox Jewish Communities, Inc.—the plaintiff in the third lawsuit filed against the Swiss banks, is an association of hundreds of Jewish religious communities comprised of Holocaust survivors and their descendants.

The Swiss class action is important in many respects. First, while it was the second, and not the first, class action filed in the United States involving the Holocaust, it was the first Holocaust-era class action lawsuit to achieve a successful result.

Second, as every experienced international litigation attorney recognizes, the most important stage of an international litigation lawsuit, apart from the trial, is the court's decision whether to grant or deny defendant's motion to dismiss. In the Swiss bank litigation, the defendant banks filed extensive motions to dismiss. The dismissal motions presented every conceivable reason why a Holocaust-era suit should not be adjudicated in U.S. courts. Plaintiffs, in turn, filed extensive briefs to counter defendants' positions. While the arguments were never resolved (the action having settled before the motion to dismiss was decided), attorneys litigating the still-ongoing—and future—Holocaust and other World War II-era restitution suits will find it useful to closely examine the parties' arguments at the dismissal motion stage.

Third, the Swiss bank action resulted in the largest settlement of a human rights case in the history of American litigation. As the first Holocaust-era case to reach the settlement stage, the Swiss bank settlement exposed the various problems associated with determining both how to allocate and distribute funds to elderly Holocaust survivors and other victims of World War II. Associated with the distribution issue, the Swiss bank settlement raised, for

130. See Weisshaus Amended Complaint, supra note 123, ¶¶ 5-14; Trilling-Grotch Amended Complaint, supra note 123, ¶¶ 11-19; Sonabend Amended Complaint, supra note 123, ¶¶ 10-19.
131. See World Council Complaint, supra note 123, ¶¶ 6-7.
132. The first Holocaust-era class action lawsuit was Handel v. Artukovic, 601 F. Supp. 1421 (C.D. Cal. 1985), discussed supra in Part II.C.
133. See infra Part III.A.2.
134. See infra Part III.A.2.
135. See infra note 294 and accompanying text.
136. See discussion and notes infra Part III.D.3.
the first time, the ethical question of whether lawyers working on
Holocaust restitution should be taking a fee for their services.\textsuperscript{137}

Since the issues and problems first encountered in the Swiss bank
litigation are bound to appear in both ongoing and future World War
II-era lawsuits, this section will focus on such issues and problems.

1. Plaintiffs’ Claims

While each of the lawsuits against the Swiss banks alleged
slightly different causes of action, the gravamen of the three
lawsuits was similar. The lawsuits presented three types of
claims.\textsuperscript{138}

a. Dormant Account Claims

Plaintiffs’ first set of claims were based upon “dormant accounts”
or “deposited assets” in the Swiss defendant banks. Thirteen
individual plaintiffs alleged that their family members deposited
monies for safekeeping in one or more of the Swiss banks, or their
predecessors, on the eve of World War II, and that these monies
were never returned by the banks.\textsuperscript{139} Plaintiffs demanded the return
of these monies, compensatory and punitive damages for the banks’
failure to do so for the last fifty years, and imposition of a construc-
tive trust upon these monies.\textsuperscript{140}

The historical background of the dormant accounts claims can be
traced back to Switzerland’s enactment in 1934 of strict bank
secrecy laws.\textsuperscript{141} The laws made the Swiss banks attractive to Jews

\textsuperscript{137} See discussion and notes infra Part III.D.3.c. (discussing how the attorneys were paid
for their work in Holocaust-era litigation).

\textsuperscript{138} Plaintiffs sought to establish three classes of plaintiffs, each based upon one of the
three claims. See Memorandum of Law submitted by Burt Neuborne at 11-12, In re Holocaust
Victim Assets, No. CV-96-4849 (E.D.N.Y. filed June 16, 1997) [hereinafter Neuborne
Memorandum]. For discussions of the allegations made in the lawsuits, see Anita
Ramasastry, Secrets and Lies? Swiss Banks and International Human Rights, 31 VAND. J.
TRANSNatl’L L. 325 (1998); Stephanie A. Bilenker, Comment, In re Holocaust Victims’ Assets
Litigation: Do the U.S. Courts Have Jurisdiction over the Lawsuits Filed by Holocaust
Survivors against the Swiss Banks?, 21 MD. J. INT’L L. & TRADE 251 (1997); Ganz, supra note
123, at 1306.

\textsuperscript{139} See Neuborne Memorandum, supra note 138, at 2. Professor Neuborne, of the New
York University School of Law, is serving as plaintiffs’ co-counsel for each of the three cases.

\textsuperscript{140} See id. at 2-3.

\textsuperscript{141} See id. at 4-6 (discussing the historical background of the dormant account claims).
seeking to shield their assets from the German Nazi government, first in Germany, and later in other countries occupied by the Nazis. To avoid tracing of the accounts, the Swiss banks allowed accounts to be opened in the name of nominees, and also merged deposits into consolidated custodial accounts. As a result, identification of the accounts became more difficult: first, to the Nazis seeking to ferret out accounts deposited by Jews in Germany, Austria, and other occupied countries; and thereafter, to individuals and institutions attempting to locate these accounts.

Plaintiffs claimed that “European Jews . . . poured enormous sums into defendant banks, lured by promises of confidentiality and trustworthiness.” Plaintiffs also alleged that “more than 100 million dollars was deposited by Jews in Swiss banks between 1933-1945.” Moreover, plaintiffs accused the defendant banks of engaging in “obstructive and evasive behavior in seeking to prevent return of the deposited assets for more than 50 years.”

142. See id. at 4.
143. See id. at 5.
144. See id.
145. Id. at 5.
146. Id. at 5-6. Plaintiffs estimated “the current value of the Jewish deposits at substantially in excess of one billion dollars.” Id. at 6 n.4.
147. The three defendant banks—Credit Suisse, Union Bank of Switzerland (“UBS”) and Swiss Bank Corporation (“SBC”)—represent, according to plaintiffs, approximately 75% of the private banks operating in Switzerland between 1933-1945, having acquired their predecessors by merger, acquisition, or transfer. See id. at 9.


148. Neuborne Memorandum, supra note 138, at 2. According to plaintiffs: [S]urvivors of the death camps, and families of those who failed to survive, approached the defendant banks, and their predecessors, in an effort to trace and recover sums deposited by Jews prior to the Holocaust. In one of the tragic moral perversions of recent times, Swiss bankers, including the defendant banks and their predecessors, relied upon the 1934 Swiss bank secrecy laws to frustrate efforts to trace the Jewish deposits; the same bank secrecy laws that had been used to induce Jews to deposit assets in Swiss banks in the first place.

Id. at 7.

Paul Volcker’s Independent Committee of Eminent Persons (“ICEP”) report on dormant prewar accounts, issued in December 1999, see supra note 15, did not go that far in blaming the Swiss banks for their behavior. In a section entitled “Evaluation of Bank’s Conduct,” the report made the following findings:

In setting the record straight, the Committee has come to certain conclusions about the appropriateness of the actions of the Swiss banks in dealing with the accounts of victims of Nazi persecution. Assessing the record as a whole, the committee concluded:

(a) The auditors have reported no evidence of systematic destruction of records of victim accounts, organized discrim-
nation against the accounts of victims of Nazi persecution, or concerted efforts to divert the funds of victims of Nazi persecution to improper purposes; and

(b) There is, however, confirmed evidence of questionable and deceitful actions by some individual banks in the handling of accounts of victims, including withholding of information from Holocaust victims or their heirs about their accounts, failure to keep adequate records, many cases of insensitivity to the efforts of victims or heirs of victims to claim dormant or closed accounts, and a general lack of diligence— even active resistance— in response to earlier private and official inquiries about dormant accounts.

... No less important were various actions resulting in the closing of accounts. Normal fees and charges, assessed on all dormant accounts, were applied even to victims where banks knew or should have known that the account holder was dead or had disappeared leading to eventual closing by exhaustion of the account values. Moreover, long dormant accounts were transferred to the banks’ profit accounts, most without retaining readily available documentation necessary to easily identify the accounts of returning depositors. The criticism, applicable in this case to the treatment of all dormant accounts, of such actions is even more pointed with respect to the extraordinary charges for searches for victims accounts or to close accounts. This criticism also applies to the placing of accounts in fee-free suspense accounts without payment of interest and, in many cases, without adequate documentation. In these cases, tracing of ownership was difficult or impossible, with a consequent greater impact on Holocaust victims whose accounts became involuntarily dormant. These actions... led the Committee to question whether their duty of due care in their dealings with customers was observed by a number of banks and their officers in the special situation following World War II.

... Finally, the Committee also notes that a factor in the indifferent treatment of many claimants to the accounts of victims of Nazi persecution was a fear of embarrassment and litigation arising out of transfers of victims accounts to Nazi authorities after these victims had been coerced into signing transfer papers. At the time, ethical and business dilemmas were plainly created for the bank in this situation. However, the practice apparently adopted after the War by a few banks or bank officials of denying to claimants in such cases all knowledge of the existence of an earlier closed account relationship is impossible to justify.


The Swiss newspaper Dier Bund commented on the findings as follows:

So now we know: Swiss banks don’t hold $6.3 billion belonging to victims of the Nazis, our financial institutions didn’t embezzle victims’ money, they didn’t systematically destroy documents— and, after more than five decades, they still have an astounding quantity of account details. So far, so good.

But if the Swiss Bankers Association and the federal banking commission insist only on seeing a “positive reference”... that smacks of self-delusion, of exactly the sort that Switzerland can no longer afford on this subject.

The Swiss banks didn’t emerge as the devil in Volcker’s verdict— but they were far from innocent lambs...

One can try to dismiss the dozens of cases of improper behavior cited in
Plaintiffs alleged that in 1962 the Swiss government promised to return to Jews the assets deposited by them in the Swiss banks. However, the Swiss did not keep their promise. According to plaintiffs:

Of the vast sums that plaintiffs will prove flowed into Swiss banks in the years before the Holocaust, only a pittance has ever been acknowledged. The vast bulk of the assets have simply disappeared into the Swiss banking system, constituting the single most egregious example of unjust enrichment in banking history.

But the banks' postwar behavior in searching for missing assets is described in the report as it obviously was—stonewalling, 'widespread,' 'generalized' and in some cases even leading to 'active resistance.'

Alan Hevesi, Comptroller of the City of New York and head of the Executive Monitoring Committee group overseeing local government efforts on Holocaust restitution, stated: "The findings in this report reveal what we have believed all along—namely that some Swiss banks conducted a despicable campaign of deceit and immorality by bleeding dry the accounts of Holocaust victims and lying to survivors trying to claim assets worth hundreds of millions of dollars." AGENCE FR.-PRESSE, Dec. 7, 1999, available in 1999 WL 25156758.

Paul Volcker, in an interview following the issuance of the report, made the following comment: "They were lackadaisical, to say the least. . . . The banks had no incentive to find out the truth about the assets because they felt they should protect the honor of Switzerland. They could have solved this problem a long time ago if they really wanted to." William Drozdiak, Panel Discovers 54,000 Accounts of Nazi Victims; Swiss Banks Cleared of Conspiracy, WASH. POST, Dec. 7, 1999, at A1 (quoting Paul Volcker).

George Krayer, president of the Swiss Bankers Association, "said the report absolved the banks from any criminal liability. The dramatic and sweeping accusations leveled against Swiss banks four years ago have proved to be unfounded." Id. (quoting George Krayer). Krayer did apologize to the families of Holocaust victims for "the disappointment and hurt feelings' that banks may have caused in their past failures to help them seek redress for the missing assets. But he said the report's findings proved that, with the exception of a few isolated cases, the banks' conduct during the period in question was correct." Id. (quoting George Krayer).

Abraham Foxman, head of the Anti-Defamation League and a Holocaust survivor, called this conclusion to be "unwarranted and offensive." ADL Commends Report on Swiss Banks and Holocaust Assets, U.S. NEWSWIRE, Dec. 7, 1999, available in 1999 WL 22284188 (quoting Abraham Foxman). According to Foxman, "the Swiss still have a way to go in confronting their actions during the war era." Id.

Finally, "[a] prominent Swiss Jewish leader, Sigi Feigel, said the banks' behavior 'was based on anti-Semitism and sheer hunger for money.' But he praised the banks' cooperation, saying it showed a change in attitudes." Elizabeth Olson, Swiss Banks Criticized on Holocaust Accounts, INT'L HERALD TRIB., Dec. 7, 1999, at 1, available in 1999 WL 5115219. And according to Israel Singer, secretary-general of the World Jewish Congress, "What happened here today is a worldwide mea culpa." Id.

See Neuborne Memorandum, supra note 138, at 8.

149. See Neuborne Memorandum, supra note 138, at 8.

150. Id.
b. Looted-Assets Claims

The Nazis, as part of their effort to systematically exterminate the Jews of Europe, also forcibly took from the Jews their property, both before and after killing them. The property included gold (at times, literally forced from the victims' mouths) and other valuables.

Nazi Germany then used Swiss public and private institutions to launder the assets stolen from the Jewish victims. Plaintiffs accused the Swiss defendant banks of "knowingly and repeatedly acting [as] receivers of stolen property on behalf of officials of the Third Reich in connection with assets looted from Jews."\textsuperscript{151} Plaintiffs alleged that the three defendant banks "willingly cooperated with the Nazis by knowingly receiving property looted from the Jews, and laundering it into Swiss francs," and that "defendant banks were paid substantial commissions by the Nazis for knowingly laundering vast quantities of looted Jewish assets."\textsuperscript{153}

Plaintiffs alleged that the defendant Swiss banks earned more than $75 million by knowingly trafficking in looted assets and in

\textsuperscript{151} Switzerland was a neutral country during World War II, and, therefore, able to trade with both the Allied and Axis powers. As a result, Switzerland benefited enormously from such trade. See generally Stephen P. Halbrook, Target Switzerland: Swiss Armed Neutrality in World War II (1998); Lebor, supra note 14; Ziegler, supra note 14. According to plaintiffs:

In order to transform looted Jewish property into negotiable instruments usable for the German war effort, it was necessary to find an international receiver of stolen property willing to fence the looted assets by laundering them into currency that could be used to purchase war material. Swiss banks knowingly assumed that role.

Neuborne Memorandum, supra note 138, at 6.

\textsuperscript{152} Neuborne Memorandum, supra note 138, at 3.

\textsuperscript{153} Id. at 6; see also Plaintiffs' Counterstatement of Facts at 6-7, In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. filed June 16, 1997) [hereinafter Plaintiffs' Counterstatement of Facts]. The plaintiffs alleged:

Looted valuables were transferred to the Reich Bank or sold through Berlin pawn shops by the Reich Bank and largely disposed of through or deposited in Swiss banks. . . . The Union Bank of Switzerland, the Swiss Bank Corporation and Credit Suisse, as well as other banks in Switzerland, were a critical link and instrumentality in knowingly financing, participating and aiding and abetting Nazi Germany's war crimes and genocide and in knowingly preserving their fruits of plunder . . . .

. . . [The banks] knowingly transferred and exchanged and disposed of looted property and provided Germany with the necessary currencies to 'purchase needed products' to perpetrate their atrocities.

\textit{Id.} at 6-7.
assets produced by Nazi slave labor. According to plaintiffs, the current value of such profits earned by the defendant banks is in excess of one billion dollars.

In 1946, the Swiss government admitted that it held gold looted by the Nazis from nations the Nazis occupied. The Swiss promised, under an agreement entitled the Washington Accords, to return the gold to its rightful owners. According to plaintiffs, “the Swiss never carried out their promises under the Washington Accords.”

c. Slave Labor Claims

The Nazis not only plundered occupied Europe of property but also forced their victims, both Jewish and non-Jewish, into slave labor. Plaintiffs’ third set of claims were based upon benefits the defendant banks allegedly received from slave labor during World War II.

Plaintiffs alleged that “[t]he defendant banks . . . knowingly provided Nazi Germany with Swiss francs in return for goods produced by Jewish slave labor.” Plaintiffs stated that at trial they would “demonstrate that Swiss banks, including the three defendant banks and their predecessors, were paid enormous sums by the Nazis for their complicity in knowingly financing the importation into Switzerland of goods produced by Jewish slave labor.” Plaintiffs also maintained that the Nazis deposited the profits made from the use of slave labor in Swiss banks. For these claims, plaintiffs alleged that the banks “knowingly and repeatedly trafficked in goods produced by Jewish slave labor with knowledge that they were trafficking in the fruits of war crimes.”

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154. See Neuborne Memorandum, supra note 138, at 7.
155. See id. at 7 n.5.
156. Id. at 8.
157. For further discussion of slave labor in Nazi-occupied Europe and claims being made against German companies that used slave labor, see discussion and notes infra Part VI.
159. Id. at 7.
160. See, e.g., World Council Complaint, supra note 123, ¶¶ 34-35, 81-96. The Weisshaus lawsuit did not contain any slave labor claims.
161. Neuborne Memorandum, supra note 138, at 3; see also Plaintiffs’ Counterstatement of Facts, supra note 153, at 6-8. The plaintiffs alleged:

Profits of slave labor exploitation were deposited, cloaked and harbored in accounts in Swiss banks... [T]he Swiss banks knowingly received, laundered and/or concealed German plunder and knowingly accepted concealed profits of slave labor. The Union Bank of Switzerland, Swiss Bank Corporation and
Plaintiffs demanded “disgorgement of any profits unjustly earned by defendant banks by knowingly assisting Nazis in the consummation of crimes against humanity, together with the return of any assets (or the value thereof) for which the banks acted as knowing receivers of stolen property.”

2. Defendant Banks’ Defenses

In response to the complaints filed in the three cases, the Swiss banks, in lieu of filing answers, filed motions to dismiss. The dismissal motions, filed on May 15, 1997, were massive, totaling over 500 pages. In the motions, the defendant banks set out numerous reasons, covering both procedural and substantive grounds, as to why the lawsuits should be dismissed.

Credit Suisse derived significant profits of their own on these deliberate transactions.

Id. 162. Neuborne Memorandum, supra note 138, at 3.
163. In addition to defendant banks’ motions, the Swiss Ambassador to the United States wrote a letter to the court urging the dismissal of the lawsuits. See Letter from Alfred Defago, Ambassador of Switzerland to the United States, to The Honorable Edward R. Korman (June 3, 1997) (on file with author). According to Ambassador Defago, “The most effective and just means for dealing with these matters are in Switzerland, not in a United States court . . . . The Government of Switzerland . . . urges the Court to dismiss the lawsuits.” Id. at 6.

The briefing by the parties was so voluminous that both sides submitted overview memoranda, summarizing the arguments made in the various individual briefs.

164. Interestingly, the particular legal arguments made by the Swiss banks in support of dismissal, discussed herein, and the responses by plaintiffs to these arguments, can be found in every other Holocaust-era suit filed after the Swiss bank litigation. The reason is obvious: every Holocaust-era lawsuit revolves around a similar set of facts and, thereby, raises almost identical legal issues.

All defendants, ranging from Swiss banks sued in 1997 to German corporations sued in 1999, have adopted a common legal strategy. Defendants invariably admit that wrongs may have been committed by them during World War II, but argue that courts in the United States cannot provide a remedy for such wrongs. Compare Reply Memorandum of Law in Support of Defendants’ Motion to Dismiss on Forum Non Conveniens Grounds at 1, In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. filed July 19, 1997) [hereinafter Reply Memorandum of Law in Support of Defendants’ Motion to Dismiss on Forum Non Conveniens Grounds] (‘Plaintiffs’ opposition . . . rests heavily on attacks on the integrity of the Government, courts, and people of Switzerland. This case indeed raises emotional issues, but a U.S. court of law is bound to proceed based solely on the dispassionate application of governing legal standards.”), with Memorandum in Support of Bayer AG’s Motion to Dismiss at 1, Kor v. Bayer AG, No. TH99-036-C M/H (S.D. Ind. filed June 30, 1999) (presenting the question of whether an American court is the appropriate forum in which to address German war crimes). The Memorandum in Support of Bayer AG’s Motion to Dismiss states: The surrender of Nazi Germany on May 8, 1945 ended the largest conflict in European history. As the war ended, the world learned the full scope of Nazi crimes . . . . This motion does not—and could not—seek to diminish the judgment
a. Defendant Banks' Procedural Grounds for Dismissal

i. Existence of Alternative Resolution Mechanisms

Defendant banks argued that the resolution of any claims to dormant accounts could be resolved without the extreme measure of filing a lawsuit in U.S. courts.\(^\text{165}\)

The banks admitted that they may have been holding monies belonging to Holocaust victims or their heirs. However, they pointed out that extensive nonadversarial mechanisms have now been set up by them to ferret out any such monies and deliver it to their rightful owners.\(^\text{166}\) According to the banks: "Plaintiffs were not required to come to a court of law to seek redress . . . superior, cooperative mechanisms are available, and those alternatives become more attractive every day."\(^\text{167}\)

Defendant banks argued that the district court should abstain from deciding plaintiffs' claims "in order to [1] avoid interfering with Swiss sovereign interests, [2] encroaching on the conduct of U.S. of history. Thus, the question presented here is not whether the conduct described in the complaint is wrong. Rather, the question is whether a lawsuit in an American federal court against a German corporation, alleging wrongs that occurred in Germany more than 50 years ago, can be reconciled with the clear parameters that define the reach of the United States' civil justice system. The answer is no."\(^\text{Id.}\)

\(^{165}\) The argument that resolution of Holocaust claims should not be decided by litigation in the United States, but rather through some other nonadversarial mechanism, was taken up by other defendants after they were sued in the United States for their World War II activities. For discussion of the nonadversarial mechanisms created by other defendants to counter U.S.-style litigation, see discussion and notes infra Part IV.C. (discussing European insurance companies creating and funding the "International Commission on Holocaust Era Insurance Claims" after being sued for failing to pay on Holocaust-era policies along with German government and industry creating and funding the "Remembrance, Responsibility and the Future Fund" to compensate former slave laborers after slave labor lawsuits are filed in the United States).

\(^{166}\) See Reply Memorandum of Law in Support of Defendants' Motions to Dismiss on Abstention Grounds and in the Alternative to Stay These Proceedings at 1-7, In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. filed July 9, 1997) [hereinafter Reply Memorandum of Law in Support of Defendants' Motions to Dismiss on Abstention Grounds and in the Alternative to Stay These Proceedings].

\(^{167}\) Defendants' Overview Reply Memorandum at 1, In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. filed July 9, 1997) [hereinafter Defendants' Overview Reply Memorandum].
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foreign policy and [3] impeding superior alternative processes for resolving Holocaust-related claims."^{168}

In support of their position, defendants relied on statements made by then-Under Secretary of State Stuart Eizenstat, chief U.S. government official on the Swiss claims issue, and Paul A. Volcker, Chairman of the Swiss Government's Independent Committee of Eminent Persons ("ICEP"), that the class action litigation may frustrate the resolution of the claims process under way in Switzerland.^{169}

Defendant banks, therefore, sought for the district court either to dismiss the lawsuits on grounds of abstention or, in the alternative, to stay the proceedings pending resolution of the dormant account claims by the Volcker Committee and the Swiss Federal Banking Commission's program of both publishing names of dormant account holders and processing any claimant inquiries.^{170}

Defendants argued that the Swiss Government's alleged "comprehensive claims resolution process for all accounts dormant in Swiss banks since 1945 . . . offer[s] a far superior alternative to class action litigation for resolving claims fairly and efficiently."^{171}

168. Id. at 22.
169. See id. at 24. In fact, Paul Volcker wrote to the court opposing this litigation, fearing that it would threaten to cripple the resolution process of the dormant account claims being conducted by the Volcker Committee. See Letter from Paul A. Volcker, Chairman, Independent Committee of Eminent Persons, to The Honorable Edward R. Korman, U.S. District Court for the Eastern District of New York 6-7 (July 24, 1997) (on file with author). This letter was cited in Defendants' Post-Hearing Reply Memorandum of Law. See Defendants' Post-Hearing Reply Memorandum of Law at 6, In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. filed Sept. 12, 1997) [hereinafter Defendants' Post-Hearing Reply Memorandum].
170. See Defendants' Overview Reply Memorandum, supra note 167, at 5, 22-25.
171. Id. at 23-24; see also Defendants' Post-Hearing Reply Memorandum, supra note 169, at 4-6 (discussing the issue of whether plaintiffs can proceed on their claim without interfering with or duplicating the Volcker Commission's work). But see Neuborne Memorandum, supra note 138, at 61-63, 71-72. Professor Neuborne wrote:

[D]efendants urge the Court to decline to exercise Congressionally mandated subject matter jurisdiction, arguing that the Court should abstain in favor of a private effort sponsored and financed by the Swiss Bankers Association, and headed by Paul Volcker.

Defendants' argument for abstention is, at bottom, that plaintiffs will receive a better quality of justice in a non-judicial forum than in this Court. With due respect for defendants' newly discovered sense of justice, that decision is for the plaintiffs to make. Defendants are hardly in a position to give advice to their victims about where to find the best quality of justice. Indeed, defendants' strenuous effort to deflect this litigation into a non-judicial forum of their own choosing and design speaks volumes about the importance of
ii. Lack of Standing

Defendant banks also claimed that plaintiffs’ slave labor and looted-assets claims should be dismissed because plaintiffs lacked standing to sue.172

Defendants pointed out that plaintiffs did not allege that any profits from slave labor conducted by any individual plaintiff or by a plaintiff’s heir could be traced to any individual defendant bank.173 Similarly, for the looted-assets claims, plaintiffs did not allege that any profits from looted assets were deposited in or transacted through any individual defendant bank.174 Therefore, defendants argued, plaintiffs could not meet the “traceability” requirement of constitutional standing.175

Defendants also pointed out that the damages plaintiffs sought for looted assets and slave labor could not be tied to any particular plaintiff’s injury.176 Therefore, the damages, according to defendants, would have to be arbitrarily divided among plaintiffs and their class members.177 Defendants thus argued that plaintiffs could continuing this judicial proceeding. For 50 years, defendants have avoided making restitution of assets deposited by Jews on the eve of the Holocaust, and have avoided disgorging unjust profits they earned from assisting in Nazi war crimes. . . .

. . . .

Defendants’ abstention motion is nothing less than an effort to dictate the forum in which plaintiffs may seek redress against defendants for 50 years of duplicity. The one forum defendants fear is the one forum they cannot control—an American court.

Id. at 61-63, 71-72.

172. See Memorandum of Law in Support of Defendants’ Partial Motion to Dismiss for Lack of Standing to Sue at 7-10, In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. filed May 15, 1997) [hereinafter Memorandum in Support of Defendants’ Partial Motion to Dismiss for Lack of Standing]; Reply Memorandum of Law in Support of Defendants’ Partial Motion to Dismiss for Lack of Standing to Sue at 2-17, In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. filed July 9, 1999) [hereinafter Reply Memorandum in Support of Defendants’ Partial Motion to Dismiss for Lack of Standing].

173. See Defendants’ Overview Reply Memorandum, supra note 167, at 19-20.

174. See id.

175. See id. at 18; Memorandum in Support of Defendants’ Partial Motion to Dismiss for Lack of Standing to Sue, supra note 172, at 6-15.

176. See Defendants’ Overview Reply Memorandum, supra note 167, at 20-21.

177. See id. at 18-19.
not meet the “redressability” requirement of constitutional standing.\textsuperscript{178}

iii. Lack of Subject Matter Jurisdiction

a. Lack of Diversity Jurisdiction

The Swiss defendant banks argued that complete diversity was lacking between plaintiffs and defendants, and, therefore, the federal district court lacked subject matter jurisdiction over the case.\textsuperscript{179} Specifically, defendants pointed out that there were both alien plaintiffs and alien defendants in each case, thereby destroying

\textsuperscript{178} \textit{See id; see also Memorandum in Support of Defendants’ Partial Motion to Dismiss for Lack of Standing, supra note 172, at 16-18. Defendants also argued that in the third lawsuit, institutional plaintiff World Council of Orthodox Jewish Communities “lacks associational standing and therefore may not pursue its slave labor or looted asset [sic] claims.” Defendants’ Overview Reply Memorandum, supra note 167, at 19; see also Memorandum in Support of Defendants’ Partial Motion to Dismiss for Lack of Standing, supra note 172, at 18-22.}

Plaintiffs, in their reply brief, argued that each of the named plaintiffs had standing to file their suits. \textit{See Plaintiffs’ Memorandum in Opposition to Defendants’ Motions to Dismiss for Lack of Standing, Failure to State Claims upon which Relief Can Be Granted, Failure to Join Indispensable Parties, and Motion to Strike Punitive Damages at 22-24, In re Holocaust Victims Assets, No. CV-96-4849 (E.D.N.Y. filed June 16, 1997) [hereinafter Defendants’ Memorandum in Opposition to Defendants’ Motion to Dismiss for Lack of Standing, Failure to State Claims upon which Relief Can Be Granted, Failure to Join Indispensable Parties, and Motion to Strike Punitive Damages].}

Professor Neuborne argued, in his brief, that the standing argument was premature, and should await the discovery process, allowing plaintiffs to be able to connect assets held by defendants to individual plaintiffs. \textit{See Neuborne Memorandum, supra note 138, at 76. Even if discovery fails to make such a link, Professor Neuborne argued that “theories of group entitlement and collective liability” should provide standing to plaintiffs. Id. As explained by Professor Neuborne:}

\textit{In the end, the issue may come down to permitting defendant banks to retain money that is not theirs’ as a form of unjust enrichment, or requiring the banks to disgorge the unjust enrichment to close family members of the true owners, or, if no close family members survived, to appropriate institutional representatives of the victims for distribution to the communities from which the money was stolen. Id. at 77.}

\textsuperscript{179} \textit{See Defendants’ Overview Reply Memorandum, supra note 167, at 8; Reply Memorandum of Law in Support of Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction at 4-11, In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. filed July 9, 1997) [hereinafter Reply Memorandum in Support of Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction]. For a discussion of the jurisdiction issue in the Swiss bank litigation, see Bilenker, supra note 138.}
complete diversity between the parties necessary to invoke the federal diversity statute.\textsuperscript{180}

b. Lack of Federal Question Jurisdiction

It is undisputed that using individuals as slave laborers, even during a time of war, and looting assets of civilians during war are both today, and during World War II, clear violations of international law.\textsuperscript{181} War is not a free-for-all, where all rules of conduct are suspended.\textsuperscript{182}

It is also undisputed that if plaintiffs had been able to show that the Swiss banks knowingly participated with the Nazis in profiting from the slave labor and looted assets they would be, at the least, civilly responsible as accomplices for such violations.\textsuperscript{183} The difficult question is the ability of having both the slave labor and looted-assets claims heard in U.S. courts.

Plaintiffs sought to invoke federal question jurisdiction,\textsuperscript{184} arguing that the slave labor and looted-assets claims “arise under” the

\textsuperscript{180} See Defendants’ Overview Reply Memorandum, supra note 167, at 17-18 (citing 28 U.S.C. § 1332 (1994)). To deal with this problem, plaintiffs agreed to dismiss the nondiverse alien plaintiffs, and have the remaining U. S. plaintiffs serve as class representatives for both alien and resident members of the class. See Neuborne Memorandum, supra note 138, at 52. In fact, after defendants filed their motion, plaintiffs filed amended complaints attempting to cure any diversity jurisdiction problems by separating the alien and nonalien plaintiffs. Compare Weissblum Amended Complaint, supra note 123, at 2 (arguing that all plaintiffs are U. S. citizens; jurisdiction primarily based upon diversity statute), with Sonabend Amended Complaint, supra note 123, at 4 (arguing that all plaintiffs are aliens; jurisdiction is based upon the Alien Torts Claims Act, 28 U.S.C. § 1350 (1994)).


\textsuperscript{183} See generally Doe v. Unocal Corp., 963 F. Supp. 880, 891 (C.D. Cal. 1997) (stating that “private actors may be liable for violations of international law even absent state action”).

various international human rights treaties existing both presently and during World War II.\textsuperscript{185}

The defendant banks responded that the treaties cannot be used to invoke section 1331 "arising under" jurisdiction because the treaties are not self-executing.\textsuperscript{186} Moreover, defendants argued that, even if self-executing, the treaties were not in force at the time of the defendants' alleged wrongful conduct and could not be applied retroactively.\textsuperscript{187}

Finally, defendants argued that customary international law does not provide federal question jurisdiction over plaintiffs' claims.\textsuperscript{188}

\begin{footnotesize}
\begin{enumerate}
\item[185.] See Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Under International Law at 46-48, \textit{In re Holocaust Victim Assets}, No. CV-96-4849 (E.D.N.Y. filed June 16, 1997) [hereinafter Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Under International Law].
\item[186.] See Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaints for Lack of Subject Matter Jurisdiction at 10-35, \textit{In re Holocaust Victim Assets}, No. CV-96-4849 (E.D.N.Y. filed May 15, 1997) [hereinafter Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaints for Lack of Subject Matter Jurisdiction]; Defendants' Overview Reply Memorandum, \textit{supra} note 167, at 15-16.
\item[187.] See Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaints for Lack of Subject Matter Jurisdiction, \textit{supra} note 186, at 30-35.
\item[188.] See id. at 35-41; Defendants' Overview Reply Memorandum, \textit{supra} note 167, at 19; Defendants' Post-Hearing Reply Memorandum, \textit{supra} note 169, at 7-9.
\end{enumerate}
\end{footnotesize}

This argument is basically a reformulation of the argument made by defendants that customary international law does not provide plaintiffs with a cause of action against the Swiss banks. For a discussion of this argument, see discussion and notes \textit{infra} Part III.A.2.b.

It appears that plaintiffs ultimately abandoned reliance upon any treaty of the United States to provide them with any jurisdiction or a cause of action, relying solely on customary international law. See Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Under International Law, \textit{supra} note 185, at 39 (stating that treaties set out in the complaints are being cited not as basis for suit but as "evidence of binding principles of customary international law that can be applied by federal courts whether or not the treaties are considered 'self-executing'"); see also Neuborne Memorandum, \textit{supra} note 138, at 56. That memorandum states:

\begin{quote}
Customary international law is an integral part of federal common law.... Plaintiffs have demonstrated claims arising under customary international law for the disgorgement of all profits earned by defendants in participating in the commission of Nazi war crimes. Federal question jurisdiction exists over such claims because they arise under federal common law.
\end{quote}

\textit{Id.} at 56.
c. Lack of Jurisdiction under the Alien Tort Claims Act\textsuperscript{189}

Plaintiffs alleged that their slave labor and looted-assets claims came within the jurisdictional requirements of the Alien Tort Claims Act ("ATCA").\textsuperscript{190}

The ATCA grants federal district courts original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."\textsuperscript{191}

Defendant banks claimed that plaintiffs could not properly invoke the ATCA because (1) not all of the plaintiffs are aliens;\textsuperscript{192} (2) not all of the claims sounded in tort; and (3) defendants' activities were commercial in nature and did not rise to the level of conduct in violation of the Law of Nations, or international law.\textsuperscript{193}

\begin{footnotesize}
\begin{enumerate}
\item[190.] See \textit{Sonabend} Amended Complaint, \textit{supra} note 123, ¶ 9(b).
\item[192.] On July 29, 1997, plaintiffs' counsel cured this defect by filing amended complaints, in which the alien plaintiffs filed their own separate lawsuit. See \textit{Sonabend} Amended Complaint, \textit{supra} note 123, ¶ 9(b).
\item[193.] See Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaints for Lack of Subject Matter Jurisdiction, \textit{supra} note 186, at 42-62; Defendants' Overview Reply Memorandum, \textit{supra} note 167, at 16-17; Defendants' Post-Hearing Reply Memorandum, \textit{supra} note 169, at 13-14.

Plaintiffs filed a detailed rebuttal brief countering each of these arguments and showing that the claims under the ATCA are proper. See Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Under International Law, \textit{supra} note 185, at 16-45. According to plaintiffs, they have alleged that defendants knowingly aided and abetted the Nazi Regime by providing them with the financing necessary to continue World War II for at least a year longer than it might otherwise have lasted; that the banks knowingly engaged in transactions with the Nazi Regime that furthered criminal activities; that the banks knowingly accepted and disposed of assets they knew, or should have known, were the result of looting, plunder and slave labor engaged in by or on behalf of the Nazi Regime; and that the banks knowingly took advantage of the chaos during and after the War to unjustly enrich themselves at the expense of the very victims to whom they held out their institutions as safe havens. These claims sufficiently state a violation of recognized international law principles against knowingly aiding, abetting, and
\end{enumerate}
\end{footnotesize}
iv. Forum Non Conveniens

Defendant banks filed a separate motion to dismiss the complaints on the ground of forum non conveniens. In their motion, the Swiss banks argued that the doctrine of forum non conveniens mandates dismissal of the suits, since both public and private interest factors favored dismissal.

Specifically, the defendant banks claimed that Switzerland should be the sole forum for adjudication of plaintiffs' claims because: (1) the challenged conduct occurred in Switzerland; (2) most of the potentially relevant evidence is found in Switzerland and is not in the English language; (3) Swiss law would apply to most claims; (4) litigating the case in the United States creates unnecessary administrative burdens; (5) Switzerland has a strong national interest in this dispute; and (6) Swiss courts could adequately adjudicate plaintiffs' claims. As succinctly explained at one point by defendants: "Almost everything about these cases relates to assisting genocide, slave labor, discriminatory treatment based on race, and the plundering of public and private property.

Id. at 48-49.

194. See Memorandum of Law in Support of Defendants' Motion to Dismiss on Forum Non Conveniens Grounds, In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. filed May 15, 1997) [hereinafter Memorandum in Support of Defendants' Motion to Dismiss on Forum Non Conveniens Grounds]. For a recent discussion of the doctrine of forum non conveniens as it applies to litigation in the United States against corporate entities for commission of international human rights abuses, see Boyd, supra note 191, at 101.

Unlike defendants in the insurance and slave labor cases, the Swiss banks could not argue lack of personal jurisdiction, since the banks do extensive business in the United States, including having branches in New York, where the suits were filed. See discussion and notes infra Parts IV & VI (discussing the insurance and slave labor cases, respectively). Denied the argument of lack of personal jurisdiction, the Swiss banks resorted to the alternative argument that, despite existence of personal jurisdiction over them, the cases, nevertheless, should be dismissed because of the availability of an adequate foreign forum. See Memorandum in Support of Defendants' Motion to Dismiss on Forum Non Conveniens Grounds, supra, at 1.

195. See Memorandum of Law in Support of Defendants' Motion to Dismiss On Forum Non Conveniens Grounds, supra note 194, at 5-30; Reply Memorandum of Law in Support of Defendants' Motion to Dismiss on Forum Non Conveniens Grounds, supra note 164, at 6-7.

196. See Memorandum of Law in Support of Defendants' Motion to Dismiss On Forum Non Conveniens Grounds, supra note 194, at 10-39; Reply Memorandum of Law in Support of Defendants' Motion to Dismiss on Forum Non Conveniens Grounds, supra note 164, at 7-29.
Switzerland and very little relates to the Eastern District of New York or even the United States."

v. Failure to Join Necessary Parties

Defendant banks also filed a separate motion to dismiss plaintiffs' looted-assets claims and slave labor claims for failure, under Rule 19(b) of the Federal Rules of Civil Procedure ("F.R.C.P."). to join necessary parties.

Defendants maintained that if they dealt in any looted assets or assets derived from slave labor, then individual Nazis and Nazi-related German companies that brought to them such assets are necessary parties to these suits and must be joined in the actions. According to the Swiss banks, "[s]ince it will be impossible to join many or all of these necessary parties, dismissal [of the looted-
assets and slave labor claims] is appropriate under [F.R.C.P.] Rule 19(b)."  

vi. Need for Stay of Discovery

Defendant banks asked that discovery be stayed pending resolution of their motion to dismiss. The district court issued a stay of merits discovery, but allowed limited discovery for the purpose of plaintiffs being able to respond to defendants' motion to dismiss.

b. Defendant Banks' Substantive Grounds for Dismissal

i. Choice of Law

The Swiss banks argued that, under applicable choice of law principles, Swiss law governed plaintiffs' claims. Under Swiss law, defendants argued, plaintiffs' claims fail.

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200. Id.; see also Memorandum of Law in Support of Defendants' Motion to Dismiss Claims of Looted Assets and Slave Labor Classes for Failure to Join Necessary Parties, supra note 198, at 13-19.
201. See Defendants' Motion for a Protective Order Staying Discovery at 1, In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. filed Apr. 28, 1997).
202. See Defendants' Overview Reply Memorandum, supra note 167, at 3 (citing Transcript of Civil Cause for Conference before The Honorable Edward R. Korman at 43 (May 1, 1997)).
203. See Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Common-Law and Swiss Law Claims for Failure to State a Claim at 5-15, In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. filed May 15, 1997) (hereinafter Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Common-Law and Swiss Law Claims for Failure to State a Claim); Reply Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Common-Law Claims for Failure to State a Claim at 3-10, In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. filed July 9, 1997) (hereinafter Reply Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Common-Law Claims for Failure to State a Claim).
204. See Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Common-Law and Swiss Law Claims for Failure to State a Claim, supra note 203, at 16-36; Reply Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Common-Law Claims for Failure to State a Claim, supra note 203, at 11-12.

As is often the practice in international litigation cases where foreign law may be applicable, defendant banks submitted declarations from two experts on Swiss law in support of their arguments that plaintiffs' claims fail under Swiss law. See Declaration of Pierre Tercier, In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. filed May 13, 1997) (Swiss law professor); Declaration of Robert Karrer, In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. filed May 13, 1997) (Swiss attorney). F.R.C.P. 44.1 allows the court to consider such declarations. Rule 44.1 states:

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in
Even if New York law is applicable, defendants argued, the complaints failed to state a claim.\textsuperscript{205}

ii. Failure to State Causes of Action

The defendant banks argued that regardless of which substantive law is applied, plaintiffs failed to state proper causes of action for their dormant account, looted assets, and slave labor claims.\textsuperscript{206}

a. Dormant Account Claims

For the dormant account claims, a major contention between the parties was the amount of evidence plaintiffs were required to produce to show that they, or their heirs, deposited monies in the Swiss defendant banks.\textsuperscript{207}

\textsuperscript{205} See Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Common-Law and Swiss Law Claims for Failure to State a Claim, \textit{supra} note 203, at 36-51; Reply Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Common-Law Claims for Failure to State a Claim, \textit{supra} note 203, at 12-27.

\textsuperscript{206} See Defendants' Overview Reply Memorandum, \textit{supra} note 167, at 19, 21; \textit{see also} Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Common-Law and Swiss Law Claims for Failure to State a Claim, \textit{supra} note 203, at 1; Reply Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Common-Law Claims for Failure to State a Claim, \textit{supra} note 203, at 1.

\textsuperscript{207} The evidentiary issue, first raised in the Swiss bank litigation, has reappeared in every Holocaust-era lawsuit. Essentially, the issue comes down to the question of which party has the burden of proof in the lawsuit. In response to the complaint, defendants argue that the case should be dismissed because the Holocaust victims or their heirs are not able to prove their case by the civil evidentiary standard of preponderance of the evidence. \textit{See} Reply Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Common-Law Claims for Failure to State a Claim, \textit{supra} note 203, at 11-12. Plaintiffs, in turn, argue that they should be allowed to engage in discovery to determine whether defendants, or third parties, are in possession of such evidence. \textit{See} Neuborne Memorandum, \textit{supra} note 138, at 21. Such discovery, invariably, is difficult, because it involves a focus upon activities conducted and documents located abroad (primarily in Central and Eastern Europe) and going back over fifty years. In the alternative, plaintiffs argue that the burden should shift to defendants to dispute plaintiffs' allegations. \textit{See id.} For a discussion of the evidentiary issue as it applies to the Swiss bank litigation, \textit{see} Ramasastry, \textit{supra} note 138, at 379-80.
In ordinary bank litigation, an alleged depositor seeking to collect money from a bank must show proof that the depositor maintained an account at the defendant bank. The Swiss banks essentially sought for the plaintiffs to prove such a link for each plaintiff to each of the defendant banks.

It appears that defendant banks did not dispute that an individual can recover monies from a bank if the plaintiff can identify the particular bank where a Holocaust-era account was opened.

The three consolidated lawsuits listed thirteen individual plaintiffs. Of these, four plaintiffs appeared to have satisfied the defendant banks' standard, since they directed their claim against a particular bank.

However, most Holocaust survivors and heirs of deceased victims cannot provide such specific identification. The depositors' records were either lost or destroyed during World War II, and the depositor is no longer alive to provide testimony about the deposit. This is the case, plaintiffs concede, for the other nine individually-named plaintiffs.

Since the burden of proof is on the plaintiffs to prove their case, the Swiss banks claimed that the lawsuits of these nine plaintiffs

208. Defendants maintained that ordinary contract principles, found in both Swiss law and New York law, require each plaintiff to provide such evidence of a depositor-bank relationship. See Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Common-Law and Swiss Law Claims for Failure to State a Claim, supra note 203, at 18-21, 36, 44 (discussing Swiss and New York contract law).

209. See Reply Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Common-Law Claims for Failure to State a Claim, supra note 203, at 12-18.

210. See id. at 14 (stating that "with the exception of four plaintiffs' dormant accounts claims, plaintiffs allege nothing linking their claims to any of the defendants"); Defendants' Overview Reply Memorandum, supra note 167, at 19 (stating that "with respect to the common-law claims, dismissal is required for all but four dormant account claimants").

211. Plaintiff Gizella Weisshaus made a claim against the Union Bank of Switzerland. See Weisshaus Amended Complaint, supra note 123, ¶ 5. Plaintiff Estelle Sapir made a claim against Credit Suisse. See id. ¶ 11. Plaintiff Jacob Friedman made a claim against the Union Bank of Switzerland and the Swiss Bank Corporation. See id. ¶ 10. Plaintiff Rudolfine Schlinger made a claim against Union Bank of Switzerland. See id. ¶ 6; see also Neuborne Memorandum, supra note 138, at 15-16.

Defendant Swiss banks concede that these four plaintiffs state proper causes of action and also have standing to sue the defendant banks. See Defendants' Overview Reply Memorandum, supra note 167, at 21; see also Declaration of Pierre Tercier, supra note 204, at 6. Defendants maintain, however, that these four plaintiffs' claims should be dismissed for lack of subject matter jurisdiction. See Defendants' Overview Reply Memorandum, supra note 167, at 21.

212. See Neuborne Memorandum, supra note 138, at 15-16.
Plaintiffs argued, however, that they should be allowed to conduct discovery of the defendant banks' records to search for documents showing that they, or their heirs, held an account in one or more of the defendant banks. Plaintiffs argued that they should be able, pursuant to F.R.C.P. Rule 20(a), to join the defendant banks in one action, and then "use the mechanism of discovery to ascertain the precise bank into which a deposit was made."

Defendant banks, in response, argued that discovery cannot be used by a plaintiff to determine whether a claim exists in the first instance. Quoting a federal district court opinion, defendants maintained that "'[t]he discovery rules are not a hunting license to conjure up a claim that does not exist.'"

As an alternative, plaintiffs argued that even if they could not prove that a particular bank held an account belonging to them, defendants still may be liable under theories of joint and several liability. Plaintiffs based their arguments that joint and several liability can be imposed upon the banks on two theories existing in American law.

First, plaintiffs claimed that if they could show that the defendant banks acted in concert to deprive plaintiffs of their assets, and also obstructed plaintiffs' efforts to prove that the banks held funds

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213. See Reply Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Common-Law Claims for Failure to State a Claim, supra note 203, at 11-12.
214. See Neuborne Memorandum, supra note 138, at 21 (stating that plaintiffs should be "given an opportunity, through discovery, to determine the name of the Swiss bank into which their relatives deposited assets in an effort to safeguard them from the Nazis").
215. Rule 20(a), dealing with joinder, states, in pertinent part:
   All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.
   FED. R. CIV. P. 20(a).
216. Neuborne Memorandum, supra note 138, at 19. Plaintiffs point out that joinder is especially appropriate on the particular facts here, where the "defendant banks represent, through merger or succession, approximately 75 percent of the private Swiss banks operating during the years in question." Id.
218. See Neuborne Memorandum, supra note 138, at 20.
219. See id.
belonging to them, equity requires that the banks should be held collectively liable.220

Second, plaintiffs maintained that their facts fall within the "market share" or "enterprise liability" category of cases, in which each defendant is held severally liable according to the share of the market held by the defendant in the thing causing injury to the plaintiff.221

The market share doctrine was created by the California Supreme Court almost two decades ago in Sindell v. Abbott Laboratories,222 a case involving products liability actions against numerous pharmaceutical companies who were alleged to have caused birth defects by their sale of the drug DES.223 In Sindell, the California Supreme Court abandoned the rigid traditional tort liability requirement of showing a direct causal link between each defendant and the harm suffered by each plaintiff in favor of a less-stringent basis of liability based on the percentage of the market share of sales of the dangerous product held by each corporate defendant.224

According to plaintiffs, the market share doctrine should be applied to the dormant account claims of those plaintiffs who cannot identify a particular Swiss bank that is holding plaintiffs' monies.225 Each defendant bank, plaintiffs maintained, should be held liable in


221. See id.

222. 607 P.2d 924 (Cal. 1980).

223. As explained by a leading treatise on torts:

The California Supreme Court imposed liability on each of eleven drug makers of DES that were joined in the lawsuit for a proportionate share of particular victim's damage attributable to DES. The requirements for market-share liability seem to be: (1) injury or illness occasioned by a fungible product (identical-type product) made by all of the defendants joined in the lawsuit; (2) injury or illness due to a design hazard, with each having been found to have sold the same type product in a manner that made it unreasonably dangerous; (3) inability to identify the specific manufacturer of the product or products that brought about the plaintiff's injury or illness; and (4) joinder of enough of the manufacturers . . . to represent a substantial share of the market.


224. See Sindell, 607 P.2d at 938. In New York, whose law is applicable to the case, the market share doctrine was most recently reaffirmed by the New York Court of Appeals in Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989), where the market share theory using the national market was applied in determining liability and apportioning damages in DES cases in which identification of the specific manufacturer of the injury-causing DES was impossible. See id. at 1078.

proportion to the share of deposits taken in by the bank, without the necessity of each plaintiff singling out the particular defendant bank holding monies belonging to the plaintiff. To do otherwise, plaintiffs argued, would result in an unjust enrichment to the banks. Plaintiffs alleged that, despite their inability to meet the traditional legal standards of proof, the court's equitable powers allow the court to order the banks to pay damages for monies held and profits derived at the expense of Holocaust victims. Defendants argued that the doctrine of market share liability is inapplicable to a commercial case, which is entirely different from a suit involving defective products, where the market share liability doctrine was created.

Application of a market share liability regime to the Swiss dormant account claims would have been a novel use of the doctrine. Without such an extension of the doctrine, or some other relaxation of the standard of proof, however, it appears that the dormant account claims of nine of the thirteen named plaintiffs (and all other similarly situated dormant account claimants) would have failed.

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226. See id.

227. The unjust enrichment argument is best made in the brief filed by Professor Burt Neuborne, in which he traces the history of unjust enrichment from its origins in Greek and Roman law to the present-day American Restatement of Restitution and the Swiss Code of Obligations. See id. at 12-14.

228. See Reply Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Common-Law Claims for Failure to State a Claim, supra note 203, at 14-17.

229. One commentator to the Swiss bank litigation, while supporting the use of market share liability in the case of Swiss dormant account claims, nevertheless acknowledged that "[c]ollective liability is indeed a controversial theory" and cited a comment from a recent New York Court of Appeals opinion that collective liability is a "radical departure from fundamental tenets of tort law." Ramasastry, supra note 138, at 381 (citing Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989) (Mollen, J., concurring and dissenting)); see also King v. Cutter Lab., 714 So. 2d 351, 354 (Fla. 1998) (extending market share liability doctrine to other products besides DES, but limiting the doctrine solely to negligence actions involving dangerous products). In imposing such limitations, the Florida Supreme Court explained:

The market share doctrine is a new, evolving tort theory. The doctrine is designed to provide plaintiffs access to the courts in the limited class of cases where the injured party cannot identify, after diligent inquiry, which product manufacturer in fact caused a specific injury. . . . While the doctrine is still evolving, it has some specific restraints that limit its application.

Id. at 354. Nevertheless, the Florida Supreme Court recognized its "continuing responsibility to the citizens of this state" to modernize traditional principles of tort law when such becomes necessary "to ensure that the law remains both fair and realistic as society and technology change." Id. at 355 (quoting Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447, 451 (Fla. 1984)). Plaintiffs in the Swiss bank litigation, undoubtedly, would have reminded Judge Korman of the same responsibility.
b. Looted-Assets Claims

Defendant banks claimed that plaintiffs also failed to state legally-cognizable causes of action for their looted-assets claims under New York common law, Swiss law, and international law. 230

The banks argued that regardless of whether New York or Swiss law was applied, the looted-assets claims had to be dismissed because they suffered from a fatal defect: Plaintiffs' factual allegations failed to link any individual defendant bank to any damages suffered by any particular plaintiff. 231 Put another way, none of the plaintiffs could show that any of the assets looted from them by the Nazis ended up in any of the banks that they sued. At most, plaintiffs could only show that the Swiss banks ended up with some assets looted by the Nazis, but could not trace the looted assets to any individual victim. 232 Defendants essentially recast their procedural lack of standing objection, argued earlier, 233 into a substantive objection, namely that plaintiffs failed to state facts upon which to base a claim for looted assets either under New York or Swiss law. 234

Defendants also claimed that plaintiffs' looted-assets claims fail to state a cause of action under international law. 235

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230. For a discussion of the looted-assets claims, see notes and text supra Part III.A.1.b. For a brief analysis of the looted-assets claims as they were set out in the earlier stages of the Swiss bank litigation, see Ramasastry, supra note 138, at 382-87.

231. See Defendants' Overview Reply Memorandum, supra note 167, at 18-19.

232. The eventual settlement made by the Swiss banks, see infra Part III.D., proved the defendants correct: When it came time to distribute the settled funds to victims of Nazi looting and their heirs, the "looted-assets" claimants were not required to show that their looted assets made their way to a Swiss bank. See id.

233. See supra Part III.A.2.a.(ii).

234. See Defendants' Overview Reply Memorandum, supra note 167, at 19-20.

235. See Memorandum of Law in Support of Defendants' Motion to Dismiss the International Law Claims in Friedman and World Council for Failure to State a Claim at 2-69, In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. filed May 15, 1997) [hereinafter Memorandum of Law in Support of Defendants' Partial Motion to Dismiss the International Law Claims in Friedman and World Council for Failure to State a Claim]; Reply Memorandum of Law in Support of Defendants' Motion to Dismiss the International Law Claims in Friedman and World Council for Failure to State a Claim at 2-46, In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. filed July 9, 1997) [hereinafter Reply Memorandum of Law in Support of Defendants' Motion to Dismiss the International Law Claims in Friedman and World Council for Failure to State a Claim]. The Weisshaus complaint did not allege claims under international law, and, therefore, defendants' motion to dismiss the international law claims was directed only to the latter two lawsuits.
International law is part of U.S. law and can be used in U.S. courts to state a cause of action. In fact, the complaints in Friedman and World Council specifically seek damages from defendant banks for violations of international human rights law by their alleged knowing dealings with looted assets.

International law claims can be based either upon specific self-executing treaties or upon international customary law. Plaintiffs initially based their looted-assets claims upon both treaties and international custom, but apparently abandoned their reliance on treaties since they could not find a treaty that was both self-executing and in existence when the looting took place during World War II.

Defendants—relying specifically on precedent established at the Nuremberg Tribunal—claimed that plaintiffs' customary international law claims were defective for a variety of reasons. First, defendants argued that plaintiffs sought to apply international law norms recognized only after 1945 to defendants' pre-1945 conduct.

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236. See The Paquette Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction."); Marcos Estate I, 978 F.2d 493, 502 (9th Cir. 1992) (stating that "it is ... well settled that the law of nations is part of federal common law"); see also FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS; LAW, POLICY, AND PROCESS 499-552 (2d ed. 1996) (discussing U.S. adjudicative remedies for violations occurring outside the United States); Louis Henkin, International Law as U.S. Law in the United States, 82 MICH. L. REV. 1555 (1984).

237. See Friedman Complaint supra note 123, ¶¶ 207-16; World Council Complaint, supra note 123, ¶¶ 134-48. Plaintiffs argued that defendant banks are liable for the human rights abuses committed by the Nazis as knowing aiders and abettors of such crimes, and, therefore, are liable as accomplices to the Nazis. See Plaintiffs' Counterstatement of Facts, supra note 153, at 6-7 (stating that defendant banks "were a critical link ... in knowingly ... aiding and abetting Nazi Germany's war crimes and genocide").


239. See Neuborne Memorandum, supra note 138, at 28-35, 39-45 (referring solely to customary international law as a basis for plaintiffs' international law claims).

240. See Reply Memorandum of Law in Support of Defendants' Motion to Dismiss the International Law Claims in Friedman and World Council for Failure to State a Claim, supra note 235, at 8-42.

241. See id. at 8-17.
Moreover, defendants claimed that their conduct was not so egregious as to amount to violations of international human rights law.\textsuperscript{242} Similarly, as corporate-banking entities of a neutral country, defendants claimed that their dealings with the Nazis do not expose them to civil liability under customary international law.\textsuperscript{243}

c. Slave Labor Claims

Defendant banks likewise claimed that plaintiffs failed to state a proper cause of action for their slave labor claims under New York common law, Swiss law, or international law.\textsuperscript{244} The banks argued that the slave labor claims also suffered from the fatal defect of failing to link any individual defendant bank to any damages suffered by any plaintiff.\textsuperscript{245} Finally, defendants argued that the cause of action for violations of international law for the slave labor

\textsuperscript{242} See id. at 18-19.
\textsuperscript{243} See id. at 36-42. The defendant banks also claimed that the conviction of Karl Rasche, chairman of Dresdner Bank, by the U.S. Military Tribunal at Nuremberg, did not establish a precedent for the defendant banks' civil liability under international human rights law. See id. at 21-36. The Swiss banks distinguished the Rasche case from the accusations made against them as follows:

\textquote{Rasche was a high-ranking Nazi and the speaker of the board of directors of the Dresdner Bank. As such, he personally used brutal physical coercion to loot and plunder property from victims in Nazi-occupied territories. . . . It was for these activities—and not his actions as a commercial banker—that Rasche was convicted of war crimes. The U.S. Military Tribunal acquitted Rasche of war crimes and crimes against humanity charges based on his activities as a banker.}

\textsuperscript{245} See Defendants' Overview Reply Memorandum, supra note 167, at 19-20.
claims, stated in *Friedman* and *World Council*, must fail for the same reasons as the looted-assets claims.246

**B. Other Actions against the Swiss Banks**

1. Action in California State Court

   In June 1998, plaintiffs’ attorneys in the federal class action in New York opened a second front against the Swiss banks by filing a separate class action lawsuit in California state court.247 The Swiss banks now began to defend themselves on both coasts of the United States.

   The state class action was filed against the same three Swiss banks, but by different claimants.248 Plaintiffs were four elderly Holocaust survivors, all U.S. citizens and residents of California.249

   None of the plaintiffs alleged that they, or their families, deposited monies with Swiss banks. Rather, plaintiffs’ claims were based solely on allegations that the defendant banks profited from “knowingly accepting for deposit and concealing the existence of slave labor profits and assets looted by the Nazis.”250 Plaintiffs were suing on their own behalf and on behalf of all “victims of Nazi

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246. See Defendants’ Overview Reply Memorandum, *supra* note 167, at 19; see also *supra* notes 230-43 and accompanying text. But see Neuborne Memorandum, *supra* note 138, at 34. That memorandum states:

   Plaintiffs’ “slave labor” claims are, similarly, not based on ordinary commercial banking transactions. They are based on defendants’ repeated actions in earning substantial profits from knowingly acting as the vendor and/or financial conduit for products that they knew were being produced by Jewish slave labor under conditions that sink to the level of war crimes and crimes against humanity.

   *Id.*


248. See *id.* ¶¶ 15-18.

249. See *id.* ¶ 9 (stating claim of plaintiff Irene Markovicova, who survived the Auschwitz concentration camp by doing slave labor for the German multinational Krupp, while family assets were confiscated and seventy members of her family were killed in Auschwitz); *id.* ¶ 10 (stating claim of plaintiff Dr. Barbara Schwartz-Lee, who survived the Chrzanow Ghetto by doing forced labor at various concentration camps); *id.* ¶ 11 (stating claim of plaintiff Lia Atschul Fishman, who survived the Holocaust by going into hiding while her family assets were looted and her parents were killed in Auschwitz); *id.* ¶ 12 (stating claim of plaintiff Liliane Schmidt-Escobar, a Romani (“Gypsy”) who, along with her family, was deported to Auschwitz—where she was subjected to medical experiments—while family assets were looted and six siblings died at Auschwitz or other concentration camps).

250. *Id.* ¶ 1.
persecution during the period 1933-1945, whose assets were looted by the Nazis and deposited in and/or laundered through the Defendants, and/or whose forced labor generated profits that were deposited in and/or laundered through the Defendants.\(^2\)

In their complaint, plaintiffs specifically sought to distinguish their action from the class action litigation before Judge Korman.\(^2\)

The California plaintiffs made the same accusations against the Swiss banks as were found in the looted assets and slave labor claims in the East Coast litigation: namely, that the Swiss banks "intentionally concealed the looted assets and slave labor profits they possessed and/or laundered, intentionally preventing their discovery, and allowing the Banks to escape for years the serious scrutiny of their Holocaust-related misconduct."\(^2\)

However, the California plaintiffs sued under a state statute, the California Unfair Competition Act ("UCA").\(^2\) In fact, the complaint contained only one cause of action: violation of the UCA.\(^2\) The UCA prohibits companies doing business in California from gaining a competitive advantage as a result of engaging in "any unlawful, unfair or fraudulent business act or practice"\(^2\) and allows the general public to sue to collect restitution from the wrongdoer who has gained a competitive advantage from engaging in such wrongful conduct.\(^2\)

\(^{251}\) Id. \(\S\) 14.
\(^{252}\) See id. \(\S\) 20.
\(^{253}\) Id. \(\S\) 40.
\(^{255}\) See Markovicova Complaint, supra note 124, \(\S\)\(\S\) 43-46. Interestingly, in March 1999, the same attorneys who earlier filed this California state action under the UCA against the Swiss banks repeated their tactic in two other Holocaust-era lawsuits, presently being litigated.

On March 24, 1999, suing on behalf of one Holocaust survivor residing in Southern California, the attorneys filed a second UCA action stemming from the Holocaust, this time against six French banks and two American financial institutions—Chase Manhattan Bank and J.P. Morgan & Co—alleging their profiteering from looted and slave labor assets during World War II. See Complaint \(\S\) 1, Mayer v. Banque Paribas, No. BC 302226 (Cal. Sup. Ct. filed Mar. 24, 1999).

One week later, on March 31, 1999, yet another group of Holocaust survivors, represented by the same set of attorneys, filed a third UCA action against three German banks, the German airline Lufthansa, and American automotive giants Ford and General Motors, accusing them of profiting from the use of slave labor and looting during World War II. See Complaint \(\S\) 1, Simon Wiesenthal Ctr. v. Deutsche Bank, No. BC 302420 (Cal. Sup. Ct. filed Mar. 31, 1999).

\(^{256}\) Cal. Bus. & Prof. Code \(\S\) 17200 (West 1997).
\(^{257}\) See id. \(\S\) 17203.
This was a novel use of the California UCA statute. Trying to fit the Swiss banks' conduct under the UCA, plaintiffs alleged that the banks' "wrongful retention, handling, disposition and/or concealment" of looted and slave labor assets amounted to an "unlawful, unfair and/or fraudulent business act and/or practice" prohibited by the UCA.

2. Action against the Swiss National Bank

On June 29, 1998, one day before filing the second action in California against the three private Swiss banks, the attorneys prosecuting these actions filed a separate lawsuit against the Swiss government. The third action, filed in federal district court in Washington, D.C., on behalf of yet another group of Holocaust survivors, was against the Swiss National Bank ("SNB"), the central government bank of Switzerland.

Recently-discovered documentation has revealed that the SNB was extensively involved in laundering Nazi-stolen gold. The SNB was "the central relay point for gold the Nazis sold to neutral nations during World War II." A May 1998 Swiss government historical report issued by the Bergier Commission stated that "Switzerland was the leading center of German gold transactions abroad during World War II and the [SNB] was the biggest client,..."

258. See Markovicova Complaint, supra note 124, ¶ 44.
259. See Complaint ¶ 1, Rosenberg v. Swiss Nat'l Bank, No. CV-98-1647 (D.D.C. filed June 29, 1998) [hereinafter Rosenberg Complaint]. Named as co-conspirators with the central bank of Switzerland, but not included as defendants, were the central banks of Argentina, Liechtenstein, Portugal, Sweden, Spain, Germany's two largest private banks—Deutsche Bank and Dresdner Bank—and "the private banks of Switzerland." Id. ¶ 25. All these banks were alleged to have "knowingly operated with [the] Swiss National Bank to design a web of financial and gold transactions intended to benefit the Nazi Regime." Id. Thereafter, both Deutsche Bank and Dresdner were sued in the United States for their World War II activities. See discussion and notes infra Part VII.A.1. (discussing claims against the German and Austrian banks).

As more information is uncovered of dealings by the central banks of these other neutral countries with the Nazis during World War II, additional lawsuits may be filed against these other banks. See supra note 16 (citing articles discussing other nations' financial involvement with the Nazis).

260. See Rosenberg Complaint, supra note 259, ¶ 1.
buying 1.2 billion Swiss francs' worth, or about $280 million at wartime prices... worth more than $2.5 billion today.\textsuperscript{262}

The Bergier Commission found that part of the gold the SNB purchased from the Nazi Reichsbank included "119.5 kilograms of fine gold (worth $1.2 million at today's prices) that could be identified as being melted down by the Nazi bankers into gold bars from teeth fillings and wedding rings, torn away from victims in the Nazi concentration camps."\textsuperscript{263}

C. Factors Leading to Settlement of the Swiss Bank Litigation: The Sapir Settlement, the Meili Episode, and the Power of Sanctions

In August 1997, Judge Korman heard oral arguments on the Swiss banks' motions to dismiss the consolidated class actions in New York. Earlier, in July 1997, plaintiffs filed amended com-

\textsuperscript{262} Report: Swiss Knew Nazi Gold Stolen, L.A. TIMES, May 26, 1998, at A8. The Bergier Commission, consisting of a panel of nine Swiss, American, Israeli, Polish, and British historians, concluded:

There is no longer any doubt: The governing board of the National Bank was informed at an early point in time that gold from the central banks of occupied nations was being held by the Reichsbank, and the Swiss National Bank was also aware of other methods used by the Germans to confiscate gold from private individuals before and after the outbreak of the war.... Although it was plain for all to see that Germany was acquiring gold by illegal means, the [Swiss central bank] authorities appear to have remained wedded to "business as usual."

\textit{Id.}

Under a 1946 treaty with the United States, Britain, and France, known as the Washington Agreement, see Multilateral Liquidation of German Property in Switzerland, May 25, 1946, 13 U.S.T. 1118, the SNB contributed 40% of the 250 million Swiss francs Switzerland paid to end all Nazi-gold-related claims. See William Hall, Swiss Bank Spurns Nazi Gold Deal, FIN. TIMES (London), Aug. 22, 1998, at 2, available in 1998 WL 23267472. The SNB maintained that the Washington Agreement released the Swiss government from all future obligations with regard to Nazi-stolen gold acquired by the SNB. See \textit{id.}

Nevertheless, in 1997, the SNB contributed 100 million Swiss francs ($70 million) to a special Holocaust Needy Fund set up by Swiss private industry and government. See Report: Swiss Knew Nazi Gold Stolen, supra, at A8. The SNB also announced at that time that it would attempt to use 7 billion Swiss francs of its gold reserves to set up a so-called Solidarity Foundation to help both Jews and others who suffered during World War II, and for other social projects. The proposal required an amendment to the Swiss Constitution and approval from the Swiss Parliament; unfortunately, in June 1999, the Swiss Parliament vetoed the proposal. See Swiss Parliament Stalls Gold Foundation, JERUSALEM POST, June 20, 1999, at 4, available in 1999 WL 9004642.

\textsuperscript{263} Gisela Blau, More Swiss Stonewalling, JERUSALEM REP., Sept. 14, 1998, at 34 ("The 119.5 kilos of shame," wrote one newspaper in the French part of Switzerland, discussing the 'body gold' issue.").
plaints, reconfiguring some of the named plaintiffs, dropping some parties, and adding others.264

Thereafter, Judge Korman did something brilliant: nothing. Rather than ruling on the motions, he made no decision for over one year.

In August 1998, Judge Korman, without ever issuing a decision on the dismissal motions, achieved a settlement of the litigation.265 The settlement was all-inclusive, requiring plaintiffs to dismiss every lawsuit filed against the Swiss banks and Swiss government, discussed above, as a condition of the settlement.266

During this one-year waiting period, critical events transpired that led to the settlement of the lawsuits.

1. Settlement with Estelle Sapir

In May 1998, Credit Suisse reached a separate settlement with Estelle Sapir, the most visible and persistent dormant accounts plaintiff.267 While the settlement terms remain secret, various media sources reported that Credit Suisse paid Sapir $500,000 to settle the matter.268

The seventy-two-year-old Estelle Sapir emerged as the most prominent symbol of the Swiss banks' bad faith dealings with regard to World War II-era dormant accounts.269 Her story was featured in

264. For a discussion of the amended complaints, see Ramasastry, supra note 138, at 376-78.
266. See id. ¶ 12.
268. See id.; see also Settlement by Credit Suisse Leaves Open Precedent Issue, INT'L HERALD TRIB., May 6, 1998, at 5.
269. See Sanger, supra note 267, at A27. That article states:
By settling individually with Miss Sapir, who is down to 65 pounds and clearly
in poor health, Credit Suisse has taken care of one of the most visible examples
of its failure to investigate accounts opened by Holocaust victims . . . . [Sapir]ecame a 4-foot-9-inch symbol of the Holocaust survivors whom the Swiss
banks summarily dismissed.
Id. The other case symbolizing the Swiss banks' nefarious dealings is that of fired bank guard Christoph Melli, who saved pre-World War II documents about to be shredded by UBS. See discussion and notes infra Part III.C.2.
two television documentaries on Switzerland’s role during World War II.270

Embarrassed by the negative publicity generated by its poor handling of Sapir’s claim,271 Credit Suisse took the extraordinary step of settling with her, even while continuing to deny payments to the other class action plaintiffs.272

The next year, in April 1999, Estelle Sapir died.273 A true hero, she remains a symbol of the struggle by elderly Holocaust survivors to obtain long-delayed justice from the Swiss banks and other European institutions. Even though she enjoyed her settlement for less than one year, she lived long enough to see not only a personal victory of her claim, but also the Swiss banks’ acknowledgment of the claims of the other Holocaust survivors.274

270. The first was a documentary produced by BBC Television and rebroadcast in the United States by the Public Broadcasting System (“PBS”). See Switzerland: Neutral or Cowardly? (BBC television broadcast, rebroadcast in United States by PBS, May 21, 1997). The second was a documentary shown on A&E Television as part of its “Investigative Reports” series. See Blood Money: Switzerland’s Nazi Gold (Arts & Entertainment television broadcast, July 26, 1997). Both documentaries were first broadcast in 1997.
271. In 1946, when Sapir attempted “to retrieve millions of dollars she believed her father, Josef, left in the Credit Suisse Bank, officials said she needed a death certificate [for her father], a document most Holocaust survivors didn’t have.” Chrisena Coleman, Swiss Bank Pays in Holocaust Suit, N.Y. DAILY NEWS, May 5, 1998, at 8.
Sapir did not give up. “Between 1946 and 1957, while living in Paris, Sapir made 20 trips to Credit Suisse. Each time, she said, they refused to deal with her.” Elaine Woo, Estelle Sapir: First Holocaust Survivor to Recover Wartime Claim from Swiss Bank, L.A. TIMES, Apr. 16, 1999, at A30. More than 50 years later, in 1998, Credit Suisse finally admitted that it “found a card under the name of J. Sapir that appeared to confirm that he held an account [at Credit Suisse], without an indication of how much the account may have once contained.” Sanger, supra note 267, at A27.
272. See Sanger, supra note 267, at A27 (“Perhaps to make it clear that it did not intend Miss Sapir’s case to be precedent-setting, the bank went out of its way today to describe it as an exceptional case.”).
274. As Sapir related in interviews: “I promised my father the last time I saw him in the concentration camp. He made me promise that I would find his account with the Swiss. Before I die, I must do this.” Richard Sisk, At 71, She’s Still Trying to Redeem Swiss Holdings, N.Y.DAILY NEWS, Oct. 31, 1997, at 40. “I felt that my father was always behind me and with me,” she said after her lawsuit was settled last year. ‘When I die and go to heaven, I will see him and say, “I accomplished it.”’” Honan, supra note 273, at A20.
2. The Meili Episode

UBS, the other Swiss bank defendant, also suffered an embarrassing episode during the course of the litigation.

Between the evening of January 8 and the morning of January 9, 1997, Christoph Meili, a security guard at UBS in Zurich, discovered in the bank's shredding room pre-World War II financial documents that were about to be shredded by the bank. Shredding of such documents was illegal under Swiss law.

Meili saved the documents and turned them over to a Jewish cultural group that, in turn, gave them to the Zurich police. Meili was subsequently fired from his job, and a criminal investigation was opened against him for violating Swiss bank secrecy laws. Ten months later, the criminal investigation was dropped.

Earlier, however, Meili and his family, facing death threats in Switzerland, fled to the United States. In July 1997, Congress passed special legislation, signed by President Clinton, granting Meili and his family permanent residency. According to Meili: "I have become the first Swiss person to seek and acquire political asylum in the United States."

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276. See John-Thor Dahlburg, Legendary Swiss Neutrality Rocked by WWII Charges, L.A. TIMES, Feb. 28, 1997, at A1 ("On Jan. 8 [1997], while on duty at the Union Bank of Switzerland, [Meili] came across two hoppers of historical documents waiting to be shredded. The previous month, banks had been ordered to keep paperwork from World War II-era transactions.").
277. See id. at A6.
279. See id. As reported by Newsday: "In Zurich, Swiss authorities issued a terse statement dropping the charges. 'The Zurich district attorney's office has halted the proceedings against former night watchman Christoph Meili,' it said. District Attorney Peter Cosandey had no further comment." NEWSDAY, Oct. 2, 1997, at A21. At the same time, "the Zurich district attorney's office also dropped its probe of[Erwin Hagenmueller,] the chief archivist at Union Bank of Switzerland, who released the papers [Meili rescued] for shredding." Probe of Former Bank Guard Ends, supra note 278, at A10.
The negative publicity generated from being caught illegally shredding prewar financial records was a factor in UBS coming to the bargaining table and eventually settling the litigation.\textsuperscript{282}


As will be discussed more fully in Part III.D., in August 1998 the Swiss banks reversed their earlier position and raised what they had publicly labeled their final offer of $600 million\textsuperscript{283} to $1.25 billion. Plaintiffs, demanding $1.5 billion, agreed to accept this amount, and the case was settled.\textsuperscript{284}

Asked to explain the banks' sudden reversal of their position, Rabbi Marvin Hier, head of the Los Angeles-based Simon Wiesenthal Center, explained: "It was for only one reason: they were pressured into it. Without the pressure, with Sen. D'Amato's banking committee, without the threat of sanctions, the Holocaust survivors would have gotten nothing."\textsuperscript{285}

The London-based \textit{Financial Times}, in a story examining how the settlement was achieved, came to the same conclusion:

\begin{quote}

Meili also appeared on the July 30, 1998 episode of \textit{Oprah}, and was featured on the July 3, 1998 episode of \textit{Dateline NBC}. See \textit{Oprah} (Harpo Productions television broadcast, July 30, 1998); \textit{Dateline} (NBC television broadcast, July 1998).


\textsuperscript{283} See \textit{Swiss Banks Offer $600 Million to Close Holocaust Claims}, L.A. TIMES, June 20, 1998, at A6 ("Switzerland's three biggest banks offered $600 million Friday [June 19, 1998] to settle claims they stole assets of Holocaust victims. The banks called it their top offer; outraged Jewish leaders called it insultingly low.").

\textsuperscript{284} \textit{See Settlement Agreement, supra note 265.}

The clearest lesson from the Swiss banks’ $1.25bn settlement with Holocaust survivors is this: threatening to impose sanctions can work. Every important breakthrough in the negotiations came soon after threats from US local government officials to impose sanctions (banning, for example, Swiss banks from certain kinds of business in New York). The settlement itself came two weeks before a threat to start the sanctions and a week after Moody’s, the rating agency, published a report saying that UBS, Switzerland’s (and Europe’s) biggest bank, might lose its triple-A rating if sanctions were imposed.286

Economic sanctions are increasingly viewed as an ineffective means to conduct foreign policy. A recent study concluded that they do not work in changing the behavior of other countries.287 For instance, despite an economic blockade for close to forty years, the United States has not been able to remove from power or change the behavior of the Communist government of Fidel Castro in Cuba.288 The only success story has been the sustained economic pressure brought against the apartheid government of South Africa, leading eventually to the white minority in the 1980s gradually giving up its power, and the ascension of Nelson Mandela as South Africa’s president.289

The sanctions applied against the Swiss, leading to the $1.25 billion settlement in August 1998, will be viewed as another case where sanctions proved effective.290

286. John Authers & Richard Wolffe, When Sanctions Work, FIN. TIMES (London), Sept. 9, 1998, at 14; see also James D. Besser, Behind the Scenes: A Curious Synergy, JEWISH J., Aug. 21, 1998, at 14 (“Without doubt, the Swiss banks were pushed into a settlement because of their fear of being shut out of vital U.S. markets.”).
288. See id.
289. See id.
290. The strategy undertaken by top state and local financial officials against the Swiss banks was first to threaten sanctions, and then to impose them in stages until the Swiss banks would come to an agreement. See John J. Goldman, Pressure Rises for Holocaust Fund Pact, L.A. TIMES, July 3, 1998, at 3.

On July 3, 1998, New York State Comptroller H. Carl McCall and New York City Comptroller Alan Hevesi announced at a news conference in Manhattan this system of so-called “rolling sanctions,” specifically “designed to pressure Swiss banks into reaching an agreement with Holocaust victims who claim the institutions held their assets for decades.” Id. The sanctions would have been implemented as follows: (1) if a settlement would not have been reached by September 1, 1998, the New York state and city comptrollers would have stopped depositing their short-term investments with the Swiss banks, and would have barred Swiss banks and investment firms from selling state and city debt; (2) if a settlement would not have been reached by November 1, 1998, private investment managers investing for the state and city would be instructed to cease trading through Swiss firms; and (3) if a settlement still would not have been reached, other sanctions and penalties would follow in the future. See id.
There are a number of unique factors, however, in this success story.

First, the sanctions were applied by state and local governments in the United States, contrary to clear opposition by the Clinton Administration.\textsuperscript{291}

Second, doubts remain whether the sanctions were legal under U.S. law. While their legality was never tested in court, since the case settled before any court challenge to them was heard, it is possible that they could have been declared unconstitutional.\textsuperscript{292}

State and local officials in other jurisdictions would have followed suit, since New York City Comptroller Hevesi heads the so-called Executive Monitoring Committee, "representing 800 financial officers throughout the nation [which also] recommended sanctions against Switzerland's three biggest banks." \textit{Id}. The Executive Monitoring Committee is composed of nine leading state and local officials that coordinate strategy, on behalf of its 800 members, on how to best exert financial and political pressure upon various foreign companies to settle Holocaust-era claims. For a description of the work of the Executive Monitoring Committee, see \textit{Update on Swiss Restitution to Holocaust Survivors, August 1998} (visited Jan. 20, 1999) <http/vww.finance.net.gov/nycnet.htm>.

California Treasurer Matt Fong went one step further and ordered his staff not to do business with the Swiss banks. \textit{See id}; \textit{see also Tom Tugend, California Imposes Sanctions against Swiss Banks, JEWISH J., July 10, 1998, at 12.}

The sanctions had the potential of denying the Swiss banks billions of dollars in investments.

The Swiss government, in response, labeled the sanctions "counterproductive, unjustified and illegal" and asserted that Switzerland would not be influenced by "attempts to exert pressure." \textit{Id.}

\textsuperscript{291} \textit{See Nancy Dunne, Court in U.S. Bars State Sanctions, FIN. TIMES (London), Nov. 5, 1998, at 10.}

\textsuperscript{292} In June 1999, the use of sanctions by state and local governments for political purposes was dealt a blow when the U.S. Court of Appeals for the First Circuit declared the so-called Massachusetts Burma Law ("MBL") unconstitutional. \textit{See National Foreign Trade Council v. Natsios, 181 F.3d 38,77 (1st Cir.), cert. granted, 120 S. Ct. 525 (Nov. 29, 1999).} The MBL, enacted in 1996, severely restricted the ability of Massachusetts agencies to purchase goods or services from individuals or companies that engage in business in Burma, also known as Myanmar. \textit{See id. at 45.} The law was passed to express Massachusetts's disapproval of the dictatorial regime in Burma, and as a means to impose economic pressure upon the repressive Burmese regime to allow democratic reform in the country. \textit{See id. at 46-47.}

The First Circuit, following the lead of the district court, found that the MBL unconstitutionally infringes on the federal government's power over foreign affairs. \textit{See id. at 51-59.} Going beyond the district court's holding, the First Circuit also held that the MBL violated the foreign commerce clause of the U.S. Constitution. \textit{See id. at 61-71.}

On November 29, 1999, the U.S. Supreme Court granted certiorari to Massachusetts' appeal to overturn the First Circuit's \textit{Natsios} decision. \textit{See National Foreign Trade Council v. Natsios, 120 S. Ct. 525 (1999) (granting certiorari).} Until the Supreme Court finally decides the issue, the First Circuit's \textit{Natsios} decision puts any sanctions by state and local governments to force settlement of Holocaust-era claims in serious jeopardy.

The relevance of the \textit{Natsios} decision to the sanctions threatened in the Swiss banks case—and the other Holocaust-era claims—was underscored by the fact that New York
Third, the sanctions were not applied against a foreign government, but against private banks involved in the federal class action litigation.

Fourth, the sanctions were applied for a single, limited purpose: to effect the outcome of a single lawsuit. Never before have sanctions, either in the United States or abroad, been applied with such a narrow focus.

Finally, the sanctions were effective even without their full implementation. The actual sanctions applied against the Swiss banks, before they came to bargaining table, were minimal. It was the threat of future, more serious punitive actions that forced the Swiss banks, first, to come to the bargaining table and offer $600 million, and then to raise this “last offer” to $1.25 billion to resolve the litigation.

One important lesson from this experience is that private commercial institutions can behave rationally, even when sovereign governments may not. Looking at the economic bottom-line, the Swiss banks made the rational decision that it would cost them less to settle rather than to fight the lawsuits and face the looming economic threats about to be imposed upon them by state and local governments in the United States.

D. The August 1998 Settlement

On August 12, 1998, a comprehensive “rough justice” settlement for $1.25 billion was reached by the Swiss banks with the plaintiffs in the various actions filed against the banks.293 The $1.25 billion

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For discussions of the behind-the-scenes maneuvers leading to the settlement, see
The $1.25 billion figure was not a lump-sum settlement. Rather, under the agreement struck between the parties, the two Swiss banks, UBS and Credit Suisse, agreed to pay out the $1.25 billion in four installments: (1) an initial payment of $250 million to be paid 90 days after Judge Edward Korman, the trial judge, formally approved the settlement; and (2) the next three payments of $333 million each to be paid on the first, second and third anniversary of Judge Korman's approval order.

Pursuant to a settlement agreement subsequently signed by the parties on January 26, 1999—more than five months after the settlement was orally agreed upon and preliminarily approved by Judge Korman in open court—the $1.25 billion should be fully paid off by the Swiss banks by November 23, 2001.

Under a time frame set out by Judge Korman in mid-1999 to meet the requirements of class action litigation in the United States, nearly 900,000 potential beneficiaries were notified by late summer.
1999 of the class action settlement, and had until October 22, 1999 to opt out of the settlement so as to pursue their individual actions. The notifications were made by direct mail, through notices in 500 newspapers published in forty countries, and in various languages, including Yiddish. A toll-free number and a Web site were set up to provide information to potential claimants. The notification process was hailed as "the most ambitious effort ever to notify potential beneficiaries of a legal settlement."

298. Survivors who have registered with the various plaintiffs' law firms or are members of organizations representing their interests, such as the Holocaust Museum in the United States or Yad Vashem in Israel, obtained legal notices of the class action settlement through the mail. Additionally, advertisements were published in newspapers around the world, including those with a special audience, such as those with a large Jewish or Romani (Gypsy) readership, to notify the readers of the settlement and procedures for "opting out." See Marilyn Henry, Swiss Banks Reparations Only Expected in One Year, JERUSALEM POST, June 6, 1999, at 3, available in 1999 WL 9003995. An estimated $25 million, an astounding sum, though still only 2% of the $1.25 billion settlement, was allocated by Judge Korman to meet the notification and distribution requirements necessary to conclude this class action settlement. See id.

299. See Letter from Professor Burt Neuborne, Court-Appointed Settlement Counsel, to Class Members at 2, In re Holocaust Victim Assets Litigation, No. CV-96-4849 (E.D.N.Y. June 9, 1999) [hereinafter Letter from Professor Neuborne to Class Members].

300. See, e.g., To Victims of Nazi Persecution and Their Heirs Who May Have Claims against Swiss Banks or other Swiss Entities Relating to the Holocaust, L.A. TIMES, July 11, 1999, at A32 (advertising the class action settlement).


302. See id. The toll-free number is 1-888-635-5483 and the Web site is <http://www.swissbankclaims.com>. See id.

303. See id. The notice dated June 11, 1999 that was mailed to potential class members and posted on the Internet contains a summary of the settlement in a helpful question-and-answer format. See Notice of Pendency of Class Action and Proposed Settlement and Hearing; Initial Questionnaire, In re Holocaust Victim Assets Litigation, No. CV-96-4849 (E.D.N.Y. filed May 10, 1999) [hereinafter Notice of Pendency of Class Action and Proposed Settlement and Hearing].

The notice also contained an "Initial Questionnaire." Individuals seeking to obtain a share of the settlement were asked to return the completed questionnaire (or, at least, send a letter to register their name) to the Notice Administrator by October 22, 1999. See id. The questionnaire was criticized by some as being unduly complicated. "Clients look at this 20-page thing and they don't understand it," said Elihu Kover, director of social services at Selfhelp, the preeminent New York agency assisting survivors. It's not like filling out a welfare application. It's an emotional issue. This is pretty complicated and stressful." Henry, supra note 298, at 3.

In fact, failure to fill out the questionnaire did not prejudice any claimant in sharing in the settlement proceeds. "The truth is that if they do absolutely nothing with the [questionnaire], that's fine, ' [Professor] Neuborne said. Ignoring the questionnaire does not affect a survivor's legal right to make a claim against the banks settlement." Id. (first alteration in original). Professor Burt Neuborne heads the committee of plaintiffs' lawyers representing the claimants. See id.

Of course, failure by a member of one of the settling classes to notify the court that
In addition, Judge Korman held a “fairness hearing” on November 29, 1999 to determine whether the settlement is “fair, adequate and reasonable.”

With the various notice and fairness requirements imposed by class action litigation, it unfortunately appears that the Nazi victims, most of them elderly, will not be receiving any payments until mid-2000, two years after the Swiss bank settlement was first announced.

While the historic settlement ended the question of how much money should be paid out, it left many other questions unanswered, including: (1) Who would pay the $1.25 billion?; (2) Who would receive the $1.25 billion?; and (3) Which defendants would be released from further litigation?

With the September 1, 1998 deadline for the issuance of further sanctions against the Swiss banks looming just two weeks away, the parties in the Swiss bank litigation cannot be blamed for settling the case in mid-August 1998 without first deciding these critical, but

the member is opting out of the settlement would prejudice such member: the person would be precluded from filing a separate lawsuit against the Swiss banks or any other entities released in this litigation. See Notice of Pendency of Class Action and Proposed Settlement and Hearing, supra, at 9.

304. Weinstein, supra note 301, at A3. Of course, in this case, the “fairness hearing” was nothing more than a formality required under rules of federal class action litigation. Since it was Judge Korman who crafted the $1.25 billion settlement in August 1998, it is unlikely that in November 1999 he would have found the settlement not to be “fair, adequate and reasonable.”

305. See Henry, supra note 298, at 3. Distribution might begin even later. As reported by the Los Angeles Times:

Elan Steinberg, executive director of the World Jewish Congress, one of the organizations that has played a key role in the Swiss bank campaign, said he expects that distribution of funds will start in the second half of [2000]. However, Melvin [sic] I. Weiss, one of the lead lawyers for the plaintiffs, said he would “not predict when distribution would begin.”

Weinstein, supra note 301, at A3 (quoting Melvyn I. Weiss); see also Letter from Professor Burt Neuborne to Class Members, supra note 299, at 2 (“If all goes according to plan, we hope to be able to begin disbursing the funds within one year.”). In his letter to class members, Professor Neuborne acknowledged that the process of distribution was taking too long, but also explained the reasons for the delay:

All of us who have worked on this Settlement regret that we cannot move more quickly in distributing the funds. It is our duty, however, to assure that everyone affected by the Settlement is given a chance to comment on its fairness, and to have an opportunity to express an opinion about the fairest way to allocate and distribute the funds. That takes time. . . . Because we all feel so deeply about the Holocaust, we want this process to treat every survivor with scrupulous fairness.

Id.
thorny, issues. This mentality, however, of "let's just take the money and run," created a host of problems. Many of these problems continue to this day. Each will be discussed separately below.

1. Parties Paying the $1.25 Billion

The parties obligated to make the payment of $1.25 billion are Credit Suisse and UBS, the defendant banks in the federal class action litigation. The two banks, however, will receive a credit against this amount for any payments made by them or by any other Swiss banks on World War II-related dormant accounts, whether the payments are made voluntarily or as a result of an award issued by the bank-created Claims Resolution Tribunal.

306. See Settlement Transcript, supra note 296, at 2 ("The defendant banks will pay $1,250,000,000 in four payments over the course of three years."); Settlement Agreement, supra note 265, ¶ 1 (defining "Settling Defendants"). Credit Suisse will pay one-third of the settlement, or $416,667,000, and UBS will pay two-thirds, or $833,333,000. See Moore, supra note 293, at A12. UBS, Europe's biggest bank, is paying two-thirds of the amount since, during the course of the litigation, it merged with the third Swiss defendant bank, Swiss Bank Corporation. See discussion supra note 295. Soon after the settlement, UBS reported a third-quarter loss of $660 million. See Swiss UBS Reports 3rd-Quarter Loss, AP ONLINE, Nov. 17, 1998, available in 1998 WL 22419424. It appears, however, that the loss was due to UBS's investments, rather than from its obligation to pay the settlement. See Edmund L. Andrews, Swiss Banks Stagger after Several Investing Missteps, N.Y. TIMES, Oct. 23, 1998, at S4; Alan Cowell, Big Swiss Bank is Shaken up by Hedge Fund, N.Y. TIMES, Oct. 3, 1998, at B1.

307. See Settlement Transcript, supra note 296, at 2-3; Settlement Agreement, supra note 265, ¶¶ 5.2, 5.3.

The probe of 63 Swiss banks to locate Holocaust dormant accounts—created and funded by the Swiss Bankers Association (“SBA”) and chaired by former Federal Reserve Chairman Paul Volcker—has turned out to be both more costly and more time-consuming than originally anticipated. See Delay Seen in Report on Holocaust Assets, WALL ST. J.-EUR., Nov. 17, 1998, at 2, available in 1998 WL 21154259. In November 1998, Volcker's ICEP reported that it would not meet its original deadline of December 31, 1998 to finish the audit of the Swiss banks. See id. That same month, Swiss bank officials announced that the cost of the audit "is definitely a multiple of what we're looking for." Tani Freedman, Cost of Swiss-Bank Audits to Trace Nazi-era Accounts Causes Anger, AGENCE FR.-PRESSE, Nov. 16, 1998, available in 1998 WL 16640465 (quoting Michel Derobert, head of the SBA). According to the French-language newspaper Le Temps, the entire ICEP operation might cost one billion Swiss francs, or $719 million. See id.


In June 1999, Professor Thomas Buergenthal of George Washington University Law School, former president of the Inter-American Court of Human Rights and one of the most respected international human-rights law scholars, was appointed to head the Claims Resolution Tribunal in Zurich. See id.
Immediately after the settlement, the two defendant banks expressed a desire for the Swiss government to contribute funds to the $1.25 billion settlement. 308 However, the Swiss government, despite obtaining the tangible benefit of having a lawsuit dropped against the government’s SNB as a condition of the settlement, refused to make any contribution. 309

The two banks, except for payments made by the other Swiss banks for provable World War II-era dormant accounts found deposited with them, 310 are being stuck with the bill for the entire Swiss nation for wrongs committed during the Holocaust. 311

308. See Elizabeth Olson, Swiss Are Relieved, But Sour, at Banks’ Holocaust Accord, N.Y. TIMES, Aug. 16, 1998, at 8. That article states:

[T]he question of exactly who will pay the $1.25 billion to Holocaust survivors seemed to ignite real worry. Many Swiss, particularly those who lived through World War II, view any use of taxpayer money for this purpose as an unacceptable admission of wartime wrongdoing. This belief is combined with the fact that Switzerland is now climbing out of its most serious recession. . . . Mr. [Pascal] Couchepin, [the Swiss Minister for the Economy] said that “there is no reason for the Swiss Government to pay anything.” . . . The Swiss National Bank, which has been singled out as a major buyer of looted gold from Nazi Germany, was not part of the accord and has not yet taken a position.

Id. (quoting Pascal Couchepin).

309. The position of the Swiss government is regrettable, since the Swiss National Bank (“SNB” “was the biggest single purchaser of looted gold acquired by Nazi Germany from countries it occupied and from individual Jews robbed as they faced death in extermination camps.” Alan Cowell, Biggest German Bank Admits and Regrets Dealing in Nazi Gold, N.Y. TIMES, Aug. 1, 1998, at A2.

Immediately after the settlement, the Swiss government issued a statement in which it both distanced itself from the result and took pains to confirm that it would not be contributing any monies to the settlement:

The Federal Council noted today that a settlement was finalized last night between the CS Group, UBS AG, and the American plaintiffs. It hopes that this settlement calms the tense situations of recent months and promotes good economic relations. The precise content of the settlement is not yet known. The Federal Council has always stressed that negotiating such a settlement is a matter for the parties affected. Accordingly, it did not take part in these negotiations. For this reason no obligation ensues for the Swiss Confederation from the settlement. The Federal Council reserves the opportunity to make a more detailed comment as soon as it has had the opportunity to analyze the settlement’s text and conditions. Moreover, the Federal Council will continue to proceed along the way it has determined, as in the past.

Declaration of the Swiss Federal Council, Aug. 13, 1998 (on file with author) (emphasis added). See also Blau, supra note 263, at 34; Swiss Banks to Begin Holocaust Pay, AP ONLINE, Nov. 20, 1998, available in 1998 WL 23031526 (“The Swiss National Bank, the central bank, has refused to pay into the settlement. For now UBS, the biggest bank, will pay two-thirds and Credit Suisse the remaining one-third.”).

310. For discussion of dormant accounts discovered in Swiss banks, see supra note 15.

311. See The End of the Beginning for Holocaust Victims, PRIVATE BANKER INT’L, Oct. 1, 1998, at 4, available in 1998 WL 10780489. (“To some extent the two banks are picking up the tab for a number of Swiss institutions which may have faced separate lawsuits in the absence
In November 1998, the two banks timely made the first $250 million payment. The monies were deposited in an escrow account, awaiting distribution.

2. Parties Released from Further Litigation

In return for $1.25 billion, plaintiffs in the class litigation agreed to drop their instant lawsuit against the two defendant Swiss banks. However, the release obtained by the defendant banks went substantially beyond just a dismissal of the New York federal class action litigation.

First, the class action plaintiffs agreed to dismiss not only the New York lawsuit, but also to drop their California lawsuit and to release the defendant banks "for all claims of any kind arising out of a [sic] Nazi era World War II or its aftermath."

Moreover, plaintiffs agreed to release not only the two defendants for all World War II-related claims, but also "the government of Switzerland, the Swiss National Bank, all other Swiss banks, and all other members of Swiss industry, except for the three Swiss insurers who are defendants in the [federal class action insurance litigation]." As a result, plaintiffs had to dismiss their federal lawsuit against the SNB for claims involving Nazi-looted gold. Additionally, as part of the settlement, defendants sought and obtained the dismissal of the lawsuit against UBS filed by fired Swiss bank guard Christoph Meili.

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313. See Settlement Agreement, supra note 265, ¶ 12.1.

314. See id. ¶ 12.1.

315. Settlement Transcript, supra note 296, at 3.

316. Settlement Agreement, supra note 265, ¶ 1 (providing definition of "Releasees" and stating that the term Releasees excludes "Basler Lebens-Versicherungs-Gesellschaft, Zürich Lebensversicherungs-Gesellschaft, and Winterthur Lebensversicherungs Gesellschaft and their subsidiaries in the insurance business, but only to the extent of insurance claims of the type asserted in Cornell v. Assicurazioni Generali S.p.A., No. 97 Civ. 2262 (S.D.N.Y. [filed June 26, 1997])"); see also Settlement Transcript, supra note 296, at 3. For discussion of the Cornell case and other Holocaust-era insurance lawsuits, see text and notes infra Part IV.

Unfortunately, as of March 1, 2000, the releases still had not been finalized.

317. See Settlement Agreement, supra note 265, ¶ 13; Settlement Transcript, supra note 296, at 3.

318. See Interview with Christoph Meili (Feb. 11, 2000).
The dismissal of the claims against the Swiss National Bank, which paid no money to be dismissed, has come under harsh criticism. The major Holocaust survivor group in Israel initially balked at the settlement specifically for that reason.\(^\text{319}\)

Finally, as a condition of settlement, all sanctions and threats of sanctions against Switzerland and any of its businesses were dropped.\(^\text{320}\)

In effect, the settlement obtained by the two defendant Swiss banks insulates the entire nation of Switzerland and all its businesses from any kind of litigation—anywhere in the world—having any connection to World War II.\(^\text{321}\)

By agreeing to pay $1.25 billion, the two Swiss banks essentially bought peace for the entire Swiss nation (except for three Swiss insurance companies) for any acts committed by the Swiss during or related to World War II.\(^\text{322}\)

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\(^{319}\) See Marilyn Henry, *Slave Labor Suit under Way as WJC Satisfies Israeli Survivors*, JERUSALEM POST, Mar. 11, 1999, at 5, available in 1999 WL 9000437. "The [World Jewish Congress] is only now repairing its acrimonious dealings with Israeli survivors, who had resisted approving the $1.25 billion settlement. . . . Moshe Sanbar, chairman of the Center of Organizations of Holocaust Survivors in Israel, said the settlement was flawed because it released the Swiss National Bank from all claims." *Id.*

\(^{320}\) See Settlement Transcript, *supra* note 296, at 6.

\(^{321}\) See Settlement Agreement, *supra* note 265, ¶ 1. The Settlement Agreement defines "Releasees" to include:

1. the Settling Defendants [defined as "Credit Suisse and UBS AG (as successor to Union Bank of Switzerland and Swiss Bank Corporation)"]; 2. the Swiss National Bank; 3. Other Swiss Banks; 4. the Swiss Bankers Association; 5. the Swiss Confederation (including, without limitation, the Cantons and all other political subdivisions and governmental instrumentalities in Switzerland); and 6. all business concerns (whether organized as corporations or otherwise) headquartered, organized or incorporated in Switzerland as of October 3, 1996.

*Id.* The rest of the definition includes foreign corporations with Swiss subsidiaries and foreign offices of Swiss corporations, if at least 25% of the entity's shares are owned by a Swiss-based corporation. See *id.* In effect, the settlement release states to the plaintiffs: "If it's Swiss, you can't touch it."

\(^{322}\) The Settlement Agreement defines "Claims or Settled Claims" in the following broad terms:

Claims or Settled Claims means any and all actions . . . whether in law, admiralty, or equity, whether class or individual, under any international, national, state, provincial, or municipal law, whether now accrued or asserted or hereafter arising or discovered, that may be, may have been, could have been, or could be brought in any jurisdiction before any court, arbitral tribunal, or similar body . . . by reason of, or in connection with any act or omission in any way relating to the Holocaust, World War II and its prelude and aftermath, Victims or Targets of Nazi Persecution transactions with or actions of the Nazi Regime, treatment of refugees fleeing Nazi persecution by the Swiss
On January 26, 1999, the Settlement Agreement was finalized and signed by the parties. The five-month delay was due to disagreements among the claimants’ attorneys as to who would be eligible for compensation. The distribution issues are discussed below.

3. Distribution Issues

The $1.25 billion class action settlement did not solve the issue of distribution. While the settlement decided how much the Swiss banks were going to pay to end the class action litigation both against them and Switzerland, it did not decide who was going to receive this money. This thorny question was left for future determination.

Immediately after the settlement, various individuals and institutions, both Jewish and non-Jewish, began making claims to the funds. Disputes also arose as to how much the attorneys

"Confederation . . . or any related cause or thing whatever . . . ."


323. See Settlement Agreement, supra note 265; see also Weinstein, supra note 322, at A3.
324. See id. (“The main “hang-up” in wrapping up the settlement was defining the class of persons eligible for compensation,” said New York University law professor Burt Neuborne, a member of the plaintiffs’ lawyers steering committee.”).
325. The Settlement Agreement contemplates for Judge Korman to appoint a Special Master . . . [who] shall develop a proposed plan of allocation and distribution of the Settlement Fund, employing open and equitable procedures to ensure fair consideration of all proposals for allocation and distribution. The proposed allocation and distribution plan must be approved by the Court before the Settlement Fund may be distributed.
326. One day after the settlement, I was reminded by a journalist covering a press conference where the Swiss settlement was announced of a Chinese proverb that “failure is an orphan but success has many parents.” The journalist was commenting on the various individuals and organizations at the conference claiming credit for the settlement.
representing the plaintiffs should receive from the settlement.\textsuperscript{327} Such disputes continue as of January 1, 2000.\textsuperscript{328}

a. Claimants to the Settlement Proceeds

While at first blush it may appear that the only claimants to the class action settlement should be Jews, in fact, the class of plaintiffs described in the lawsuit seems to encompass other groups persecuted by the Nazis.

One group making a claim to a portion of the settlement funds are the Romani people, more commonly known as Gypsies. According to one Romani (Gypsy) representative, "[t]he 1.25 billion dollars which is to be paid by two Swiss banks belongs to Jews. But they are going to give 10-12 percent of this sum to the gypsies of Europe."

Second, even among the Jewish community, there is a debate as to who should receive the funds. As described in a news story a few months after the settlement:

A battle is flaring between Jewish humanitarian groups, plaintiffs' lawyers and concentration camp survivors over the $1.25 billion paid by Swiss banks to settle Holocaust-related lawsuits, and potentially billions more from claims against companies in Germany, Austria and other countries.

At the core of the dispute is the emotionally charged question of how to divide the bulk of the settlement, because only a small fraction of it will go to the heirs of Jews who had Swiss bank accounts on the eve of World War II and were killed by the Nazis. As a result, up to $1 billion may be up for grabs.\textsuperscript{329}

\begin{itemize}
\item \textsuperscript{327} See, e.g., Elli Wohlgelernter, \emph{Lawyers and the Holocaust}, \textit{Jerusalem Post}, July 2, 1999, at 4B.
\item \textsuperscript{329} \textit{Romanian Gypsies Seeking Part of Jewish Compensation}, \textit{Agence Fr.-Presse}, Nov. 10, 1998, available in 1998 WL 16637114 (quoting Florin Cioaba, Romanian gypsy leader).
\item \textsuperscript{330} Meier, \textit{supra} note 328, at A1.
\end{itemize}
Different proposals have been made for distribution of the funds that remain leftover after the Holocaust-era Swiss bank depositors and their heirs have been compensated. These proposals include:

1. The monies should go only to Holocaust survivors.

331. See Henry Weinstein & John J. Goldman, Cutting the Cloth of Atonement, L.A. TIMES, Sept. 17, 1998, at A1 (“There is general agreement that first payments should be made to survivors or their heirs with accounts clearly identified in the Swiss banks.”).


No amount of money, neither in bulk dollar figures nor in percentages, should be taken from any restitution-proceeds that have been obtained in the name of Holocaust-victims. Any proposed allotments, no matter how worthwhile the cause, be it for Holocaust education, support of religion, erection of monuments, or any other reason, must be entirely voluntary on our part!

Id.

The objection to monies being spent for Holocaust education or other social causes was made by NAHOS in reaction to a proposal made by some Jewish organizations in the United States that an 80/20 formula be adopted, with 80% of the proceeds going directly to Holocaust survivors and 20% allocated to Jewish organizations for social causes. See id. at 1; see also Richard Cohen, The Money Matters, WASH. POST, Dec. 8, 1998, at A21. That article states:

An immense crime was committed in Europe, a moral calamity that left a black hole in the middle of the 20th century. Money is the least of it. But money is part of it. Holocaust victims paid once for being Jewish. Now, in a way, they or their heirs are being asked to pay again—a virtual Jewish tax which obliges them not to act as others would in the same situation. But in avoiding one stereotype, they adopt a worse one—perpetual victim.

Id.; see also Marilyn Henry, Desperately Vying for a Piece of the Pie, JERUSALEM POST, Oct. 16, 1998, at 17, available in 1998 WL 6536585. That article states:

Along with a number of other survivors, Weisshaus has generated a proposal calling at least 70% of the funds to be distributed directly to survivors and heirs, while 25% of the settlement would be used for medical care of ill survivors. The Weisshaus group ... also is vehement that the World Jewish Congress and the Claims Conference should have no role in the allocation, and they receive none of the funds.

Id.; see also Jodie Morse, Restitution, But at What Price?, TIME, Dec. 14, 1998, at 78 (“Gisella Weisshaus, the 69-year-old survivor who brought the first claim against the Swiss banks ... claim[s] that the money should go only to those who suffered.”). Even if all the funds received go to survivors of the Holocaust, a problem remains: determining who is a “survivor.”

See Weinstein & Goldman, supra note 331, at A1. The authors state:

Complicating matters is the difficulty of precisely defining Holocaust survivors. Hundreds of thousands of people around the world may file claims.

Some think the definition should be limited to people who were imprisoned in concentration camps and managed to stay alive. Others believe in a broader definition, including people in forced labor camps, people who fled from their homes and lived underground, others who left Germany after the Nazi regime started taking draconian measures and still others who managed to flee other Eastern European countries after the Nazis invaded.

Exacerbating the issue is the fact that many of those who perished in the Holocaust died without wills.

Id.
(2) the monies should go to the State of Israel, where the majority of the survivors live; 333

(3) the monies should be spent for Holocaust education; 334 and

(4) all Jews, including Holocaust survivors, should reject the funds, and, instead, the monies should be distributed to survivors of other, more recent human rights tragedies (such as to the victims of the Rwandan massacres and the Bosnian conflict of the 1990s, and the Khmer Rouge Cambodian auto-genocide of the 1970s). 335

In January 1999, more than five months after the settlement was announced, the parties finally agreed on who should receive com-

I believe, first and foremost, that those who have claims should receive payment. Holocaust survivors without specific claims should be included in the disbursement of funds. After claims are satisfied and after needy survivors, who are mostly in Eastern Europe, are provided for, I suggest the remainder go to Israel. Not only would this make an important statement, but Israel has the greatest number of Holocaust survivors who need support. Israel has proportionately more children and grandchildren of survivors than any other nation.

Id.

334. See Morse, supra note 332, at 78 (“Under one proposal being floated by the World Jewish Restitution Organization, after specific [Swiss dormant bank account] claims are settled, 80% of what’s left would go to destitute survivors and 20% to Holocaust education.”); see also Besser, supra note 328, at 22 (“Survivors are entitled to get what was stolen from them or their parents. ... But we believe Holocaust education is more important; we believe the last chapter of the Holocaust cannot be gold and it cannot be bank accounts.”) (quoting Miles Lerman, chair of the U.S. Holocaust Memorial Council); Weinstein & Goldman, supra note 331, at Al (“Some individuals clearly are entitled to compensation. But... money left over... ‘should be used to rebuild and continue the Jewish people. The way to rebuild the Jewish people primarily is through education’.” (quoting Rabbi Shmuel Bloom, executive vice president of Agudath Israel of America, “a major orthodox organization”)).

I propose an entirely different idea, one that emerged in a conversation with Dennis Prager, an [sic] Los Angeles broadcaster renowned for his writings on ethics and Judaism: Once the cheated depositors have been paid, let the Jewish people relinquish any claims to the balance of the money. Let it be used instead to help human beings whose lives have been shattered by genocide and ethnic slaughter.

Rather than earmarking the money for Jewish causes, spend it to heal the still-suffering survivors of the Rwandan massacre. Or the deeply scarred victims of the Cambodian holocaust. Or the Bosnian women brutalized in Serbia’s rape camps.

“We Jews wanted to awaken the world to what the Swiss did,” Prager says. “We don’t want to profit by it.”

Id.
pensation from the Swiss banks.\textsuperscript{336} Five classes of eligible claimants were agreed upon:\textsuperscript{337}

(1) the “Deposited Assets Class,” consisting of “Victims or Targets of Nazi Persecution” (“VTNP”) claimants and their heirs seeking to recover World War II-era assets deposited in a Swiss bank, investment fund, or other custodian, prior to May 9, 1945;\textsuperscript{338}

(2) the “Looted Assets Class,” consisting of VTNP claimants and their heirs seeking to recover compensation for assets belonging to them and stolen by the Nazis, which made their way to the Swiss banks\textsuperscript{339} or Nazi assets that were “fenced” by the Swiss banks;\textsuperscript{340}

(3) “Slave Labor Class I,” consisting of VTNP claimants who performed slave labor for companies or entities that deposited assets derived from that slave labor in Switzerland;\textsuperscript{341}

\textsuperscript{336} See Weinstein, \textit{supra} note 322, at A13. Again, Judge Korman came to the rescue, successfully intervening to settle the five-month impasse. According to the \textit{Los Angeles Times}, the January 1999 final settlement with the Swiss banks “was reached only after a lengthy late night meeting in the chambers of a Brooklyn federal judge who has been supervising the massive case.” \textit{Id.}


\textsuperscript{338} See \textit{Settlement Agreement, supra} note 265, \sect{8.2(a)}. Germany surrendered to the Allied powers on May 9, 1945.

Individuals in this class, forming the original basis for the class action lawsuit against the Swiss banks, will be treated preferentially. The claimants in this class will be receiving payment directly from the Claims Resolution Tribunal in Zurich, established and funded by the Swiss banks under the auspices of Paul Volcker. These so-called “Volcker accounts” claimants will be paid individually as they are able to prove to the Tribunal the existence of the accounts, and need not wait for the release of funds from the court-created escrow account.

The Claims Resolution Tribunal, headed by international law professor Thomas Buergenthal and staffed by arbitrators and research attorneys, is using a relaxed standard of proof to determine whether a claimant has proven the existence of a World War II-era dormant account at a Swiss bank. As explained by Professor Buergenthal:

“I can’t tell you how many similar names we get and stories that ‘my mother told me we had a very wealthy uncle who lived in this town.’ . . . Our test is plausibility . . . Sometimes you have some people with the same name, the same town, with a profession where you would expect to have money. It is plausible that both are entitled to it.”

\textit{Henry, supra} note 307, at 9 (quoting Professor Thomas Buergenthal).

\textsuperscript{339} See \textit{Settlement Agreement, supra} note 265, \sect{1} (defining “looted assets”).

\textsuperscript{340} See \textit{id.} (defining “cloaked assets”).

\textsuperscript{341} See \textit{id.} \sect{8.2(c)}. 
(4) "Slave Labor Class II," consisting of individuals who performed slave labor at a facility or business concern headquartered, organized, or based in Switzerland; 342 and

(5) the "Refugee Class," consisting of VTNP claimants, and their heirs, who sought entry into Switzerland to escape the Nazis and were either denied entry, or, after gaining entry, were either sent back or mistreated by the Swiss. 343

A close analysis of these five categories reveals, however, that they make little sense. First, the "Deposited Assets," "Looted Assets," and "Slave Labor I" classes require a claimant in these three classes to prove that the Swiss government or private Swiss industry (the "Releasees" specified in these classes) did business with the Nazis. For example, a claimant who worked as a slave laborer for the Nazis does not fall under the "Slave Labor I" class unless the company for which the slave laborer worked "deposited the revenues or proceeds of that labor with, or transacted such revenues or proceeds through . . . [Switzerland]." 344

Of course, a now-elderly Holocaust survivor whose only goal was to stay alive, would almost never be able to offer proof that the benefits of his or her labor for the Nazis were eventually sent to Switzerland. This requirement is nonsensical, and exists only because this was the allegation made against the Swiss in the class action complaints.

It appears, however, that this nexus to Switzerland will never have to be made, since a mere allegation of such a charge by a
claimant seems to be sufficient for the claimant to come within the class.\textsuperscript{345}

Second, the term VTNP,\textsuperscript{346} appearing in four of the five class categories,\textsuperscript{347} does not comport with reality. It was not utilized in the Nuremberg Trials nor has it been used by any Holocaust scholar. Rather, the term was invented solely, and appears for the first time, in the Settlement Agreement.\textsuperscript{348} The Settlement Agreement's

\textsuperscript{345} See id. \S 8(c). “Slave Labor Class I consists of Victims or Targets of Nazi Persecution who actually or allegedly performed Slave Labor for companies or entities that actually or allegedly deposited the revenues or proceeds of that labor with [Switzerland].” Id. (emphasis added).

In the letter to Class Members, Professor Burt Neuborne, Court-Appointed Settlement Counsel, confirms the actual irrelevancy of this nexus between slave labor or looted assets and their proceeds being sent to Switzerland. In encouraging all former slave laborers to complete and remit the initial settlement questionnaire, thereby registering the applicant to possibly receive funds, Professor Neuborne advised:

Even if you are unsure of whether you have a claim against a Swiss entity, you should complete the enclosed Initial Questionnaire, and follow the procedures described in the enclosed Notice to preserve your rights. For example, if you performed slave labor, you may not know whether revenue or proceeds of that slave labor were deposited with Swiss banks. Or, you may have had assets looted by the Nazi regime, but you may not know whether those assets were disposed of through a Swiss bank. In both instances, you may still be entitled to share in the Settlement Fund. Although there is no guarantee that you will recover any money, you should complete the enclosed Initial Questionnaire.

Letter from Professor Burt Neuborne to Class Members, supra note 299, at 2.

That same month, Douglas M. Bloomfield of the World Jewish Congress likewise confirmed the irrelevancy of this requirement. According to Bloomfield, “because of the Nazis' intimate financial relationship with Switzerland during the war, practically all Holocaust survivors are eligible [for the $1.25 billion settlement]. 'Every single Holocaust survivor should receive something,' Bloomfield said.” Liz Halloran, Holocaust Survivors Face Evil Memories in Swiss Atonement, Victims of Banks' Nazi Appeasement Sought, HARTFORD COURANT, July 18, 1999, at A13, available in 1999 WL 19941039 (quoting Douglas M. Bloomfield).

Of course, Bloomfield's explanation still leaves an important question unanswered: Who is to be considered a "Holocaust survivor"?

\textsuperscript{346} See Settlement Agreement, supra note 265, \S 1. That agreement states: Victim or Target of Nazi Persecution means any individual, corporation, partnership, sole proprietorship, unincorporated association, community, congregation, group, organization, or other entity persecuted or targeted for persecution by the Nazi Regime because they were or were believed to be Jewish, Romani, Jehovah's Witness, homosexual, or physically or mentally disabled or handicapped.

Id.

\textsuperscript{347} The term is not used in category four, “Slave Labor Class II,” covering individuals working as slave laborers for Swiss-based companies. This class covers any person, whether or not fitting the definition of VTNP. See id. \S 8.2(d).

\textsuperscript{348} Earlier, in the Trilling-Grotch amended complaint, plaintiffs utilize the term "targets of Nazi persecution," but, unlike in the Settlement Agreement, never define the term. See Trilling-Grotch Amended Complaint, supra note 123, \P 20, 24, 35, 38-39, 41.
definition of VTNP both limits and expands the categories of individuals who can recover from the Swiss settlement.

Most striking is that VTNPs are not limited to Jews. Rather, it also contemplates that, in addition to Jews, the following four groups persecuted by the Nazis are also VTNPs, and, therefore, will receive a part of the $1.25 billion settlement: (1) homosexuals; (2) physically or mentally disabled or handicapped persons;\(^{349}\) (3) the Romani (Gypsy) peoples; and (4) Jehovah's Witnesses.\(^{350}\)

At the time of filing of the class action lawsuits, the common understanding was that the lawsuits were being filed on behalf of the Jewish victims of Nazi Germany.\(^{351}\) Throughout the course of the litigation, the Jewish non-governmental organizations ("NGOs"), such as the World Jewish Congress in New York and the Simon Wiesenthal Center in Los Angeles, led the fight against the Swiss banks.

Later, the parties in the Austrian banks' settlement also utilized the term VTNP to define the class of persons entitled to compensation from the Austrian banks. See discussion and notes infra Part VII.A.1. However, that settlement gave the term a much broader meaning:

"Victim or Target of Nazi Persecution" shall mean any person who was a member of a group that was systematically persecuted or targeted for persecution by the Nazi Regime, its agents or sympathizers, based on race, ethnic origin, nationality, political belief or affiliation, sexual orientation, or mental or physical disability, and their heirs, devises, legatees, successors, beneficiaries and/or assigns and any person persecuted or targeted for assisting the foregoing groups.

Settlement Agreement with Creditanstalt AG & Bank Austria AG § 1(c), No. 99 Civ. 0387 (S.D.N.Y. filed Mar. 15, 1999).

The Austrian banks' VTNPs, unlike the Swiss banks' VTNPs, are not limited to Jews, homosexuals, Romanis (Gypsies), Jehovah's Witnesses, and the disabled, but includes any group targeted by the Nazis. See id. Moreover, the Austrian banks' definition of VTNPs specifically includes heirs, while the Swiss bank Settlement Agreement is unclear as to whether heirs can recover.


350. See Settlement Agreement, supra note 265, ¶ 8.2(d). The Settlement Agreement contemplates one other category of persons entitled to recover: slave laborers of any ethnic group or religion who worked for Swiss firms during the war. See id.

351. This belief—that only Jews would recover in the Swiss class action litigation—existed even at the time of the settlement. For instance, the press release of Cohen, Milstein, Hausfeld & Toll—one of plaintiffs' lead attorneys—announcing the August 13, 1998 settlement states: "In an historic, unprecedented legal settlement, Swiss private banks will pay Holocaust survivors $1.25 billion to settle legal claims arising from the banks' conduct during and after World War II." Cohen, Milstein, Hausfeld & Toll, E-Journal (visited Nov. 6, 1999) <http://www.cmht.com/ipsltmt.htm> (emphasis added).
Little notice was paid, however, to the fact that the class of plaintiffs listed in all but one of the complaints filed against the Swiss banks went beyond just Jewish victims. Rather, the putative plaintiff classes covered all targets of Nazi persecution, including Jewish and non-Jewish victims.

352. Of the five complaints filed against the Swiss and consolidated under the caption of In re Holocaust Victim Assets, only one, the World Council complaint, seeks to represent solely Jewish victims of the Nazis. See World Council Complaint, supra note 123, ¶ 1.

The class action against SNB, filed in the District of Columbia federal district court, forms part of the settlement, and likewise covered both Jewish and non-Jewish claimants. See Rosenberg Complaint, supra note 269, ¶ 26 (discussing the class allegation).

The class action against the same three private Swiss banks, filed in the California state court in San Francisco, also covers both Jewish and non-Jewish claimants. See Markovicova Complaint, supra note 124, ¶ 14. In fact, the California action even includes one non-Jewish named plaintiff, a Romani (Gypsy). See id. ¶ 12.

Throughout the complaints and other pleadings filed by plaintiffs in the course of the litigation, references are made to claims of Jews and other “civilian populations” of Nazi-occupied Europe. See, e.g., Plaintiffs’ Counterstatement of Facts, supra note 153, at 4. With regard to dormant bank accounts, plaintiffs specifically assert that such accounts were opened by both Jews and non-Jews in the defendant banks: “From 1934 to 1945, numerous Jewish persons, as well as others who were members of groups subjected to religious, racial and political persecution by the Nazi regime, made deposits of assets in various forms in the Union Bank of Switzerland, Swiss Bank Corporation and Credit Suisse.” Id.

On the other hand, the named plaintiffs—save one—in all the complaints are Jewish. Moreover, the complaints also refer throughout to “victims of the Holocaust,” a term specifically referring to Nazi persecution of Jews. See discussion supra note 4.

An important legal memorandum submitted in the case refers, at one place, to “The Looted Assets/Slave Labor Claims” as representing the claims of only “Jewish slave labor.” Neuborne Memorandum, supra note 138, at 3. However, at another part, the Neuborne Memorandum sets out to list the three classes of plaintiffs, and defines one as including the claims of only Jews, and the other two as including claims of both Jews and non-Jews. See id. at 11. That section states:

Plaintiffs intend to move for class certification . . . . Plaintiffs anticipate at least three sub-classes: The Deposited Assets/Constructive Trust Class (1) a class of persons seeking to recover assets deposited by Jews in defendant banks . . . .; The Looted Assets Class (2) a class of persons seeking to recover assets looted by the Nazis and knowingly laundered into Swiss banks by defendant banks on behalf of the Nazis . . . .; and The Slave Labor Class (3) a class of persons seeking to recover profits earned by defendants by knowingly acting as the financial conduit on behalf of the Nazis of the importation and sale of goods produced by slave labor.

Id. (emphasis added).

353. See Trilling-Grotch Amended Complaint, supra note 123, ¶ 20. That complaint states:

The putative plaintiff class (the “looted assets/slave labor” class) consists of targets of Nazi persecution whose property was subject to systematic looting by the Nazi Regime . . . . Class members also seek appropriate compensatory and punitive relief, including disgorgement of all profits, for damages caused by defendant bank’s trafficking in the products and profits of Nazi slave labor.

Id. ¶ 20. “Slave labor” is defined as “work done by an individual . . . for which no, or insubstantial, compensation is paid often under circumstances that include confinement.” Id. ¶ 9.
Faced with these admissions, and pressure by the non-Jewish victims of the Nazis to receive a portion of the settlement, the settling parties expanded the categories of beneficiaries of the Swiss settlement to include some (but not all) non-Jewish victims. 354

However, the non-Jewish victim group included in the settlement is small, and excludes the entire category of Slavic peoples—primarily Poles and Russians—forced to work as slave laborers for the Nazis. 355 These victims of Nazi persecution will not

The Sonabend amended complaint contains virtually the same putative class language as the Trilling-Grotch amended complaint. See Sonabend Amended Complaint, supra note 123, ¶ 20.

The term "targets of Nazi persecution" is not defined in the two complaints, and invariably must include both Jews and non-Jews whose property was looted by the Nazis. Similarly, the term "slave labor" appears to cover any individual who forcibly worked for the Nazis, Jewish or not. In fact, most of the slave laborers were not Jews. See Barry A. Fisher, The Victims of Nazi Persecution, JEWISH J., Feb. 2, 1999, at 39 (stating that "Poles made up perhaps the single largest group of slave laborers").

Similarly, the Weisshaus complaint appears to cover both Jewish and non-Jewish victims of the Nazi regime. See Weisshaus Amended Complaint, supra note 123, ¶ 18. "The putative plaintiff class (the 'deposited assets' class) consists of persons seeking to recover assets deposited by targets of Nazi persecution in defendant banks, or their predecessors, between 1933-1945 which have not been returned to their lawful owners." Id. Like in the Trilling-Grotch and Sonabend amended complaints, the term "targets of Nazi persecution" is not defined in the Weisshaus amended complaint. Rather, the Weisshaus amended complaint uses another term, "persecutees," which it defines as "persons who were persecuted for religious, racial or political reasons by the Nazi Regime." Id., ¶ 3. Either way, it is clear that the Weisshaus amended complaint likewise seeks recovery for both Jewish and non-Jewish claimants.

The manner in which the settlement was announced in open court in August 1998 also seems to underscore that the $1.25 billion was meant to compensate both Jewish and non-Jewish victims of Nazi Germany:

The plaintiffs in behalf of the worldwide classes delineated in the complaints will provide complete and total releases, the broad[est] possible releases, for all claims of any kind arising out of [the] Nazi era[,] World War II or its aftermath, including, but not limited to, claims actually made in this case and in the California case.

Settlement Transcript, supra note 296, at 3.

354. See Weinstein, supra note 322, at A13. According to Professor Burt Neuborne, one of plaintiffs' lead settlement counsel:

"We had to walk a line between everyone harmed by the Nazis—which is virtually all of Europe—or only the Jews.... Both extremes were unacceptable. The first would have so diluted the recovery it would have rendered the whole suit meaningless. The second would have made it unfairly parochial."

Id. (quoting Professor Burt Neuborne).

355. See Fisher, supra note 353, at 39. The article represents an incisive analysis of this problem, written by one of the attorneys for the plaintiffs in the Swiss bank litigation and representing the only non-Jewish named plaintiff in the suits. As explained by Fisher,

The suffering of non-Jewish Poles and other Slavs—whom the Nazis deemed untermenschen (subhumans)—under German occupation was also extreme. In pursuit of German policy to "see to it that only people of purely
receive anything from the Swiss settlement. Rather, these still-uncompensated victims (who, like the Jewish victims, are also elderly) must await recovery from the slave labor lawsuits filed after the Swiss settlement.\textsuperscript{356}

Finally, the Settlement Agreement left unsolved the share of the $1.25 billion that each group will be entitled to receive.\textsuperscript{357} It is anticipated that the bulk of the monies will go to the Jewish victims of the Holocaust.\textsuperscript{358}

One thing is clear: almost all the individuals and organizations who will be receiving a share of the $1.25 billion paid by the Swiss banks have not been harmed, at least directly, by the Swiss banks' actions during and after World War II. As conceded by Stuart Eizenstat, the U.S. Deputy Treasury Secretary who led the investigations into Swiss complicity during the war: "After all, the great bulk of the people who will be paid under the Swiss settlement will

Germanic blood live in the East," Hitler ordered the SS to "send to death, mercilessly and without compassion, men, women and children of Polish derivation." . . . [By the end of 1940, the SS had expelled more than 325,000 Poles from their homes and looted their property. Scholars estimate that between 1.8 million and 1.9 million non-Jewish Poles became victims of German occupation policies and the war.

Slave labor was a favored fate for the Polish people. Indeed, Poles made up perhaps the single largest group of slave laborers. By war's end, at least 1.5 million Poles had been impressed into forced labor . . . .\textsuperscript{Id.} (quoting United States Holocaust Memorial Museum Poles at 5).

356. It might be asked whether this is a fair result. If the Swiss settlement seeks to disgorge profits earned by the Swiss from proceeds of slave labor deposited with the Swiss by the Nazis, and if a substantial amount of the slave laborers were Poles and Russians, then the surviving Polish and Russian slave laborers should be entitled to share in the $1.25 billion settlement.

357. According to the Los Angeles Times,

attorneys and Jewish leaders said there are deep divisions over how to equitably distribute the funds . . . Rabbi Marvin Hier, dean of the Simon Wiesenthal Center in Los Angeles . . . said it will not be easy to reach a formula for distributing the money. He said there are serious splits among Jewish organizations on two major issues: who is a "survivor," and whether all the money should go to individuals or whether some of the funds ought to be allocated to Jewish organizations.

Weinstein, supra note 322, at A13.

358. Special Master Judah Gribetz began taking suggestions on how to allocate and distribute the settlement funds, and class members were encouraged to make such suggestions. See Letter from Professor Neuborne to Class Members, supra note 299, at 2. Professor Neuborne wrote, "you can let Mr. Gribetz, as Special Master, know your views about how you believe the $1.25 billion settlement fund should be allocated and distributed. You may communicate with him at any time. He welcomes your views." Id.
have had no relationship to Swiss banks. When we were developing the structure of the deal we called that the rough justice amount.\(^{359}\)

The Swiss banks' settlement-distribution process will also be looked at as a model for subsequent Holocaust-era restitution settlements, such as the insurance settlement process being created by the International Commission on Holocaust Era Insurance Claims, and the German slave labor fund. This makes the creation of a fair, efficient, and speedy distribution system for the Swiss bank settlement even more critical.

b. Distribution System for the Settled Funds

Another major issue is choosing the entity responsible for distributing the funds paid by the Swiss banks under the settlement. A system needs to be created to distribute at least $1 billion to eligible claimants, both in the United States and abroad, as the Swiss banks make their annual payments.

With an average age of eighty-one for Holocaust survivors,\(^{360}\) speed is of the essence.

Two organizations exist today with experience in distribution of funds to Holocaust survivors: (1) the Conference on Jewish Material Claims Against Germany, responsible since the 1950s for distributing German payments; and (2) the World Jewish Restitution Organization, handpicked to distribute a $200 million fund set up by Swiss banks and industry for needy Holocaust survivors world-

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359. Wolfe, \textit{supra} note 337, at 15 (quoting then-Undersecretary of State Stuart Eizenstat, who now serves as Deputy Treasury Secretary).

Plaintiff’s attorney Deborah Sturman argues that individuals who will be receiving payments from the Swiss banks settlement were, in fact, directly harmed by the Swiss banks. According to Sturman, after publication of the Eizenstat and Volcker Commission reports, there is virtually no doubt that the Swiss banks' contributions to the German war effort prolonged the war and made precisely that expansion of the duration of the war more profitable for the banks. Any slave laborer or looted asset victim who remained in a concentration or slave labor camp longer than the Germans would have been able to economically maintain those camps without Swiss funding can easily be said to have been harmed by [the] Swiss banks.

Letter from Deborah Sturman to Professor Michael Bazyler (Mar. 6, 2000) (on file with author).

wide. However, both organizations have been accused of undue delays in their efforts to distribute funds to Holocaust survivors.  

It is possible that these groups, because of their possession of established procedure and personnel for distributing World War II-era reparations, will be appointed to handle the distribution of the Swiss funds (even for the non-Jewish claimants). On the other hand, in the face of strong protest by Jewish survivors, either the “special master” or Judge Korman might set up another procedure for the fund distribution.

c. Payment of Attorneys’ Fees

As with any large class action settlement, controversy has arisen about the fees requested by the attorneys for the successful plaintiffs. By the time the three separate actions against the Swiss banks in the Eastern District of New York were consolidated before Judge Korman, twenty-nine different law firms or consultants were listed as representing plaintiffs. While almost all of the plaintiffs’ firms that worked on the Swiss cases did so on a pro bono basis, several firms requested fees that ran to millions of dollars. See Michael Hirsh, What’s Taking So Long?, NEWSWEEK, Apr. 13, 1998, at 49; Barry Meier, Survivor Aid By 2 Groups Called Slow, N.Y. TIMES, Nov. 29, 1998, at A12, available in 1998 WL 22334778; see also Henry, supra note 332, at 17. That article states: Gisella Weisshaus of Brooklyn, who in October 1998 filed the original class-action suit against the [Swiss] banks[. . .] [a]long with a number of other survivors, . . . has generated a proposal calling [for] at least 70% of the funds to be distributed directly to survivors and heirs, while 25% of the settlement would be used for medical care for ill survivors. The Weisshaus group . . . also is vehement that the World Jewish Congress and the Claims Conference should have no role in the allocation, and that they receive none of the funds.  

Id; see also text and notes supra Part II.E. (discussing the various lawsuits and accusations made over the years against the Claims Conference).

361. See Michael Hirsh, What’s Taking So Long?, NEWSWEEK, Apr. 13, 1998, at 49; Barry Meier, Survivor Aid By 2 Groups Called Slow, N.Y. TIMES, Nov. 29, 1998, at A12, available in 1998 WL 22334778; see also Henry, supra note 332, at 17. That article states: Gisella Weisshaus of Brooklyn, who in October 1998 filed the original class-action suit against the [Swiss] banks[. . .] [a]long with a number of other survivors, . . . has generated a proposal calling [for] at least 70% of the funds to be distributed directly to survivors and heirs, while 25% of the settlement would be used for medical care for ill survivors. The Weisshaus group . . . also is vehement that the World Jewish Congress and the Claims Conference should have no role in the allocation, and that they receive none of the funds.  

Id; see also text and notes supra Part II.E. (discussing the various lawsuits and accusations made over the years against the Claims Conference).

362. According to a letter sent out to the class members by Court-Appointed Settlement Counsel Professor Burt Neuborne, Special Master Judah Gribetz—appointed by Judge Korman to create a plan of distribution—will “circulate a draft proposed plan of allocation and distribution for comment by approximately December 28, 1999 . . . [Gribetz] will prepare and submit a final proposed plan of allocation and distribution to the Judge by approximately April 28, 2000.” Letter from Professor Burt Neuborne to Class Members, supra note 299, at 2 (emphasis added).


364. See, e.g., Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motions to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Under International Law, supra note 185, at 50-53.
basis, some firms have requested a fee.\footnote{Of the almost thirty law firms representing plaintiffs in the Swiss litigation, only three are seeking attorneys' fees from the Swiss settlement. However, many of the lawyers working pro bono on the litigation against the Swiss banks are seeking fees in the subsequent cases they filed. See Wolfe, supra note 337, at 15. According to one prominent lawyer representing Holocaust survivors in the post-Swiss bank cases, "[a fee, we are trying to keep it in single-digit percentages if possible." Id. (quoting Michael Hausfeld concerning the fees lawyers are seeking from settlements with the German companies.).}

The firms requesting a fee have been accused of profiting from the Holocaust at the expense of the victims.\footnote{See id. That article states:}

The attorneys have also been involved in fighting among themselves, with two groups of lawyers "spending their time denigrating

\footnote{For Holocaust survivors, the lawyers' fees and tactics are little short of reprehensible. Roman Kent, chairman of the American Gathering of Jewish Holocaust Survivors, said: "When we have lawyers running around from one country to another trying to ambulance chase, then of course it gives people the wrong sense of what the Holocaust was and is to be. From my point of view, if the lawyers want to help us, that is one thing. But if they want to work on a contingency basis then it has no place in this. You just see the glitter gold in front of the eyes of the lawyers." Id. (quoting Roman Kent). According to another commentator, [T]he extent to which an already wealthy group of lawyers will be receiving additional riches from the booty collected in these cases is a cause of additional concern... I am concerned that lawyers, one way or another, are going to reap huge fees from these cases. Such fees are contrary to the principle... that no one should profit (directly or indirectly) from the crimes of the Nazis against the Jews. I see some similarities between the profits that lawyers will be earning from these cases and the profits earned by the Swiss banks during World War II.}

Lawrence W. Schonbrun, Time Bandits, How Similar are Holocaust-Litigation Lawyers to the Swiss Banks?, L.A. DAILY J., Feb. 9, 1999, at 7. Another reporter wrote:

In the wake of last month's $1.25 billion settlement... some officials and lawyers involved in the litigation say they fear that opportunistic lawyers may see a potential gold mine in the precedent, and will seek every opportunity to file suits on behalf of victims of past atrocities.

"I worry about an explosion of these kinds of suits," said Burt Neuborne, a New York University law professor working without fee on the Holocaust cases. "That a lot of people will see a potential for what they think is a fast buck."

each other, their ability, parentage, [and their] ethnic heritage.\textsuperscript{7}

Recalling the "ambulance-chasing" style of lawyers flying to India to sign up clients in the aftermath of the Bhopal chemical plant disaster in December 1984, American attorneys have been crisscrossing Europe to sign up clients for future Holocaust lawsuits in the United States.\textsuperscript{6}

On the other hand, Rabbi Abraham Cooper, Associate Dean of the Simon Wiesenthal Center, one of the Jewish organizations intimately involved with the Holocaust restitution issues, applauds the role of the lawyers:

"The only reason the Swiss were at the table, the only reason these guys [in the other cases] are quaking is because lawyers came in and things moved forward.

I'm not giving them all the credit, but there's no question without [lawyers getting involved in] these issues, there wouldn't be a heck of a lot to be talking about in the year 1999."\textsuperscript{369}

\textsuperscript{367} Meier, supra note 366 at A1 (detailing a statement of Burt Neuborne).

\textsuperscript{368} For criticism of the lawyers involved in the Holocaust litigation, see Krauthammer, supra note 366, at B9 (labeling the lawyers representing Holocaust victims as "shysters" out to commit a "shakedown of Swiss banks, Austrian industry [and] German auto makers"); see also Meier, supra note 366, at A1. In an editorial for the \emph{Wall Street Journal}, Abraham H. Foxman wrote:

Since the Swiss settlement there has been a rush for restitution. Some lawyers see it as an opportunity of a lifetime. . . . But, I do not want Holocaust victims used as political footballs or tickets for financial gain. . . . There is no place for ambulance chasers in this serious and sacred undertaking.

Foxman, supra note 333, at A18.

\textsuperscript{369} Wohlgelernter, supra note 363, at 4B (alterations in original). Abraham Foxman, head of the Anti-Defamation League, also gives credit to the lawyers. Foxman admits that "[t]he $1.25 billion Swiss settlement would not have been achieved without the dogged efforts of lawyers and politicians, many of whom worked pro bono and because it was the right thing to do." Foxman, supra note 333, at A18.

Irwin Levin, one of the lead attorneys in the Swiss litigation, countered the comments of the officials of the World Jewish Congress and some Holocaust-survivor groups deprecating the role of the lawyers in the Holocaust restitution process:

"The WJC has many accomplishments under its belt, but one of the accomplishments it does not have is obtaining money from the Swiss or the Germans or from others, for slave labor, for the banking cases, for all the money that we have now gotten. . . . We worked hand-in-hand against the Swiss banks with the World Jewish Congress, [but] they had 50 years to try and get that money before we filed the lawsuits, and they couldn't do it. Remember, the Swiss swore that they would never pay more than $600 million, and they ended up paying $1.25 [billion]."

Wohlgelernter, supra note 363, at 4B (quoting Irwin Levin) (first alteration in original).

A columnist for the \emph{Washington Post} puts it more directly:

Yes, there is something unseemly about a bunch of lawyers trolling
The Settlement Agreement signed by the parties in January 1999 answered some, but not all, questions about attorneys' fees to be paid from the $1.25 billion settlement.

In June 1999, Judge Korman approved the maximum amount of fees for attorneys not working pro bono on the Swiss bank litigation, and costs for all attorneys. An estimated $25 million, or 2% of the settlement amount, was allocated for legal fees and costs, about the same amount as allocated for notification costs and other expenses of concluding this class action litigation.370

According to one attorney working on the case, "if the judge gave 100% of that which was requested, it would be to my knowledge the lowest percentage of fees ever awarded for a case of that size in the history of American litigation."371 It is expected that the actual fees awarded to the three law firms taking fees would be substantially less than $25 million.

Eastern Europe for the few remaining Holocaust survivors on whose behalf they can—with near-absolute justification—sue everyone in sight.

But this is the way of the world—not just of Jews and Holocaust settlements.

Who, then, are better suited to taking European insurance companies and banks which, smiling and always cordial, insisted on death certificates for the poor souls who went into the atmosphere as ash from the Nazi crematoriums? Who better to demand an accounting from companies whose management in the 1930s and '40s did business as the Nazis wanted? No one is suggesting the present management of these companies is antisemitic, but I am suggesting they would never own up—open their files, never mind their wallets—if those awful contingency lawyers had not surrounded them and run up the Jolly Roger.

Cohen, supra note 332, at A21.

370. See Notice of Pendency of Class Action and Proposed Settlement And Hearing (visited June 10, 1999) <http://www.swissbankclaims.com/>. The 2% figure was divided as follows: 1.8%, or $22.5 million, for attorneys' fees, and 0.2%, or $2.5 million, for costs expended by the attorneys. See id.; see also Henry, supra note 298, at 3 (discussing the maximum attorney's fees and costs allowed by the court); Wohlgernter, supra note 363, at 4B (discussing the same).

371. Wohlgernter, supra note 363, at 4B (quoting Irwin Levin, one of the lead attorneys in the Swiss bank litigation).
IV. CLAIMS AGAINST THE EUROPEAN INSURANCE COMPANIES

A. The Claims against the European Insurance Companies

1. Factual Background of the Insurance Claims

Prior to World War II, insurance policies were commonly purchased by the local Jewish population of Europe. In fact, an insurance policy was known as a “poor man’s Swiss bank account.”

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In addition to affording protection against loss or injury to life and property, insurance was widely perceived by Jews as a sound means of saving and investment, an issue of heightened concern to a vulnerable minority group.

Across [prewar] Europe, Jews were more likely than the population in general to purchase insurance, due to their relatively high socioeconomic standing. Jewish family breadwinners were more likely to be self-employed business owners and professionals who purchased insurance directly from agents, rather than through group or workplace plans.

The anecdotal evidence is that Jewish families were more likely to purchase larger-than-average policies.

Id. at 3-4; see also Alan Gersten, Making Amends—European Insurers Are Finally Accepting Some Liability for Unpaid Holocaust Victims’ Claims, LIFE INS. INT’L, Oct. 1, 1998, at 7, available in 1998 WL 12138659. The article states:

In the time between the two world wars, life insurance policies and annuities were popular investments. Then, investors had no US bull market, zero-coupon bonds or an abundance of other financial opportunities. During that time, Jewish families bought policies worth an estimated $2 billion to $2.5 billion in today’s dollars, about ten times higher than the pre-war value.

Note that a number of other experts estimate the figure to be much higher, closer to $10 billion in today’s value. One common policy was a dowry policy, to be paid upon a girl’s reaching adulthood, to be used to cover her dowry.

Id.

As explained by one Holocaust survivor, “When I was born, my father bought an insurance policy in my name. And at 21 I was supposed to get 5,000 gold dollars to be used for my dowry. . . . I have looked forward to this day for a long time.” LeAnn Spencer, Quest for Holocaust Insurance Benefits: Survivors, Heirs Testify about Their Unpaid Claims, CHI. TRIB., Nov. 11, 1997, at 1 (NAIC hearing testimony of Erna Gans, born in Poland and survivor of three concentration camps, now in her seventies and residing in the United States).

373. See Tom Orewyler, God’s Work, CAL. L. BUS., Sept. 28, 1998, at 25 (quoting Renee Siemens, one of the plaintiffs' attorneys in the Holocaust-era insurance class action litigation who stated that “there’s a catch phrase that the insurance lawsuit is the poor man’s Swiss bank case”).

According to some estimates, the value of the Holocaust-era insurance policies in today’s dollars may exceed the claims made against the Swiss banks. Edward Fagan, one of
Like the Swiss banks, the insurance companies selling insurance to the local Jewish populace either are still in existence today or are successor companies to the insurers who sold prewar insurance policies to Jews throughout Eastern and Central Europe. Many of these European insurance companies significantly expanded after the war and now conduct extensive operations in the United States, either directly or through subsidiaries.

the plaintiffs’ attorneys, estimates that policyholders and their heirs are due “10 times what Swiss banks [will] eventually pay to Holocaust survivors.” David Cay Johnson, Accord Signed to Name Tribunal on Holocaust Insurance Claims, N.Y. TIMES, May 7, 1998, at A5. If correct, the European insurers eventually would be obligated to pay over $10 billion.

In May 1999, Bobby Brown, the Israeli government official in charge of Holocaust restitution issues, provided an estimate on the present values of Holocaust-era insurance policies, which was quoted in the Jerusalem Post. “An expert on economics and insurance from the Holocaust era gave a formal estimate that the amount of Jewish insurance without any interest but brought up to today’s value would be worth between $2.25 and 2.5 billion.” Elli Wohlgelernter & Tom Tugend, California Pressures Insurance Companies on Holocaust-Related Payments, JERUSALEM POST, May 3, 1999, at 5, available in 1999 WL 9002452 (emphasis added).

In June 1999, it was reported that the claims by Holocaust survivors and their heirs for lost or destroyed properties insured by the European insurers may exceed the claims based upon life insurance policies. As reported by a leading insurance trade journal:

Although it’s a complex and lengthy process, means to track the billions in unclaimed claims do exist, says Terrell E. Hunt, president of Risk International Services, Inc. . . .

Three sources of information on outstanding [property] claims are family records, asset registries and Gestapo confiscation orders, Hunt said. Jews were required to report everything they own and list it on a preprinted asset registry form. The Nazis told the Jewish community they were going to buy their homes and businesses and wanted to ensure the full value of the properties were distributed, Hunt said.

“The sections listing personal property were particularly upsetting to read because they listed items like three teddy bears and children’s furniture,” [Hunt] said.


374 See Senn, supra note 372, at 4 tbl.1. For instance, Italy’s Assicurazioni Generali S.p.A. (“Generali”) had a market share of between one-fourth to one-third in prewar Poland, Czechoslovakia and Hungary. See id. Riunione Adriatica di Sicurta S.p.A., (“Riunione Adriatica”) another Italian insurance company, now owned by Germany’s Allianz, had a 37% market share in prewar Yugoslavia and an 18% market share in prewar Romania. See id.

375 See, e.g., Life Insurance and the Holocaust, INS. F., Sept. 1998, at 81, 83; see also Senn, supra note 372, at 21 (“The largest Central and Eastern European insurers who sold policies to Holocaust victims are among the world’s largest insurance carriers in existence today, with substantial operations in the United States that are subject to government regulations.”). In 1996, Germany’s Allianz collected $6.2 billion in premiums in the United States, and owns 31 U.S.-based subsidiaries, including the Fireman’s Fund Insurance Company. See Senn, supra note 372, at 21. Switzerland’s Zurich collected $5.8 billion in premiums in the United States that year, and owns 33 U.S.-based subsidiaries, including Farmers Insurance and Kemper Insurance. See Life Insurance and the Holocaust, supra, at 83. Switzerland’s
Since many of the prewar governments of Eastern and Central Europe were not politically or economically stable, and since the local Jewish population had long been exposed to anti-Semitic persecution, the foreign insurance carriers doing business in this region were able to attract business from the Jewish merchant class by guaranteeing that claims would be paid not only in local currency but, “at the policyholder’s option, in gold or U.S. dollars anywhere in the world.”

Upon coming to power in Germany in 1933, the Nazis’ persecution of Jews included confiscation of insurance policies from the Jewish citizenry.

A particularly poignant example of the theft of insurance proceeds by the Nazis occurred in the aftermath of Kristallnacht (“Night of Glass”), the state-sponsored attack on Jews and their property taking place in Germany on November 8-10, 1938. Since many of the Jewish merchants, whose shops and other properties were damaged or looted during the campaign, held casualty insurance to cover such losses, the Nazis ordered the insurance companies to pay all such claims to the state rather than to the injured parties. This confiscation was later “expanded to include denial of life insurance, health insurance, and pension benefits for [Germany’s] Jews.”

Winterthur collected $1.4 billion in premiums in the United States that year and owns 27 U.S.-based subsidiaries, including Vanguard Insurance. See id. Italy’s Generali collected $624 million in premiums in the United States that year. See Senn, supra note 372, at 21.


377. Senn, supra note 372, at 8. For example, Solomon Heitner, a Holocaust survivor now living in California, holds an insurance policy that was issued to his grandfather in 1931 by Italian insurer Riunione Adriatica. The policy, issued in Poland, states, “We are responsible for all the obligations with all our assets in Poland or outside.” George Raine, Recovering Nazi Plunder: Insurance Industry Watches Nervously as California Joins Effort to Help War Victims Collect on Policies, S.F. EXAMINER, Nov. 16, 1997, at D1.

378. See Senn, supra note 372, at 16. The report states:

After April 1938, German Jews were required to report to the Nazi authorities all their property and personal valuables, including insurance policies. These comprehensive property declarations enabled the [Nazi] regime to seize the assets of German Jews. After the 1938 Anschluss—the annexation of Austria—this technique was used to seize assets of Jews in that country as well.

Id.

379. See Senn, supra note 372, at 17.

380. Life Insurance and the Holocaust, supra note 375, at 84. The insurance companies made deals with the Nazis, allowing them to pay less on the claims to the German government rather than to their Jewish claimants. For another discussion of the insurance scheme concocted by the Nazis in the aftermath of Kristallnacht, see Senn, supra note 372, at 16.
As Nazi Germany began its invasion of Europe, the insurance companies in the conquered territories became subject to Nazi laws.\footnote{See Senn, supra note 372, at 9-10. It is disputed, however, whether Italian insurance companies, such as Generali, benefitted or suffered as a result of the Nazi conquests. Compare Senn, supra note 372, at 11 (stating that Generali’s policies and premium income “increased dramatically, while total reported losses expanded faster than liabilities”), with Life Insurance and the Holocaust, supra note 375, at 96-97 (stating that Generali resisted Nazification of its offices in occupied Europe, lost assets as a result of the Nazi occupation, and assisted its Jewish employees to escape to safety, per Scott Vayer, attorney for Generali, testifying before the U.S. House of Representatives).} Many of the local companies’ assets were simply taken over by the Nazis, with their insurance portfolios transferred to German companies that were favored by the Nazi regime.\footnote{See Senn, supra note 372, at 9. Since the Nazis forcibly took over the insurance policies of Jews in Germany, Austria, and conquered Europe, the insurance companies often paid the cash values or other insurance benefits on those policies to the Nazis. See id. at 17. As a result, the companies are claiming that after such payment they are no longer obligated to original Jewish policyholders or their heirs. See id.}

The insurance companies, however, also have been accused of participating with the Nazis in the confiscation of insurance-related assets of Jews in conquered Europe (known as “Aryanization” of Jewish-owned assets)\footnote{See, e.g., id. at 5; Tales of Nazis and Insurers, NAT'L L.J., Dec. 22, 1997, at A8. The article in the National Law Journal states: A 1941 form letter from Austrian police suggests Nazi Germany routinely filed claims with life insurance companies for benefits due relatives of Holocaust victims. . . . The one-page document was issued by the state police in Vienna [on] Aug. 8, 1941, after the Third Reich had annexed Austria. The letter instructs the Italian insurance company Riunione Adriatica di Sicurtà to pay the insurance benefit due on a policy purchased by a Viennese “emigrant,” Solomon Israel Korner. “The confiscated valuables will be disposed of and the proceeds will be paid to the Reich’s treasury,” a translation of the document says. The confiscation is done “in the spirit” of a 1933 German law authorizing property seizures from those deemed enemies of Germany. The document bears a stamp that it was received by Riunione Adriatica on Aug. 21, 1941, and a handwritten notation dated Aug. 22, suggesting it may have been processed that day. Id. at 15. The Jewish policyholders in Nazi-occupied Europe were unable to make premium payments during the war because many of them perished. See id. at 17. Such policies often were canceled by the European insurers for “non-payment” of premiums, and the beneficiaries} and of using the Nazi conquest as an excuse not to pay on the policies.\footnote{See Senn, supra note 372, at 14-15. The report explains: Private insurers in Eastern and Central European markets participated in elaborate, coordinated schemes to confiscate insurance-related assets of Jews, political prisoners and other persecuted groups and then transferred them to state control. . . . Companies also enriched themselves by retaining and not refunding pre-paid or unearned premiums on large numbers of non-life policies canceled as a result of anti-Jewish laws. Id. at 15.}
After the war, the offices of the European insurance companies located behind the Iron Curtain were nationalized by the new Soviet-dominated governments in those countries. The insurance companies maintain that such nationalization relieves them from paying any policy issued in a country where its office had been nationalized by the Communist regime after the war.

The European insurance company with the most notoriety in the field of Holocaust Era Insurance Claims is Assicurazioni Generali S.p.A. ("Generali"). It is the largest insurance company in Italy, with over $35 billion in assets but is virtually unknown in the United States.

Generali, as the company is commonly known, was founded in 1831 by a group of Jewish merchants, and until recently, its chairman was a Holocaust survivor of Auschwitz. It was known

were refused benefits upon making claims after the war ended. See id. at 18. Other policies had an accumulated cash value and, therefore, failure to pay premiums did not automatically cancel the policy. See id. at 31. Such policies, however, were still not paid since the beneficiaries never presented themselves to collect on the policies. See id.

The question with respect to Generali, then is more pointed—why were policies that were issued in Eastern and Central Europe not paid? The short answer is that Generali's businesses, as well as those of other insurers in those countries were nationalized, expropriated, or liquidated by the governments that came into power in those countries after the war. The assets and property which backed insurance throughout Central and Eastern Europe were confiscated.

The Communist regimes that swept across Central and Eastern Europe and seized control in Czechoslovakia, Hungary, Poland and other countries became the successors to our insurance business. They became legally and morally obligated to the Holocaust victims and their families who were the beneficiaries of policies issued by Generali before the war, when it had control of its business and assets. And if, for whatever reason, their claims may or may not have been made before, it is to the governments and successors entities in those countries that the families of the victims should be looking, morally and legally, for recompense.

Hearing Before the House of Representatives' Comm. on Banking, 105th Cong. 175 (1998), reprinted in Life Insurance and the Holocaust, supra note 375, at 97-98 (statement of Scott Vayer, Lead Counsel, Generali).

Because Generali was the largest seller of insurance to Jews prior to World War II, it is listed as either the lead or only defendant in most of the Holocaust-era insurance lawsuits filed in the United States. It has now become well-known in the arena of human rights litigation and among the American Jewish community.

See Gersten, supra note 372, at 7; see also Greer Fay Cashman, Grapevine, JERUSALEM POST, Aug. 21, 1998, at 18, available in 1998 WL 6534116 ("Except for the period from 1938 until the end of World War Two, Jews were always leaders in the company, and continue so today.")
in prewar Europe as a "Jewish company, whose agents saturated
the major Jewish population centers before the war."  

Generali originally maintained that it had no records of prewar policies. In late 1997, however, it revealed that a warehouse at its headquarters in Trieste, Italy, was found to contain partial records of Generali policies written in prewar Central and Eastern Europe.

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390. Marilyn Henry, A Holocaust Paper Trail to Nowhere?, JERUSALEM POST, May 12, 1999, at 11, available in 1998 WL 6529646 ("[Generali] says that while it cannot estimate its share of the Jewish insurance market, it dismisses as exaggerated published reports that it wrote 80 percent of the Jewish policies."); see Gersten, supra note 372, at 7 ("The most vulnerable and eager to settle [is] Assicurazioni Generali, Italy's largest insurer.... Generali has[ ] the greatest exposure, selling the most life insurance and annuity policies in eastern Europe during the 1920s, 1930s and 1940s, frequently to Jews.").

In 1937, in prewar British Palestine, Generali founded Migdal Insurance, the largest insurance company in Israel. See Gersten, supra note 372, at 7. In 1997, Generali purchased a majority stake in Migdal to become Israel's largest insurance company. See id.


391. In mid-1997, Generali published ads in major newspapers throughout the United States entitled An Open Letter to the Families of Holocaust Victims. In the "Open Letter" Generali explained:

During and after the dark years of World War II, Generali faced expropriations of its properties and the properties of its insureds. The racial laws of the Nazi and fascist era and the state action of Soviet-dominated regimes in Central and Eastern Europe severely damaged Generali's ability to do business there. The cold-war Communist regimes in Eastern Europe nationalized and expropriated all major businesses, seizing all of Generali's insurance business there. As a result, Generali today has very little information and few records regarding policies issued by its former branches in Central and Eastern Europe.


392. For a fascinating account of the warehouse and its contents, described by a reporter who was allowed to tour the facility, see Henry, supra note 390, at 11. The article describes the tour as follows:

Down in the industrial zone by the Adriatic port of Trieste sits a warehouse building that has taken on an aura of mystery.

It is there that the Italian insurer Assicurazioni Generali stores its Holocaust-era files—along with its personnel records, office supplies and bottles of wine.

The old binders came from Prague and Poland and other parts east.

Generali, having found the documents that were all but forgotten in its nondescript warehouse, now calls the trove its "legacy archive" . . . .

The files are only fragments . . . . Each subsidiary in the far-flung company was responsible for its own records, including the complete
Originally said to contain records of between 330,000 to 384,000 prewar policyholders, Generali culled the list down to 100,000 policies, which it transferred to a CD-ROM disc. In mid-1998, it turned over the disc: first, to the Yad Vashem Holocaust Center in Israel to match with names of Holocaust victims found in Yad Vashem's archives; and then, in May 1999, to the International Commission on Holocaust Era Insurance Claims. Unlike the Swiss banks, however, Generali declined to publish the list, despite pleas to do so.

Documentation of insurance policies. The subsidiary, in turn, forwarded to the head office so-called “water copies,” not the actual policies.

These documents—which are carbon-like copies on onion skin paper—were used by Generali's central actuarial department to calculate the reserves required for the company. They provide basic information about an individual policy, including the client's name, date of birth, where the policy was issued, the policy number, the original premium and the amount of the annuity or insurance. Generali was pushed to resurrect the lives of these old policies after a class-action suit filed a year ago in federal court in New York charged more than a dozen European insurers with failing to honor Holocaust-era insurance policies.

Id.

393. See id.; Generali's Open Account, JERUSALEM POST, Sept. 24, 1998, at 10, available in 1998 WL 6535583 (reporting that 337,000 wartime insurance policies have been located by Generali); John M. Goshko, Italian Insurer Reaches Pact on Holocaust Claims: Tentative Settlement Includes $100 Million Payment, WASH. POST, Aug. 20, 1998, at A3 (reporting that Generali's prewar policies totaled 384,000).

394. See Generali's Open Account, supra note 393, at 10. The article reports that: Following the initial disclosure concerning Generali's refusal to acknowledge insurance policies, the Italian media discovered an entire warehouse in which the wartime insurance policies were stored. Generali, to its credit, has already transferred all the data from these records onto computer discs. Of the 337,000 policies found from that period, about 100,000 have been determined to be “active”—meaning they were paid for, but never redeemed. Many, if not most, of these policies are thought to have been taken out by Jews who perished in the Holocaust.

Id.


396. See id.; see also Isaac Harari, Photo—Delivering the Disc, JERUSALEM POST, May 25, 1999, at 5, available in 1999 WL 9003441. For a discussion of the International Commission on Holocaust Era Insurance Claims, see discussion and notes infra Part IV.C.

397. See Wohlgelernter, supra note 395, at 5. Israeli parliamentarian Michael Kleiner has suggested that the names be posted on the Internet, for access to potential claimants worldwide. See id.

Examining the Swiss bank experience, the request appears reasonable, since it might lead heirs of Holocaust victims to discovery of claims for insurance benefits. For instance, after the Swiss banks published their lists of prewar dormant bank accounts, Madeline Kunin, United States Ambassador to Switzerland, discovered her mother's name on the list. Secretary of State Madeleine Albright’s grandparents were also victims of the Nazi regime. See Elizabeth Olson, Swiss Deluged by Claims after List of Wartime Accounts Appears, CHRISTIAN SCIENCE MONITOR, Aug. 25, 1997, at 7. Neither was previously aware of this information. See
The other insurance company with a large stake in the prewar European insurance market is Allianz of Germany, presently the second largest insurance company in the world. Allianz had significant and close relations with the Nazis. Its CEO, Kurt Schmitt, was Hitler's Minister of Economy. Allianz also insured California to Probe European Insurance Firms for Unpaid Holocaust Claims, AGENCE FR.-PRESSE, June 23, 1999, available in 1999 WL 2626441; Olson, supra, at 7.


A visitor looking for the nerve center of Germany's Allianz Group would be hard pressed to find it. Even at the Munich headquarters of Allianz AG Holding, the nondescript main building blends into a rambling, low-rise complex that stretches across a quiet neighborhood.

Allianz's home base is a bricks-and-mortar expression of the decentralized structure of this European giant, which with little fanfare has extended its reach around the world in all lines of personal and commercial insurance and, most recently, into asset management.

Allianz pursues its goal of market leadership through a web of subsidiaries, joint ventures and branch offices in 68 countries on six continents. A few of the major names under the Allianz umbrella are Life USA and Fireman's Fund Insurance Co. in the United States; Australia's MMI Insurance Group; AGF of France; and Riunione Adriatica di Sicurta of Italy. Id.; see also Greg Steinmetz & Anita Raghavan, Big Insurer Calls Shots in Germany, Inc., WALL ST. J., Nov. 1, 1999, at A41. As aptly explained by the Wall Street Journal, "Not much happens in corporate Germany without input from the country's largest insurer, Allianz AG." Id.

399. See Raine, supra note 398, at B1; see also Noonan, supra note 398, at 41. The Noonan article describes the Allianz atmosphere:

As Allianz strives to maintain market leadership in a rapidly changing industry, it looks to its sometimes-painful past. The company has reserved a portion of its Munich headquarters complex as the Allianz Center for Corporate History, remembering nearly 110 years that are full of growth and innovation, but also recalling embarrassing ties to the Nazi era.

A forthright attitude can't quite hide the discomfort of the subject when it is broached during an interview at the headquarters. Official remarks float between directness and euphemisms, at times referring explicitly to the Nazis, at others speaking "[o]f the years from 1933 to 1945."

Especially awkward are the ties of the one former Allianz chairman to the early years of Adolf Hitler's regime. Kurt Schmitt left Allianz in 1933 to become second minister for economic affairs in the Nazi government. In what the company casts as a kind of blessing in disguise, Schmitt suffered a heart attack in 1934, from which he never recovered. He stepped down in 1935 for health reasons, avoiding the peril of a public break with Hitler on ideological grounds.

The picture of Schmitt that has been assembled [by Allianz] reveals an
a number of concentration camps, including Auschwitz and Dachau.\textsuperscript{400}

More than one dozen other insurance companies headquartered in Europe are accused of failing to honor policies sold before World War II.\textsuperscript{401}

2. Litigation against the European Insurers

Litigation of Holocaust-era insurance claims began in the United States in late March 1997, six months after the first suit against the

ambivalent figure who saw real opportunities to do good from an economic perspective. Schmitt was part of SS Chief Heinrich Himmler's circle of friends, but he also had a French wife and English relatives and never embraced all of Hitler's policies, especially his racial ideology, according to the company.

\textellipsis

In June 1997, Allianz named Professor Gerald D. Feldman, director of the Center of German and European Studies at the University of California, Berkeley, to study the topic and publish an account of its activities in the Nazi era. Feldman’s book might be completed next spring [2000].

\textit{Id.}


Documents unearthed in Poland in 1997 also revealed that the company insured buildings and civil employees connected to Auschwitz, the most notorious of the Nazi concentration camps. Then last week, \textit{Der Spiegel}, the German magazine, disclosed that the company had actually insured those employees and buildings against damage caused by “careless or malicious actions on the part of prisoners.” History, it seems, has finally caught up with Allianz.

\textit{Id. But see} Noonan, \textit{supra} note 398, stating that “Allianz also takes pains to explain the nuances behind accusations that it insured concentration camps. In fact, the company says, it participated with other insurers in covering industrial companies that happened to have facilities in the camps. The government self-insured its own property.” \textit{Id.}

401. Other major players in the prewar insurance market included:

(1) AXA of France, now part of the AXA-UPA (Union de Assurances de Paris) Group, which is the largest insurance company in the world and the world's second largest by revenue. In the United States, it operates the Equitable Companies and the Donaldson, Lufkin and Jenrette securities brokerage.

(2) Victoria Insurance Company of Germany, which is now part of Munich Re, the largest reinsurance company in the world.

(3) Winterthur Group of Switzerland, which is now owned by Credit Suisse Bank. Its United States operations include Unigard Insurance and Southern Guaranty Insurance.

(4) Zurich Insurance Group of Switzerland, whose United States operations include Farmers Insurance, Zurich Kemper Insurance, Fidelity and Deposit Insurance and the Maryland Companies.

\textit{See California to Probe European Insurance Firms for Unpaid Holocaust Claims, supra} note 397.
Swiss banks was filed. The first such lawsuit was a class action filed in federal court in New York against sixteen European insurance companies.\textsuperscript{402} It was followed by a series of individual actions filed in California state court.\textsuperscript{403}

As of January 2000, five insurance suits are pending: three are federal cases (two consolidated class actions in New York\textsuperscript{404} and one individual action that originated in California,\textsuperscript{405} which is now on appeal before the Ninth Circuit\textsuperscript{406}); and two are California state actions.\textsuperscript{407}

The European insurers, therefore, are presently defending lawsuits on both coasts of the United States.

a. Federal Litigation

i. Cornell v. Generali\textsuperscript{408}

The first lawsuit filed against European insurance companies was similar to the first lawsuit filed against the Swiss banks.\textsuperscript{409} Like the Swiss bank lawsuit, the action against the European insurance companies was a federal class action filed in New York.\textsuperscript{410} Brought by twenty-nine plaintiffs, almost all elderly Holocaust survivors, it accused sixteen European insurance companies of failing to pay out on insurance policies and annuities taken out by European Jews before or during the Holocaust.\textsuperscript{411}

\textsuperscript{402} See discussion and notes infra Part IV.A.2.a.
\textsuperscript{403} See discussion and notes infra Part IV.A.2.b.
\textsuperscript{404} See discussion and notes infra Part IV.A.2.a.(i)-(ii).
\textsuperscript{405} See discussion and notes infra Part IV.A.2.a.(iii).
\textsuperscript{406} See discussion and notes infra Part IV.A.2.a.(iii).
\textsuperscript{407} See discussion and notes infra Part IV.A.2.b. Originally, the number was higher, but some of the suits recently settled. See id.
\textsuperscript{409} The similarity is not coincidental; both suits were filed by the same set of attorneys.
\textsuperscript{410} See Amended Complaint ¶ 1, Cornell v. Assicurazioni Generali S.p.A., No. 97 Civ. 2262 (S.D.N.Y. filed June 26, 1997) [hereinafter Cornell Amended Complaint] ("The Plaintiff Class . . . consists of policyholders and beneficiaries of insurance policies including, but not limited to, life, property and casualty insurance policies and/or annuities . . . sold by the defendant insurance companies to victims of Nazi persecution in the years leading up to the Holocaust.").
The lead plaintiff, Marta Drucker Cornell, and her family were deported from Czechoslovakia during the war to Auschwitz. Prior to the deportation, Cornell's father, a doctor, purchased various insurance policies in Czechoslovakia from defendants Generali and Riunione Adriatica di Sicurta S.p.A. ("Riunione Adriatica"), both Italian insurance companies. Cornell's entire family was killed in the concentration camps, and she was the only survivor.

As a beneficiary, Cornell requested that defendants Generali and Riunione Adriatica "acknowledge her father's insurance policies and pay her the proceeds, cash accumulated value and other benefits" of the policies. Both Generali and Riunione Adriatica refused to honor the policies taken out by Cornell's father.

Like Marta Cornell, the additional twenty-eight plaintiffs are beneficiaries of their parents' and/or grandparents' insurance policies that were bought before or during World War II. Some plaintiffs, along with their families, were deported to concentration camps; the plaintiffs remained the only survivors. Others fled Europe or went into hiding with their families to avoid Nazi persecution. All policyholders are alleged to have purchased the insurance, faithfully paid the premiums, accumulated cash values from the insurance, and lost it all during the Holocaust.

The amended complaint further alleges that the defendant insurance companies capitalized on the fear of Nazi persecution by encouraging and assisting Jews to deposit their assets and purchase insurance to safeguard their families' future. The defendant
insurance companies "marketed the insurance as an investment, to pay dividends or provide savings for weddings ['dowry policies'], old age or funerals." As Nazi persecution became well known throughout Europe, the defendant insurers are alleged to have advertised and marketed insurance policies to provide "safety and peace of mind [to] the policyholder." The amended complaint asserts, however, that the proceeds from the insurance policies of Holocaust victims were used to further the Nazi war effort or enrich Nazi war criminals.

The amended complaint asserts that, at the end of the war all defendants engaged in a pattern and practice of deception of policyholders and beneficiaries consisting of, inter alia, (i) failing to give information to policyholders and beneficiaries about their policies, (ii) demanding that policyholders produce evidence of their loss and beneficiaries produce evidence of the death of the policyholders, which defendants knew would be impossible under the circumstances of the Holocaust, and/or (iii) failing to seek out beneficiaries of the policies.

of family futures.

Id. 422. Id. ¶ 55.
423. Id. ¶ 64. The amended complaint alleges: "Persecution by Nazi Germany and the Axis countries became sufficiently well known throughout Europe to cause many people to attempt to emigrate abroad. Those who were unable to emigrate tried to hide their assets to avoid confiscation." Id. ¶ 61. It further states: "Upon information and belief, the defendant insurance companies advertised and/or otherwise marketed insurance in ways designed to attract members of the Class into purchasing insurance products, with an emphasis on providing for the safety and peace of mind of the policyholder." Id. ¶ 64.
424. See id. ¶ 1.
425. Id. ¶ 69. Likewise, "[m]any of the plaintiffs . . . notified the defendants that they were beneficiaries entitled to benefits due under the Insurance Policies." Id. ¶ 70.

The amended complaint further asserts that "[n]o statute of limitations has begun to run . . . since the plaintiffs . . . have remained in ignorance of vital information, without any fault or want of diligence or due care on their part, essential to pursue their claims." Id. ¶ 72. Furthermore, "[e]vidence of the defendants' participation in the above-described common course of conduct only recently has come to light as a result of the disclosure of archived documents." Id. ¶ 1. Moreover, according to the amended complaint:

The defendant insurance companies misrepresented to and concealed vital information from the plaintiffs and members of the Class by, inter alia:

a. falsely stating they had conducted exhaustive searches and had not found the Insurance Policies;
b. falsely stating they had conducted exhaustive searches and had found no proceeds, accumulated cash values or other policies' benefits under the Insurance Policies;
c. requiring the Class to produce death certificates in order to collect proceeds, accumulated cash values or other policy benefits under the Insurance Policies knowing that Nazi Germany and its allies did not issue death certificates for victims of their persecutions;
d. failing and refusing to give Insurance Policy information to the plaintiffs and members of the Class even though such persons are
The amended complaint sets out seven causes of action: (1) breach of insurance policies; (2) breach of fiduciary duties; (3) breach of duty to disclose; (4) conversion; (5) bad faith; (6) unjust enrichment; and (7) accounting.\textsuperscript{426}

Plaintiffs are seeking compensatory damages in an amount in excess of $1 billion from each of the insurance companies, for a total of at least $16 billion.\textsuperscript{427}

From July to November 1997, the defendant insurance companies, after being served with the lawsuit, filed various motions to dismiss. The motions covered the typical "laundry list" of procedural defenses alleged by foreign defendants when sued in the United States, including: (1) lack of personal jurisdiction;\textsuperscript{428} (2) lack of subject matter jurisdiction;\textsuperscript{429} and (3) forum non conveniens.\textsuperscript{430}

Judge Michael Mukasey in Manhattan, presiding over this lawsuit, has not ruled on defendants' motions in the two years since they were filed.\textsuperscript{431} It appears that Judge Mukasey has borrowed entitled to such information under applicable law; and

e. failing and refusing to provide full information about the Insurance
Policies, policy proceeds, accumulated cash values and other policy
benefits.

\textit{Id.} \textsection 73.

426. \textit{See id.} \textsection 83-110 (citing counts I-VII).

427. \textit{See id.} at Prayer for Judgment \textsection A-F. The amended complaint also seeks punitive damages, an accounting, pre- and post- judgment interest, and attorneys' fees. \textit{See id.}

428. \textit{See Defendants' Joint Memorandum of Law In Support of Their Motions to Dismiss For Lack of Personal Jurisdiction, Cornell v. Assicurazioni Generali S.p.A., No. 97 Civ. 2262 (S.D.N.Y. filed Oct. 24, 1997) [hereinafter Cornell Defendants' Joint Memorandum of Law In Support of Their Motions to Dismiss For Lack of Personal Jurisdiction]. This Motion was filed by 12 of the 16 foreign insurance defendants. See \textit{id.} n.1.}


430. \textit{See Joint Memorandum of Law In Support of Defendants' Motions to Dismiss the Amended Complaint on the Ground of Common Law Forum Non Conveniens, Cornell v. Assicurazioni Generali S.p.A., No. 97 Civ. 2262 (S.D.N.Y. filed Nov. 21, 1997) [hereinafter Cornell Joint Memorandum of Law In Support of Defendants' Motions to Dismiss the Amended Complaint on the Ground of Common Law Forum Non Conveniens]. This Motion was filed by 14 of the 16 foreign insurance defendants. See \textit{id.} n.1.}

For a more complete discussion of the various defenses, procedural and substantive, being asserted by the European insurance companies in the various lawsuits being filed against them, see discussion and notes \textit{infra} Part IV.B.

431. In 1997 and 1998, Judge Mukasey allowed plaintiffs to conduct limited jurisdictional discovery. For a summary of jurisdictional discovery propounded by plaintiffs upon the defendant insurers, see Defendants' Joint Memorandum of Law in Support of the Application
Judge Korman's "game plan" from the Swiss bank cases, hoping that the matter will settle without him having to rule on defendants' motions.  

ii. *Winters v. Generali* 433

In December 1998, another group of Holocaust survivors and heirs brought a second class action lawsuit against the same European insurance companies named in the *Cornell* lawsuit (and some additional insurers 434) for selling, confiscating, converting, and/or otherwise unjustly retaining insurance policies of victims of the Holocaust. 435 Like the plaintiffs in *Cornell*, plaintiffs in this suit are the children or grandchildren of Holocaust victims who purchased and paid for insurance policies during World War II. 436

The plaintiffs allege that they have "never received restitution for [the] wrongly misappropriated Insurance Policies." 437 Moreover, the

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432. As quaintly put by one attorney involved in the litigation, in a telephone discussion with the author, "Judge Mukasey is 'Kormanizing' the insurance class action litigation." Off-the-Record Telephone Interview with an attorney involved in the lawsuits (Nov. 1999).


434. The *Winters* lawsuit names 28 European insurance companies as defendants. See *Winters* Complaint, supra note 433, ¶¶ 15-43.

435. See *id.* at 1. The complaint asserts:

"This is a civil action on behalf of those victims of the Holocaust and their heirs and beneficiaries . . . whose assets in insurance and/or contractual rights under insurance and insurance-like policies covering, *inter alia*, life, property, casualty, dowry, disability, liability, accident, health, annuities, and/or pension funds . . . were sold, confiscated, converted, and/or otherwise unjustly retained by Defendants in the years leading up to, during, and following the Second World War."

*Id.*

436. *See id.* ¶¶ 7-14.

437. *Id.* The complaint asserts that the statute of limitations are tolling and defendants are estopped from "interposing any time bar type of defense to these claims." *Id.* ¶ 124. First, there is tolling pursuant to the London Debt Agreement of 1953:

"Plaintiffs' legal right to seek compensation for the unjust seizure by German Defendants of their insurance proceeds during the Second World War was deferred by the London Debt Agreement of 1953, until the German courts ruled,
defendant insurance companies are accused of not having made any reasonable attempt to pay or compensate the plaintiffs. According to the complaint:

[A]fter the Second World War, Defendants intentionally (i) conspired with one another to foil Plaintiffs' and members of the Plaintiff Class' attempts to recover their insurance assets after the Second World War; (ii) misrepresented the extent of war damage to their records and their ability to determine their liability to members of the Plaintiff Class; (iii) distorted the circumstances of their wartime activities through dissemination of false and fraudulent information; and (iv) refused to disclose documents evidencing Defendants' liability to members of the Plaintiff Class.  

The complaint describes the defendants' wrongdoing as follows: (1) the defendants colluded with the Nazi Regime to benefit economically at plaintiffs' expense; (2) the defendants plundered the victims by profiteering through "Aryanization" and retaining

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on November 7, 1997, that the Treaty on the Final Settlement with Germany had lifted the moratorium on individual claims for compensation against German entities. Accordingly, statutes of limitation claims of compensation for losses accrued in connection with the Second World War were tolled through at least November 7, 1997.  

Id. ¶ 121. Second, there is equitable tolling because "[d]efendants have concealed information from Plaintiffs and the Class by, inter alia, (i) concealing their course of conduct as described herein; (ii) failing to search for or disgorge assets belonging to the Class; and (iii) refusing to disclose information to the Class regarding the nature of assets improperly appropriated by Defendants." Id. ¶ 122. In addition, Recently, archived records concerning the actions of Germany, Austria, Italy and insurers of the Nazi regime during the Second World War were opened to the public. These records allowed an examination of various insurers' roles in the war crimes and crimes against humanity committed during the Second World War and perpetuated into the present by their inaction, deceit and concealment.  

Id. ¶ 123.  

438. See id. ¶ 5. The complaint states: At no time since the end of the Second World War has any Defendant made any reasonable attempt to compensate members of the Class for the assets Defendants wrongfully appropriated during the war, despite their knowledge that their wrongful behavior violated the laws of their respective countries, the practices of the insurance industry, and international law.  

Id.  

439. Id.  

440. See id. ¶¶ 48-56.  

441. See id. ¶ 61. "Aryanization' was the transfer of all Jewish-owned property in Germany and in territories under German wartime control to 'Aryan' owners." Id.
the victims' assets;442 and (3) the defendants participated in postwar activities to foil survivors attempts at restitution.443

The Winters lawsuit is broader than the Cornell action. The complaint alleges ten causes of action: (1) violations of international law; (2) conversion; (3) unjust enrichment; (4) breach of insurance policies; (5) breach of fiduciary duty; (6) breach of special duty; (7) breach of duty to disclose; (8) bad faith; (9) conspiracy; and (10) accounting.444

Unlike the Cornell complaint, the Winters complaint does not specify any amount of compensatory damages.445 Like in Cornell, the Winters plaintiffs are also seeking punitive damages.446

Since its filing in December 1998, no action has been taken on the Winters lawsuit, other than seeking to coordinate it with the Cornell action.447

In August 1999, some of the defendant insurers filed a motion to dismiss. The motion tracked the arguments made by the same defendants in the Cornell motion.448

As of January 2000, Judge Mukasey, also presiding over the Winters class action, had not ruled on the dismissal motion. Most likely, as in Cornell, he will not rule on the motion anytime soon, but will also allow the Winters plaintiffs, like the Cornell plaintiffs, to conduct jurisdictional discovery.

442. See id. ¶¶ 57-106.
443. See id. ¶¶ 107-110.
444. See id. ¶¶ 125-157 (citing counts I-X).
445. See id. at Prayer for Judgment ¶ A.
446. See id. at Prayer for Judgment ¶ B.
447. See Letter from Morris Ratner, Counsel for Plaintiffs in Winters, to Judges Barbara S. Jones and Michael B. Mukasey (Apr. 15, 1999) (on file with author) (suggesting that “the interests of justice and efficiency would best be served if activity in the two cases [Cornell and Winters] were coordinated” and that, to date, “no dispositive issues have been adjudicated in either case by any court”). Both lawsuits were filed in the Southern District of New York.
448. See Joint Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint for Lack of Personal Jurisdiction, Winters v. Assicurazioni Generali S.p.A., No. 98 Civ. 9186 (S.D.N.Y. filed July 30, 1999) [hereinafter Winters Joint Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint for Lack of Personal Jurisdiction]; Joint Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint on the Ground of Forum Non Conveniens, Winters v. Assicurazioni Generali S.p.A., No. 98 Civ. 9186 (S.D.N.Y. filed July 30, 1999) [hereinafter Winters Joint Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint on the Ground of Forum Non Conveniens].
iii. *Stahl v. Victoria Holding AG* 449

The first Holocaust-era insurance case to reach the hearing stage did not go well for the plaintiffs. The case, an individual action, was dismissed and is now on appeal.

Plaintiffs Sophie Stahl, Gabrielle Stahl Lansing, and Werner Stahl are the daughter, granddaughter, and grandson, respectively, of Heinrich Stahl, a prominent German Jew who died in the Holocaust.450

449. Complaint, Stahl v. Victoria Holding AG, No. BC 188677 (Cal. Super. Ct. filed Apr. 2, 1998) [hereinafter *Stahl I Complaint*]. For the ease of the reader, all future citations to documents for the state court case will be prefaced with *Stahl I*. This case was removed by the defendant to the United States District Court for the Central District of California. See Stahl v. Victoria Holding AG, No. 98 CV 3490 (C.D. Cal. 1998). For the ease of the reader, all future citations to documents for the removal of *Stahl I* to federal court will be prefaced with *Stahl II*. The plaintiffs appealed the district court's dismissal of their complaint to the United States Court of Appeals for the Ninth Circuit. See Stahl v. Victoria Holding AG, No. Civ. 99-55012 (9th Cir. filed Mar. 13, 1999). For the ease of the reader, all future citations to documents for the appeal to the United States Court of Appeals for the Ninth Circuit will be prefaced with *Stahl III*.

450. See *Stahl I* Complaint, supra note 449, ¶ 4-6, 13. The fates of *Stahl v. Victoria Holding AG* and the other individual Holocaust-era insurance cases are good illustrations of the irrationality of the removal system when applied to similar cases.

The *Stahl* complaint originally was filed in Los Angeles Superior Court together with eight other individual Holocaust-era insurance complaints (one of which was voluntarily dismissed by plaintiffs). See *Stahl I* Complaint, supra note 449, ¶ 1. All of the California cases were individual actions, unlike the federal class actions filed in New York. See supra Part IV.A.2.b. The same team of attorneys, Shernoff, Bidart, Darras & Arkin of Claremont, California, and Lisa Stern of Los Angeles, California, represented all the plaintiffs in these California state cases. Attorney Lisa Stern is the wife of Alan Stern, the grandson of Mor Stern and one of the plaintiffs in *Stern v. Assicurazioni Generali S.p.A.*, No. BC 185376 (Cal. Super. Ct. filed Feb. 5, 1998). See supra Part IV.A.2.b.(ii). (discussing other California cases being litigated).


*Babos, Sladek, Friedman, and Klein* were remanded back to state court by the federal judges. *Babos, Sladek, and Friedman* were then assigned to the same state judge who was presiding over *Stern*. See Civil Minutes-General, Babos v. Assicurazioni Generali S.p.A., No. 98 CV 5368; Friedman v. Assicurazioni Generali S.p.A., No. 98 CV 5780; Sladek v. Assicurazioni Generali S.p.A., No. 98 CV 5369; (C.D. Cal. Dec. 14, 1998) (opining on Plaintiffs Babos's and Sladek's Amended Motions and Plaintiff Friedman's Motion to Remand); see also
Prior to the war, Heinrich was the president of the Jewish community in Berlin.\footnote{451} Heinrich was one of the founders of Victoria

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*Klein* was combined with another subsequently filed case against Adriatica, and plaintiffs filed an amended complaint consolidating all three cases into one action against Adriatica, with *Klein* becoming the lead case. See *Klein v. Riunione Adriatica di Sicurta S.p.A.*, No. BC 201983 (Cal. Super. Ct. filed Dec. 8, 1998). In August 1999, plaintiff Eugene Klein died and his daughter is continuing the action. See Telephone Interview with Lisa Stern, Plaintiffs' Attorney (Feb. 16, 2000); discussion and notes *infra* Part IV.A.2.b.(ii).

*Stahl v. Victoria Holding AG (Stahl II)* remained in federal court and is now the only individual action Holocaust-era insurance case in the federal court system.

An examination of the jurisdictional facts for the California cases shows that, for federal versus state jurisdictional purposes, the cases are the same. No reason exists why one should be in federal court while the others are in state court.

Insurance Company ("Victoria") of Berlin, Germany. \(^{452}\) Heinrich's

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\(^{452}\) See id. ¶¶ 7, 8, 13. Since the end of the war, Victoria Insurance Company of Berlin, as it was originally known, has gone through a number of mergers and name changes.

At some point after the war, Victoria Insurance Company of Berlin became known as Victoria Holding AG. Since all parties and the trial court referred to defendants collectively as "Victoria," this will be the designation used herein. At another point, a company named Victoria Lebensversicherung AG became the "successor to [the] insurance business of Victoria Holding AG." \(^{Stahl II}\) Declaration of Gert Schlosser in Support of Defendant's Notice of Motion and Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction, for Insufficiency of Process, and, in the Alternative, for Forum Non Conveniens ¶ 1, at 26, Stahl v. Victoria Holding AG, No. 98 CV 3490 (C.D. Cal. June 22, 1998) [hereinafter \(^{Stahl II}\) Declaration of Gert Schlosser]; see also \(^{Stahl I}\) Defendant's Amended Notice of Filing of Notice of Removal of Action to United States District Court for Central District of California at 1, Stahl v. Victoria Holding AG, No. BC 188677 (Cal. Super. Ct. filed May 8, 1998) [hereinafter \(^{Stahl I}\) Defendant's Amended Notice of Filing of Removal of Action to United States District Court for Central District of California] (Victoria Lebensversicherung AG is the successor-in-interest to Victoria Holding AG).

In January 1998, Victoria (and presumably Victoria Lebensversicherung AG) ceased to exist as independent companies after merging with Hamburg Mannheimer AG, another German company. \(^{Stahl III}\) Preface to Appellees' Brief 11, Stahl v. Victoria Holding AG, No. Civ. 99-55012 (9th Cir. filed May 10, 1999) [hereinafter \(^{Stahl III}\) Preface to Appellees' Brief].

In October 1997, Hamburg Mannheimer AG changed its name to Ergo Versicherungsgruppe AG, which appears to be the current name of the company. This is the successor to the Victoria-Hamburg Mannheimer merger. See id. It appears, however, that Victoria Lebensversicherung AG still operates under its own name. See supra.

Ergo Versicherungsgruppe AG, in turn, is owned by Münchener Rückversicherungs-Gesellschaft ("Munich Re"), the world's largest reinsurance company. See Henry Weinstein, \(^{German Insurer Targeted over Holocaust Claims},\) L.A. TIMES, June 23, 1999, at A3.

Munich Re owns "approximately sixty-three percent (63%) of the outstanding stock of appellee Ergo Versicherungsgruppe AG. . . . The remaining outstanding stock of said appellee is publicly traded on stock exchanges located in Frankfurt and Düsseldorf, Federal Republic of Germany." \(^{Stahl III}\) Preface to Appellees' Brief, supra. ¶ 2.

Plaintiffs point out that Munich Re owns an American insurance company, American Reinsurance ("American Re"), which has two regional offices in California "and derives 17% of its business from [California]." \(^{Stahl III}\) Appellants' Opening Brief at 18, Stahl v. Victoria Holding AG, No. Civ. 99-55012 (9th Cir. filed Mar. 10, 1999) [hereinafter \(^{Stahl III}\) Appellants' Opening Brief].

Plaintiffs assert that Munich Re, "a multinational conglomerate[,] operates [these] various subsidiaries on a consolidated, integrated basis." Id. According to plaintiffs, "Munich Re operates as a single unitary enterprise in which American Re and VICTORIA/ERGO are merely conduits or instrumentalities for the operation of Munich Re's business." Id. at 40.
son, Bruno, was the Victoria agent in Brussels from 1931 to 1941.\textsuperscript{453}

Heinrich and his wife, Jenny, were deported by the Nazis to the Theresienstadt Concentration Camp, where, in 1942, Heinrich was killed.\textsuperscript{454} Jenny survived the war and emigrated to the United States where she died in 1959.\textsuperscript{455} Their daughter, Sophie, was ninety-eight years old at the time of filing the lawsuit in 1998 and resided in California.\textsuperscript{456} Granddaughter Gabrielle is also a resident of California, and grandson Werner resides in New York.\textsuperscript{457}

Plaintiffs allege that, prior to the war, Heinrich and Bruno purchased various life and annuity policies from Victoria and that such policies provided "that when Heinrich and Bruno died[,] defendant VICTORIA would pay life insurance and annuity proceeds to their surviving heirs, which include Plaintiffs."\textsuperscript{458}

Plaintiffs, however, do not have any of the alleged policies. Plaintiffs allege that, in or about 1993, Victoria invited the family to celebrate its centennial anniversary, and "[i]t was at that time that VICTORIA declared that the Policies only had 'sentimental value' and confiscated them for their archives. Regretably [sic], the family now does not have possession of even a copy of the Policies."\textsuperscript{459}

\textsuperscript{454} See id. ¶ 13.
\textsuperscript{455} See id. ¶ 15.
\textsuperscript{456} See id. ¶ 1, 16. In August 1999, she died. Interview with Lisa Stern, Plaintiffs' Attorney (Feb. 16, 2000).
\textsuperscript{457} See Stahl I Complaint, supra note 449, ¶ 2-3.
\textsuperscript{458} Id. ¶ 11. Plaintiffs also alleged that, after the war, the Stahl family "requested on multiple occasions that VICTORIA pay benefits under the huge stock options, life insurance and annuity policies that the family owned [and that] VICTORIA has refused to honor its insurance obligations to the family." Id. ¶ 18.
\textsuperscript{459} It remains unclear how many policies, which they allegedly turned over to Victoria at this anniversary celebration, plaintiffs retained after the war. Compare preceding statement and Stahl III Appellants' Opening Brief, supra note 452, at 11 (both referring to multiple "policies"), with id. at 48 (stating that, at the anniversary celebration, plaintiffs requested "payment of the proceeds under one of the policies issued to Heinrich Stahl which appellants still had possession of . . . [Victoria] confiscated the policy.") (emphasis added).
\textsuperscript{460} Stahl I Complaint, supra note 449, ¶ 19. Plaintiffs also alleged that "Heinrich was presented with a certificate from VICTORIA for his 20 faithful years of service prior to his deportation [to a Nazi concentration camp]." Id. ¶ 17. Plaintiffs attached a copy of the certificate as Exhibit A to the complaint.

In its motion to dismiss, Victoria denied plaintiffs' allegations. See Stahl II Declaration of Gert Schlosser, supra note 452, ¶ 8; see also Stahl III Appellees' Brief at 51-52, Stahl v. Victoria Holding AG, No. Civ. 99-55012 (9th Cir. filed May 10, 1999) [hereinafter
The complaint sets out four causes of action: (1) breach of the implied covenant of good faith and fair dealing; (2) breach of contract; (3) damages and injunctive relief under California Business & Professions Code sections 17200 and 17500; and (4) intentional spoliation of evidence.\[461\]

Following service, defendant removed the lawsuit from California state court to federal court, specifically to the Central District of California. There, Victoria moved to dismiss the suit for lack of personal jurisdiction and, in the alternative, on grounds of forum non conveniens.\[462\]

The federal trial court granted Victoria's motion to dismiss, citing lack of personal jurisdiction.\[463\] The court found that it does not possess either general or specific personal jurisdiction over Victoria.\[464\]
The trial court first focused on whether it has general jurisdiction.\textsuperscript{465} Since Victoria is a German corporation not domiciled in California, to establish general jurisdiction the court had to find that Victoria's activities in California were “substantial” or “continuous and systematic.”\textsuperscript{466}

The court cited a variety of factors why the activities of Victoria in California were not substantial or continuous and systematic. Specifically, Victoria did not:

1. transact any business within California;
2. have any agents or representatives in California to conduct business;
3. solicit any business within California;
4. have an office within California;
5. conduct any advertising, solicitation or other activity directed to any person or entity within California;
6. attempt to develop a national market through any participation in any entity or association; or
7. have any accounts, assets, funds, monies, or property in California.\textsuperscript{467}

To counter these factors, plaintiffs argued that Victoria, nevertheless, had substantial California contacts. Plaintiffs' assertion was based upon evidence obtained by an investigator “that [Victoria] invested large sums of money in the American market.”\textsuperscript{468} The court rejected this evidence. The court held that this assertion of Victoria's U.S.-based activities “is found in a declaration by an attorney citing the findings of a private investigator, [amounting to] a classic out of court statement offered to prove the truth of the matter.

\textsuperscript{465} After removal to federal court, plaintiffs filed an amended complaint, adding as an additional defendant Ergo Versicherungsgruppe AG (“Ergo”), a German company that plaintiffs alleged is the surviving or resulting corporation of a merger between Victoria Insurance and Hamburg-Mannheimer AG and is the successor-in-interest to the rights, duties, and obligations of Victoria. See Stahl I Complaint, supra note 449, ¶ 9.

In its analysis, the court examined whether personal jurisdiction exists over either Victoria or Ergo. See Stahl II Opinion, supra note 463, at 3-6. Since the court's analysis for both Ergo and Victoria is the same, the discussion herein will refer to both entities collectively as “Victoria.” See supra note 452.

\textsuperscript{466} Stahl II Opinion, supra note 463, at 2. The judge noted that “[g]eneral jurisdiction exists when a defendant is domiciled in the forum state or when its activities there are ‘substantial’ or ‘continuous and systematic.’” Id. (citing Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 408, 414-16 (1984)). The Court in Helicopteros actually used the terms “continuous and systematic general business contacts” and “sufficient contacts.” Helicopteros, 466 U.S. at 414-16.

\textsuperscript{467} Stahl II Opinion, supra note 463, at 3. Compare these factors, favoring a finding of lack of jurisdiction over the German insurer Victoria, with the factors cited by the California state court in Stern v. Generali, favoring a finding of jurisdiction over the Italian insurer Generali. See discussion and notes infra Part IV.A.2.b.(i).

\textsuperscript{468} Stahl II Opinion, supra note 463, at 40.
asserted." Such evidence alone, the court found, was not enough to sustain plaintiffs' "burden of offering prima facie proof of jurisdiction."\(^\text{470}\)

Plaintiffs argued that, if the court finds that plaintiffs did not meet their burden of offering prima facie proof of jurisdiction, they should be given an opportunity to conduct discovery to obtain additional evidence to support jurisdiction over Victoria.\(^\text{471}\) Federal courts, especially the Ninth Circuit, have been liberal in allowing defendants to conduct jurisdictional discovery. This is especially true in cases involving international disputes, where information about U.S.-based activities of foreign defendants is more difficult and more time-consuming to obtain.\(^\text{472}\)

The district court, however, rejected this request outright, on the ground that "further efforts to find evidence to support jurisdiction would likely prove futile."\(^\text{473}\)

It appears that the court was unduly harsh in its assessment of plaintiffs' future ability to prove jurisdiction based upon Victoria's California-based activities. As the court noted, plaintiffs had already scheduled a deposition of an executive of St. Paul's Fire & Marine, an American insurer that is "a partner of [Victoria]\(^\text{474}\) and "ha[s] contacts with California."\(^\text{475}\)

Plaintiffs contended "that this deposition will show, through the existence of a partnership agreement [between Victoria and St. Paul's Fire & Marine], that [Victoria] ha[s] contact with California."\(^\text{476}\)

The court should have allowed plaintiffs to engage in jurisdictional discovery—at the least, to take the already-scheduled deposition—rather than dismissing the case outright, especially since

\(^\text{469. Id.}\)

\(^\text{470. Id.}\)

\(^\text{471. See id. at 7. Plaintiffs also sought to amend their complaint to add additional defendants. See id.}\)

\(^\text{472. See, e.g., Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 713 (9th Cir. 1992); Santos v. Compagnie Nationale Air France, 934 F.2d 890, 892 n.2 (7th Cir. 1991); Filus v. LOT Polish Airlines, 907 F.2d 1328, 1332 (2d Cir. 1990). In Siderman, the Ninth Circuit cited its earlier opinion in America West Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793 (9th Cir. 1989), holding that "where pertinent facts bearing on the question of jurisdiction are in dispute, discovery should be allowed." Siderman, 965 F.2d at 801.}\)

\(^\text{473. Stahl II Opinion, supra note 463, at 8.}\)

\(^\text{474. Id. at 7.}\)

\(^\text{475. Id. at 8.}\)

\(^\text{476. Id. at 7-8.}\)
the lead plaintiff is a ninety-eight-year-old Holocaust survivor who had waited for over a half-century for her day in court.477

Plaintiff presented another ground for establishing general jurisdiction. Victoria is a subsidiary of another German insurance company, Munich Reinsurance ("Munich Re"),478 which, plaintiffs alleged, has "substantial contacts with this forum."479

Even though Munich Re, Victoria’s parent, has such substantial contacts with California, the court held that general jurisdiction over Victoria still is not established. According to the court, Munich Re’s contacts with California can be asserted against Victoria to establish jurisdiction only if there is an alter ego relationship.

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477. Apparently, the court had previously denied Victoria’s motion to dismiss on the grounds that plaintiffs would present additional jurisdictional facts, and plaintiffs had failed to do so. See id. at 8 ("Finally, the Plaintiffs have failed to improve their evidentiary position since the Defendants' last motion to dismiss for lack of personal jurisdiction."). This appears to be a factor in the court denying plaintiffs’ request to postpone its ruling and the court issuing a decision based on admissible evidence presently before the court.

478. In German, the company’s name is Münchener Rückversicherungs-Gesellschaft. According to a report of the Washington State Insurance Commissioner:

Reinsurance is one of the most important—but least understood—aspects of the insurance business. Reinsurance is a form of insurance that direct insurance companies (those writing policies directly for insured parties) buy for their own protection.

Simply stated, the direct insurer gives or “cedes” a portion of its liability to the reinsurer. The reinsurer agrees to accept some of the risks from the direct insurer, commonly in exchange for a share of premium income collected . . .

In Europe, the modern reinsurance industry was pioneered by the Munich Reinsurance Company (Münchener Rückversicherung) in the early years of the 20th Century.

Two major firms, Munich Reinsurance and Swiss Reinsurance dominated the pre-WW II European reinsurance industry . . .

Before the war, Axis firms derived substantial income from European countries through their dominance of the reinsurance business . . . As the Axis powers spread, Munich Reinsurance gained preeminent status in European reinsurance, a position it continues to enjoy today.

Senn, supra note 372, app. B. at 32. Munich Re is now the world’s largest reinsurance company. See Weinstein, supra note 452, at A3.

In June 1999, the California Department of Insurance initiated an administrative hearing against the California-licensed subsidiaries of Munich Re for failing to pay Holocaust-era claims. See id. According to the California Insurance Commissioner, “Department research indicates that this group of insurance companies has significant exposure and has failed to pay Holocaust victims’ claims.” Cal. Dep’t of Ins., Press Release #114, June 22, 1999, at 1. The California Insurance Commissioner lists four subsidiaries of Munich Re as doing business in California. See id. at 2. Victoria is not among them. See id.

479. Stahl II Opinion, supra note 463, at 3.
between Munich Re and Victoria; otherwise, corporate formalities must be observed.\textsuperscript{480}

As the court explained:

\textit{This Court finds that the cases that the Plaintiffs cite do not stand for the proposition that a forum may assert personal jurisdiction over a corporate subsidiary where it may assert jurisdiction over the corporate parent. The cases cited instead show that a court may not assert jurisdiction over a corporate parent or officer without its own contacts with the forum, except under circumstances characterized by fraud or an agency or alter ego relationship. These conditions do not exist here. The Plaintiffs have made no showing that the subsidiaries have acted in any fashion through the parent, Munich Re, or that the parent has acted as an alter ego for the subsidiary. The very nature of the typical parent/subsidiary relationship assumes that the parent controls or acts through the subsidiary, not the other way around. Consequently, jurisdiction is not proper on this ground.}\textsuperscript{481}

The court's analysis makes the situation more clear-cut than it actually is. In fact, as will be discussed below, the law concerning personal jurisdiction over foreign-based entities is complicated. Furthermore, the specific facts concerning Victoria's relationships to its parent, its parent's subsidiaries, its parent's American partner, and Victoria's subsidiary or successor-in-interest are convoluted and require further examination.

First, contrary to the impression created by the district court, the law concerning obtaining personal jurisdiction over foreign entities doing business in the United States, either directly or through subsidiaries or independent distributors, is uncertain.\textsuperscript{482}

Moreover, the court was presented with an unusual situation, which it failed, at least explicitly, to acknowledge.

In all other cases dealing with the question of personal jurisdiction based on corporate affiliations—including the cases cited by the court—the issue was whether a court can assert jurisdiction over a foreign parent as a result of the activities in the forum of the foreign parent's wholly-owned subsidiary. In those instances, the parent has

\textsuperscript{480} See id. at 3-4.

\textsuperscript{481} Id. (emphasis added) (citations omitted).

\textsuperscript{482} See BORN, supra note 12, at 151-70 (discussing and reviewing cases dealing with jurisdiction based on corporate affiliations or agency relationships of foreign-based companies and their subsidiaries doing business in the United States).
little or no direct contact with the forum, while the subsidiary has substantial forum-based contacts.

The situation here is reversed. Plaintiffs are asserting that the court possesses jurisdiction over the foreign-based subsidiary, Victoria, because Victoria's foreign-based parent, Munich Re, has substantial contacts in California.

Not recognizing this novel scenario, the court applied the traditional test, first enunciated by the Supreme Court in 1925, in Cannon Manufacturing Co. v. Cudahy Packing Co. Under Cudahy, corporate formalities between a parent and subsidiary should be respected in determining personal jurisdiction over a parent for the subsidiary's forum-based activities, in the absence of evidence showing that the parent and the subsidiary were alter egos.

Since plaintiffs "have made no showing that the subsidiary here has acted in any fashion through the parent, Munich Re, or that the parent has acted as an alter ego for the subsidiary," the court dismissed the case simply by applying the traditional Cannon analysis for determining jurisdiction over a parent company.

Even if the court was correct—that the test to be applied for finding jurisdiction over a subsidiary is the same as that for finding jurisdiction over a parent company—the court failed to recognize that the seventy-year-old test in Cannon has been relaxed in recent years, due to the emerging phenomenon of multinational corporations and the manner they do business.

483. 267 U.S. 333 (1925). In Cannon, a North Carolina corporation brought a breach of contract lawsuit in North Carolina against a Maine corporation. See id. at 334. The defendant Maine corporation had an Alabama subsidiary that had an agent for service of process in North Carolina. See id. Plaintiff served the defendant Maine corporation by serving the North Carolina agent. See id. The Supreme Court affirmed the dismissal of the suit on the ground that the two corporations were legally distinct and could not be treated as one. See id. at 335. The Court found that the two companies kept separate books, and conducted transactions between them "in the same way as if the two were wholly independent corporations." Id. According to the Court, "[T]he corporate separation, though perhaps merely formal, was real. It was not pure fiction." Id. at 337.

484. See id.
486. Id.

[After World War II . . . the phenomenon of the multinational enterprise, as we now know it, became a major factor in the world scene. Since then tens of
Rather than looking strictly at alter ego, "[m]any courts ... apply less stringent tests for alter ego status [by] inquir[ing] into the parent corporation's control over its subsidiary's operations, rather than merely examining 'corporate formalities.'"\(^{488}\) A few courts "have departed [even] further from the Cannon analysis, instead considering whether a parent and its subsidiary are 'economically integrated.'"\(^{489}\)

Besides unsettled law, the relationships, if any, of Victoria (1) to Munich Re, (2) to American Reinsurance Company ("American Re") and other Munich Re insurance subsidiaries\(^{490}\) that sell insurance in California, (3) to St. Paul Fire & Casualty, Victoria's American partner, and (4) to Victoria Lebensversicherung AG, a Victoria subsidiary or its successor-in-interest, that appears to be doing business in the United States, are complex and confusing.\(^{491}\)

\(\text{Id.}\) Since these words were written, almost two decades ago, the globalization trend and growth of multinational corporations has become even more rapid. See generally Thomas L. Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (1999).

488. Born, *supra* note 12, at 160 (discussing Hargrave v. Fibreboard Corp., 710 F.2d 1154 (5th Cir. 1983)).

489. *Id.* at 154-56, 161. Plaintiffs specifically assert this economic integration by arguing that:

\[
\text{[G]iven the incorporation and consolidation of VICTORIA/ERGO into the} \\
\text{operations of the Munich Re Group, the jurisdiction conferred on Munich Re} \\
\text{justifiably extends to VICTORIA/ERGO as well.}
\]

Nor is this linking of relationships to reach VICTORIA/ERGO in any way unreasonable. It is clear from the documentation that the entire Munich Re Group does, in fact, operate as a consolidated, integrated unit—a word actually used by Munich Re to describe its Group. Thus, exercising jurisdiction over VICTORIA/ERGO is no different than exercising jurisdiction over Munich Re or even American Re itself; they are all part of one whole.


Defendants present two counter arguments: the "documentation" relied on by plaintiffs is inadmissible hearsay that the district court properly disregarded, and the economic integration argument is not the law as it ignores the requirement of recognizing the corporate formalities of each of Munich Re's subsidiaries that, according to defendants, are separate and distinct corporations. *See Stahl III* Appellees' Brief, *supra* note 460, at 21-24, 31-45.

490. For a discussion on Munich Re's four licensed subsidiaries in California, see text and notes *supra* Part IV.A.3.

491. As the court's opinion itself shows, the various relationships between Victoria, Ergo, Victoria Lebensversicherung AG, American Re, Munich Re, and St. Paul Fire & Casualty are complicated, perhaps even convoluted. *See Stahl II* Opinion, *supra* note 463, at 2-3. The
At the least, the court should have allowed plaintiffs to conduct further discovery to sort out these confusing relationships, and to examine whether any of them are sufficient to establish personal jurisdiction.\footnote{492}

complexity is exacerbated by the fact that all these insurers, except for St. Paul Fire & Casualty, are German companies incorporated under a foreign legal system, and doing business world-wide. See id. Furthermore, it appears that since the policies were written in the 1920s and 1930s, Victoria has undergone a name change, and various mergers and acquisitions. See id. After filing of the complaint, plaintiffs discovered that Victoria is now part of Ergo Versicherungsgruppe AG, a German corporation that arose out of a merger between Victoria and Hamburg-Mannheimer AG, another German concern. See id. Ergo and Victoria are, in turn, subsidiaries of Munich Re, another German corporation. See id.

Defendants further confused the issue by asserting that Victoria Lebensversicherung AG is the “successor in interest” to defendant Victoria Holding AG, formerly known as Victoria Insurance Company of Berlin. See Stahl I Defendant's Amended Notice of Filing of Removal of Action to United States District Court for the Central District of California, supra note 452, at 1. The declaration of an officer of Victoria confirms this fact. See Stahl II Declaration of Gert Schlosser, supra note 452, at 26 (stating that Victoria Lebensversicherung AG became the “successor to [the] insurance business of Victoria Holding AG”).

Defendants argue that the nexus to California by Munich Re or any other company affiliated with Victoria or Munich Re is irrelevant by stating that: “Personal jurisdiction over Victoria cannot constitutionally be based upon the California contacts of Victoria's parent or any other entity affiliated with Victoria.” Stahl III Appellees' Brief supra note 460, at 11. Defendants, therefore, would prevent examination of the relationships between the various Munich Re companies and Victoria. See id. Of course, the defendants go too far. As shown above, in some instances, the relationship between various subsidiaries of a multinational corporation and the multinational parent and its subsidiaries can be sufficient to establish personal jurisdiction in the United States. See BORN, supra note 12, at 151-70.

Finally, plaintiffs assert that Victoria itself, without any connection to Munich Re or any of its subsidiaries, does business in the United States and within California through Victoria's participation with American insurance companies in an international network of insurance that sells insurance in California, and through Victoria's “50% or greater” investment in a New York-based real estate development partnership that owns properties in California. See Stahl III Appellants' Opening Brief, supra note 452, at 21. The district court disregarded any evidence of Victoria's contacts in the United States and, specifically, California, as inadmissible hearsay. See Stahl II Opinion, supra note 463, at 4 (“The Court finds that this is a classic out of court statement offered to prove the truth of the matter asserted.”).

492. It may well be that upon further discovery, plaintiffs would need to amend their complaint once again to sue the appropriate successors to the no-longer-existing Victoria Insurance Company of Berlin. Plaintiffs specifically made this request, but it was denied by the court as “futile.” See Stahl II Opinion, supra note 463, at 8 (stating that “[f]inally, the plaintiffs suggest that if given leave to amend, the plaintiffs will be able to add other Munich Re corporate subsidiaries to allow this Court to assert jurisdiction over the case”).

Allowing plaintiffs to conduct jurisdictional discovery, rather than dismissing the case outright, comports with the newly-enacted California Holocaust Victim Insurance Act. See CAL. CIV. PROC. CODE § 354.5 (West 1999) (expressing the California legislature's interest in having Holocaust-era insurance claims by its residents decided in California courts and subject to California law). For discussion of section 354.5, see infra note 533 and accompanying text. While the trial court in Stern v. Generali found section 354.5 to be critical, see infra Part IV.A.2.b.(i), the trial court here completely ignored the statute.
The district court also found that it has no specific personal jurisdiction over Victoria. In examining personal jurisdiction, the court conducted a separate analysis of plaintiffs' contract and tort claims against Victoria. 493

For the contract claims, the court found that Victoria did not purposefully avail itself of the privilege of doing business in California by putting insurance policies, which have found their way to California, in the stream of commerce. 494 Citing Ninth Circuit authority that interpreted California law, the court found that mere presence of an insurance contract in a forum is not sufficient for the forum to assert jurisdiction over the defendant insurer. 495 Critical to the court's analysis was the fact that Victoria "ha[s] not advertised or attempted to sell insurance to residents of California." 496

Plaintiffs also alleged an intentional tort claim against Victoria: namely, that Victoria wrote a letter to the plaintiffs in California inducing them to come to Germany for Victoria's millennium celebration in order to obtain an insurance policy from plaintiffs so that it could be destroyed. 497 Plaintiffs alleged that this amounted to the tort of intentional spoliation of evidence, recognized under California law. 498

While the court found that such acts of Victoria, if proved to be true, satisfy the tests of (1) purposeful availment and (2) "arising out of" defendants' forum-related activities, necessary for a finding of specific jurisdiction, 499 the court still dismissed this claim on the ground that forcing Victoria to litigate this intentional tort in California would be unreasonable. 500 According to the court, "There is no question that it would be burdensome for [Victoria] to defend in California and that alternate forums, namely Germany and Belgium, exist." 501

494. See id. at 5.
495. See id. at 5-6.
496. Id. at 6.
497. See id. The district court referred to multiple "policies" that the plaintiffs turned over to Victoria. See id. Apparently, however, there was only one such policy, which plaintiffs still had in their possession after the war. See Stahl III Appellants' Opening Brief, supra note 452, at 48.
500. See id. at 7.
501. Id.
The court also found Victoria’s purposeful interjection into California to be “somewhat limited,” stating: “[A]lthough the alleged solicitation of the Plaintiffs to come to Europe occurred in California, the remaining elements of the alleged plan occurred in Europe, where the evidence was fraudulently obtained and allegedly destroyed.”\textsuperscript{502}

Therefore, the court acknowledged that while California “has an interest in protecting its citizens against the intentional spoliation of evidence,”\textsuperscript{503} a factor that favors trying this case before this court, the location of evidence—the other factor in determining reasonableness of assertion of jurisdiction by the forum—“does not mitigate in favor of either forum, [since e]vidence related to the tort . . . exists in both California and Europe.”\textsuperscript{504} The court, nevertheless, found it unreasonable to assert jurisdiction over the intentional tort claims since to do so would not “comport with ‘fair play and substantial justice.’”\textsuperscript{505}

The court’s rationale for dismissal of the intentional spoliation of evidence on the ground of unreasonableness likewise cannot be supported. To maintain that trying this case in California would be burdensome for Victoria, as compared to the burden that would be imposed upon plaintiffs in trying this case in Germany, is pure fiction.

This is not a case where a small foreign entity that engages only in local business is dragged into a California court. Victoria is a large multinational corporation, and part of Munich Re, an even larger multinational, which has extensive business dealings in California.\textsuperscript{506} The lead plaintiff, in contrast, is a ninety-eight-year-old California resident.\textsuperscript{507}

Forcing Victoria to defend itself in California presents a small burden,\textsuperscript{508} especially in comparison to the burden that will be

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\textsuperscript{502}Id.
\textsuperscript{503}Id.
\textsuperscript{504}Id. at 7 n.2.
\textsuperscript{505}Id. at 6 (quoting Burger King v. Rudzewicz, 471 U.S. 462, 477-78 (1985)).
\textsuperscript{506}See Stahl I Complaint, supra note 449, ¶ 7.
\textsuperscript{507}See id. ¶ 16. After filing the suit, the lead plaintiff died. See supra note 456.
\textsuperscript{508}See Boyd, supra note 191, at 70. The article states: Litigants in international cases have access to overnight delivery of documents, facsimiles, and Internet electronic mail; witnesses can be flown all over the world. Compulsory process of non-party witnesses by the U.S. forum may also be less of a concern given the use of customary letters rogatory and the Hague Evidence Convention, which provide for compelling testimony of foreign non-
imposed upon the elderly California plaintiff if she is forced to go to Germany or Belgium to prosecute her action.\textsuperscript{509}

The case is presently on appeal before the Ninth Circuit.\textsuperscript{510} The Ninth Circuit should remand the case to allow plaintiffs to conduct jurisdictional discovery, and, at the conclusion of such discovery, to amend their complaints, if necessary, to add or delete parties in the action.

b. State Court Litigation

i. \textit{Stern v. Generali} \textsuperscript{511}

The \textit{Stern} case has the distinction of being the most prominent Holocaust-era insurance case.\textsuperscript{512}

\begin{quote}

party witnesses.
\end{quote}

\textit{Id.}

\textsuperscript{509} The court also provides another reason to deny jurisdiction in California, which forces plaintiffs to try their case in Belgium or Germany. \textit{See Stahl II Opinion, supra note 463, at 7.} "Perhaps more importantly, a Belgian or German court would be more likely to be able to provide relief to the Plaintiffs, if their claim were found to be meritorious, given that the Defendants have no assets in the United States." \textit{Id.}

This is a strange reason to deny jurisdiction. If, in fact, there are no assets in the United States for plaintiffs to attach if they prevail in their lawsuit, then this action is senseless. It should be for the plaintiffs, not the court, to make this decision. If plaintiffs chose to prosecute their action in the United States, they must have believed that the defendants are not judgment-proof in the United States. It is not the court's role to second-guess this decision. Moreover, if Victoria is judgment-proof, why is it even defending this action? Apparently, Victoria has exposure in the United States, and the court's reasoning, which it considers important, is faulty.


The case originally was set for trial on February 9, 2000, and was going to be the first Holocaust-era insurance case to reach trial. \textit{See Henry Weinstein, Judge Sets First Trial of Holocaust Claims against Insurance Firms, L.A. TIMES, May 29, 1999, at B8.} The case, however, was subsequently transferred to another judge, who set aside the February 2000
The Stern lawsuit stems from the activities of Moshe "Mor" Stern, a wealthy Jewish merchant who died in the Holocaust. Before the war, Mor had a successful wine and spirits production business in Uzghorod, Hungary. Mor and his wife Regina had six sons and one daughter.

In 1944, the entire Stern family, except for one son, was transported to Auschwitz. Mor, Regina, and three sons perished there.

Before the war, Mor took out substantial life insurance and annuity policies and a dowry policy on his daughter, through the Prague office of Generali. Mor purchased the policies between 1929 and 1939, and prepaid premiums on the policies through 1944.


514. See id. ¶ 24.

515. See id. ¶ 23.

516. See id. ¶ 29.

517. See id. Plaintiff Adolf Stern's wife and child were also murdered by the Nazis. See id.

518. See id. ¶ 25.

519. See Stern First Amended Complaint, supra note 513, ¶ 18. Of the various policies purchased by Mor Stern, written proof exists for one policy: a Generali annuity policy number 115285, issued to Mor Stern on April 23, 1929, and payable upon Mor's death, or in 1949, if he was still living. See id.

Policy 115285 also provided "that when Mor died, defendant GENERALI would pay life insurance proceeds to his surviving heirs, which include Plaintiffs." Id. The initial premium paid on the policy had a "payout value of at least 400,000 [Czech] Krona, equivalent at the time to nearly fifteen thousand dollars," and was paid up until 1939. Id. ¶ 26. Later on Mor Stern's instructions, Adolf Stern prepaid to Generali an additional five years worth of premiums, through 1944. See id. ¶ 27. During the war, the Stern children lost all documentation for the policies purchased by Mor. See id. Exhibit B ¶ 7 (affidavit of Adolf Stern).

In a letter dated August 31, 1972, to Edith Stern, Mor Stern's daughter, Generali stated that it found no documentation of any life insurance policy on Mor Stern. See id. ¶ 38. "Referring to your letter of the 19th of August 1972, we wish to inform you that in the local records of our former Czechoslovakian stock we have not traced any assurance offered on the life of a Mr. Mor Stern." Id.

In a letter dated October 11, 1996, to Martin Stern, one of the Stern grandchildren, Generali again denied that it had any records of any policies issued to Mor Stern. See id. ¶ 43. The letter informed the Stern family of the following:

Assicurazioni Generali has no direct knowledge of the incidents described in the letter of Mr. Stern (to which the new items relate). Assicurazioni Generali made efforts to find records relating to the insurance policy of the late Mr. Morris Stern, allegedly issued in Prague in 1929/30. Unfortunately, no such records were found, as the documents and details relating to specific policies were
In June 1945, soon after the war ended, Adolf Stern, Mor's oldest son who survived the Buchenwald Concentration Camp, made his way to Generali’s offices in Prague seeking payment on the family's insurance policies. Adolf was twenty-eight years old at the time.

At his deposition, Adolf, now eighty-two years old and residing in Florida, testified that the Generali officials demanded that he produce a death certificate for Mor. When Adolf explained that the Nazis did not issue death certificates, he was mocked and forcibly removed from Generali's offices.

Surprisingly, a summary of one policy, policy number 115285, was found. “On December 10, 1996, contrary to GENERALI’S prior assertions on August 31, 1972 and October 11, 1996, that no documents existed evidencing that a policy was even issued covering the life of Mor Stern, a GENERALI clerk faxed MARTIN [STERN] a copy of one of the annuity policies!” A copy of this summary policy is attached as Exhibit A to the complaint.

Generali concedes the existence of this document. “Attached to the Complaint as Exhibit A is a German-language summary of the Policy that Generali found in its files and transmitted to the Sterns in 1996.” Defendants' Memorandum of Points and Authorities Supporting Motion to Quash Summons and/or Dismiss or Stay at 3 n.4, Stern v. Assicurazioni Generali S.p.A., No. BC 185376 (Cal. Super Ct. filed Aug. 7, 1998) [hereinafter Stern Defendants’ Memorandum of Points and Authorities Supporting Motion by Specially Appearing Defendants to Quash Summons and/or Dismiss or Stay]. According to Generali, the original policy was written in Hungarian, and Exhibit A is a “German-language abstract reflecting certain terms and conditions” of the policy. Id. at 3-4.

In response to the filing of the suit, in 1998, Generali performed a search for any policies belonging to Mor Stern. Declaration of Federico Baroglio in Support of Motion to Quash ¶ 33, Stern v. Assicurazioni Generali S.p.A., No. BC 185376 (Cal. Super Ct. filed Aug. 7, 1998) [hereinafter Stern Declaration of Federico Baroglio]. In addition to finding evidence of policy number 115285, Generali found another policy issued to Mor Stern. Policy number 115438 was issued on May 10, 1929, and Generali believes that it is a replacement policy for policy number 115285. See id. ¶ 36 n.6.

See Stern First Amended Complaint, supra note 513, ¶ 30.

See id. ¶ 23.

See id. ¶ 7.


The Assicurazioni Generali officials were less than kind. They mocked me. They were arrogant. They stated that I would have to produce a death certificate and copies of the relevant insurance policies before they would process the claims. I explained that Hitler did not pass out death certificates and that all family insurance documentation was confiscated by the Third Reich. They declined my request to retrieve from Generali’s own files the insurance and annuity policies that they sold to my family. The officials said that Generali could not help me and they had me forcibly removed from the premises by a security guard. I was humiliated.
For the next fifty years, Adolf and his other siblings—and subsequently their children (Mor’s and Regina’s grandchildren)—repeatedly petitioned Generali to make payment on the policies purchased by Mor. They were rebuffed each time.

In February 1998, the children and grandchildren of Mor Stern filed a $135-million lawsuit against Generali in Los Angeles Superior Court. The suit sought $10 million in compensatory damages and $125 million in punitive damages. The lawsuit, filed in Los Angeles Superior Court, listed Adolf as the lead plaintiff.

The complaint set out four causes of action: (1) breach of the implied covenant of good faith and fair dealing; (2) breach of contract; (3) damages and injunctive relief under California Business & Professions Code sections 17200 and 17500; and (4) intentional spoliation of evidence.

In response, Generali filed a motion to dismiss. In its motion, Generali argued that California courts lack personal jurisdiction over Generali, that the action should be dismissed because the Generali policies sold to Mor Stern contained a forum-selection clause.

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Id. 254. See Stern First Amended Complaint, supra note 513, ¶¶ 32-35, 37-38, 41-60.

255. See Plaintiff's Opposition to Motion to Quash and/or Stay or Dismiss Action at 2, Stern v. Assicurazioni Generali, S.p.A., No. BC 185376 (Cal. Super. Ct. filed Nov. 30, 1998) [hereinafter Stern Plaintiff's Opposition to Motion to Quash and/or Stay or Dismiss Action]. The Memorandum states:

After Mr. Stern perished in a Nazi death camp, his children repeatedly tried to obtain the proceeds of the policies issued by Generali. . . . GENERALI rejected those claims under a litany of specious grounds. First, GENERALI refused to pay the claims without a death certificate and without the original policies; then it refused on the grounds that its records indicated that no policy ever existed; later, it asserted that because its property in Eastern Europe had been nationalized, it was no longer obligated to pay the claims.

Id. 256. Of the nine Stern family plaintiffs, two reside in California: Anne Stern, wife of one son who died in 1996, and Alan Stern, grandson of Mor. See Stern First Amended Complaint, supra note 513, ¶¶ 4, 7,10, 11.

257. It should be noted that the case will be tried in the same court, the Central District of Los Angeles Superior Court (downtown Los Angeles), where a jury in July 1999 issued a record verdict of $4.9 billion, the largest verdict ever in a personal injury case. See Ann W. O'Neill, Henry Weinstein & Eric Malnic, GM Ordered to Pay $4.9 Billion in Crash Verdict, L.A. TIMES, July 10, 1999, at A1 (awarding punitive damages of $4.8 billion).

258. See Stern First Amended Complaint, supra note 513, ¶ 1.

259. See id.

30. See Stern Defendants' Memorandum of Points and Authorities Supporting Motion by Specially Appearing Defendants to Quash Summons and/or Dismiss or Stay, supra note 519, at 1.
clause mandating that all disputes be settled in Prague, and the case should be dismissed on the grounds of forum non conveniens.\textsuperscript{531}

In filing its motion to dismiss, Generali faced a major obstacle. In May 1998, after this lawsuit was filed, California enacted the Holocaust Victims Insurance Act ("HVIA").\textsuperscript{532} The HVIA specifically vests California with jurisdiction over Holocaust-era insurance cases; nullifies any forum-selection clause in a Holocaust-era policy; and tolls the statute of limitations for Holocaust Era Insurance Claims until 2010.\textsuperscript{533}

531. See id. at 13. California law specifically recognizes the doctrine of forum non conveniens. A defendant is allowed to seek "[t]o stay or dismiss the action on the ground of inconvenient forum." CAL. CIV. PROC. CODE § 418.10(a)(2) (West 1999).

532. See Stern Defendants' Memorandum of Points and Authorities Supporting Motion by Specially Appearing Defendants to Quash Summons and/or Dismiss or Stay, supra note 519, at 17, 23-24 (referring to the HVIA as "AB1334," its original bill number when it was introduced in the California Assembly by Assemblyman Wally Knox).

Both chambers of the California legislature, controlled by the Democratic Party, unanimously passed the HVIA and designated it as urgency legislation. California Governor Pete Wilson, a Republican, immediately signed the bill into law. The enacting legislation to the HVIA explains why the California legislature promulgated the HVIA:

(a) The Legislature recognizes that thousands of Holocaust survivors and the heirs of Holocaust victims are residents or citizens of the State of California. California has an overwhelming public policy interest in assuring that its residents and citizens who are claiming entitlement to proceeds under policies issued to Holocaust victims are treated reasonably and fairly and that those contractual obligations are honored.

(b) It is the specific intent of the Legislature to assure Holocaust victims be permitted to have an expeditious, inexpensive, and fair forum in which to resolve their claims for benefits under these policies by allowing actions to be brought in California courts and subject to California law, irrespective of any contrary forum selection provision contained in the policies themselves. It is the finding of the Legislature that enforcement of forum selection provision in those policies would work an undue, unreasonable, and unjust hardship on Holocaust victims who are residents of California and that those provisions are unenforceable with respect to the policies as to which this act applies.


533. See CAL. CIV. PROC. CODE § 354.5 (West 1999). Subsection (a)(1) defines a "Holocaust victim" to be "any person who was persecuted during the period of 1930 to 1945, inclusive, by Nazi Germany or its allies." Id. § 354.5(a)(1). The victim need not be Jewish.

Subsection (a)(3) defines an "insurer" to be "an insurance provider doing business in [California], or whose contacts in [California] satisfy the constitutional requirements for jurisdiction, that sold life, annuities, dowry, educational, or casualty insurance covering person or property to persons in Europe at any time between 1920 and 1945, directly or through a related company." Id. § 354.5(a)(3).

Subsection (a)(2), in turn, defines a "related company" to be "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." Id. § 354.5(a)(2). This subsection is meant to cover the myriad ways that European insurance companies headquartered in Western Europe, and still existing today or being a successor company, sold insurance in prewar Eastern Europe. See id.

Sections (b) and (c) contain the operative provisions of the HVIA. Section (b) states:
Confronted with the HVIA, Generali argued that the Act was unconstitutional on three grounds.\textsuperscript{534}

First, the [HVIA] violently interferes with the legitimate expectations of the parties to the [insurance] Policy, in violation of the Due Process clause. Moreover, its purported extraterritorial reach violates Due Process as well as the Commerce and Supremacy Clauses. Finally, its enactment exceeded the Legislature's power under the separation of powers set forth in the California Constitution, which does not grant to the Legislature the constitutional power to place its thumb on a judicial scale to pre-ordain the outcome of judicial decisionmaking.\textsuperscript{535}

Notwithstanding any other provision of law, any Holocaust victim, or heir or beneficiary of a Holocaust victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased in Europe between 1920 and 1945 from an insurer described in paragraph 3 of subdivision (a) of this section, may bring a legal action to recover on that claim in any superior court of the county in which the plaintiff or one of the plaintiffs resides, which court shall be vested with jurisdiction over that action until its completion or resolution. Id. § 354.5(b).

Section (c) deals with the issue of statute of limitations for Holocaust-era insurance claims. See id. § 354.5(c). Even though Holocaust survivors or their heirs may argue equitable tolling or make some other counter-argument to the defense of statute of limitations, in an action seeking proceeds of a Holocaust-era insurance policy, subsection (c) removes the need to make such argument by stating that any such action "shall not be dismissed for failure to comply with the applicable statute of limitation, provided the action is commenced on or before December 31, 2010." Id. 534. See Stern Defendants' Memorandum of Points and Authorities Supporting Motion by Specially Appearing Defendants to Quash Summons and/or Dismiss or Stay, supra note 519, at 17-24.

535. Id. at 17-18. With regard to its last assertion, Generali argued that the California Legislature passed the HVIA with the Stern lawsuit in mind, and used its legislative power to meddle with this ongoing litigation. As Generali asserted:

Assemblyman Knox, the Act's sponsor, has publicly acknowledged that the Act was rushed into law to ensure that Generali "do[es] not prevail" on the present motion.

"We are not talking about a hypothetical problem. At this very moment, insurance industry lawyers are poised to file motions in California Court to dismiss the first major lawsuit brought against them for a claim on a Holocaust policy. The legislature must act quickly to see that they do not prevail." Id. at 23-24 (quoting the statement of Assemblyman Wally Knox in support of AB 1334). Generali explained that, "[H]ere, the [HVIA] unconstitutionally intrudes upon the function of the judicial branch by purporting to dictate a specific result preferred by the Legislature—namely, the denial of the present motion." Id. at 23. According to Generali, the California Legislature cannot do this because it violates the separation of powers between the legislative and judicial branches mandated by the California Constitution. See id. at 22 (citing CAL. CONST. art. III, § 3, stating that "[t]he powers of State government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution").
The trial court denied Generali's motion. In so doing, the trial judge appeared to be sidestepping the question of the constitutionality of the HVIA, by holding that, even without the statute, the court possessed jurisdiction over the case and need not dismiss the case on forum non conveniens grounds.

On the question of jurisdiction, the court found that "[a] number of factors support the conclusion that Generali has consented to the jurisdiction of the California Courts." While any one of the factors, "standing alone might be insufficient to confer jurisdiction, when considered together, they constitute both express and implied consent on the part of defendant to the jurisdiction of [California]."

The court found the following factors, in the aggregate, conferred jurisdiction. First, Generali has been admitted to transact insurance business in California since 1958 and has been selling insurance policies in California since that time. Second, Generali has acquired a certificate of authority from the California Department of Insurance. Third, Generali has designated an agent for the service of process in California and, in the form designating such an agent, has stated that service on such an agent "shall give jurisdiction over the person of such insurer." Fourth, Generali has brought suit in California courts to assert or protect its interest.


In its ruling, the court did not indicate whether the Insurance Commissioner's appearance as amicus on the side of the plaintiffs played a role in the court's decision to deny defendant Generali's dismissal motion. See Stern, 1999 WL 167546, at *1. However, much of the discussion in the court's ruling appears in the amicus brief. See id.

538. Id.
539. Id.
540. See id.
541. See id.
542. Id.
543. See id.
And finally, Generali has in the past had an office and owned a subsidiary in California. The court noted that even though Generali's sales of insurance in California "represent[ed] only 1% of its world-wide business, it has sold insurance resulting in millions of dollars in premiums paid by California residents-$27 million in [premiums from California] in 1997 alone. Based upon the totality of these factors, the court concluded that "Generali has continuing and substantial contacts with California, sufficient to satisfy due process."

Examining the forum-selection clause in the Generali policies, the court "refuse[d] to recognize the forum-selection clause. As the court explained, "[w]hen such clauses are part of a preprinted form, designed by the insurer and imposed on the insured, they are not binding."
Finally, examining Generali's argument that the common-law doctrine of forum non conveniens mandates dismissal of the suit, the court found that it

has discretion to determine whether one forum is more convenient than another, and may choose not to exercise jurisdiction. It does not appear to the court that plaintiffs have unfairly or unreasonably chosen to litigate this matter in California, or that proceeding with litigation here is prejudicial to the defendant.  

What remains unclear from the trial court's ruling is the extent to which the court relied upon the HVIA to rule against Generali. Put another way, would Generali's motion to dismiss have been denied in the absence of the HVIA? Possibly, but less likely.

On the one hand, the court used common law principles, rooted in California case law, to reject all three arguments for dismissal raised by Generali. First, the court found that it had jurisdiction over Generali based upon Generali's business activities in California. Second, the court held that it would not enforce the choice-of-forum clause in Generali's insurance policies because it was an adhesion contract.  
Third, the court properly noted that it had discretion whether to dismiss the case on forum non conveniens grounds because one forum was more convenient than another; in this case, the court chose the California forum over the Czech Republic.

On the other hand, the court's ruling made frequent reference to the HVIA and its relevance to Generali's motion to dismiss. For instance, the court began its ruling with the following paragraph: "At the heart of this motion is Code of Civil Procedure section 354.5, the Holocaust Victims Insurance Act. That Act, unquestionably

Lines v. Superior Court, 234 Cal. App. 3d 1019, 1026 (1991)). Plaintiffs argued, "[n]othing presented by GENERALI supports the conclusion that Mr. [Mor] Stern had notice of the [mandatory choice-of-forum] provision." Id. According to plaintiffs, "[t]hus, it is obvious that Mr. Stern did not 'voluntarily' negotiate away his right—or the right of his heirs—to bring an action wherever they resided at the time the right of action existed." Id.

The U.S. Supreme Court, however, has specifically held, albeit outside the insurance context, that the existence of a preprinted form containing a forum-selection clause that benefits only the defendant does not necessarily make the clause invalid. See Carnival Cruise Lines v. Shute, 499 U.S. 585, 593 (1991).

550. See id. at *1.
551. See id.
552. See id.
relevant to these proceedings, if constitutional when applied to this defendant, controls the issues before the court." 553

While the court never specifically held in its written ruling that the HVIA is constitutional, at oral argument the court represented as much. 554

In its choice-of-forum analysis, the court specifically held that it "need not rely on the terms of this new statute in order to refuse to recognize the forum-selection clause." 555 The court, however, in addition to voiding the clause because it was not freely agreed upon, also stated that "[i]n the face of the strong public policy in favor of California’s jurisdiction, this Court will not honor the selection of Czechoslovakia as a proper forum for the resolution of this dispute." 556

Where does the court find this strong public policy? Of course, in the language of HVIA and in its legislative history, both of which the court freely quotes. 557 It appears, therefore, that the HVIA ultimately played a critical role in the court’s denial of Generali’s motion to dismiss.

553. Id.
554. Judge Cooper stated:
   I have an obligation both to uphold the law as the legislature gives it to me and to uphold the Constitution; and if the statute strikes me as blatantly unconstitutional, I will say so . . . . I'm satisfied that the act certainly does represent a very strong, very clear public policy message from the legislature and is sufficiently constitutional on its face for me not to invalidate it.

556. Id.
557. See id. Section Two of the court’s ruling is entitled “The Legislative Expression Of Public Policy” and contains the following two paragraphs:

   The statute in question, CCP § 354.5, unanimously adopted by the California Legislature, reflects a clear directive to the courts to assume and exercise jurisdiction over lawsuits such as the instant case, where suit is brought to enforce the terms of a life insurance policy sold to an insured who became a victim of the Holocaust. The statute directs the Courts to exercise jurisdiction “notwithstanding any other provision of law.”

   It also provides that “it is the specific intent of the legislature to assure that Holocaust victims be permitted to have an expeditious, inexpensive, and fair forum in which to resolve their claims . . . irrespective of any contrary forum selection provision contained in the policies themselves.”

Id. at *1-2 (quoting 1998 Cal. Stat. ch. 43, §§ 1, 3). These paragraphs are followed by the court’s rulings that it will not honor the choice-of-forum clause and will not dismiss the case in favor of a more convenient forum. See id. at *2.
Following the denial of defendant's motion to dismiss, plaintiffs filed a motion for sanctions against Generali. The motion was based on a declaration, filed by an executive of Generali in support of the earlier motion to dismiss, stating that "Generali cannot locate any records of ever having filed a lawsuit in the California state courts." In fact, Generali had brought "at least 24 lawsuits . . . in California state courts in recent years." The court found that the declaration, "if not dishonest, was at least disingenuous and clearly designed to mislead the court on the critical issue of whether defendant had substantial contacts with California and had subjected itself to the jurisdiction of California courts." The court fined Generali $14,126.06, the costs plaintiffs alleged to have expended "in order to disprove the misleading statement in defendant's declaration."

Generali's interlocutory appeals to the appellate courts of California, attempting to reverse the trial court's ruling on the motion to dismiss, failed.

Upon remand to the trial court, the case originally was set for trial on February 9, 2000, and was to become the first Holocaust-era case to reach trial. However, in July 1999, Generali was success-

558. Id.
559. Id. According to the court, "[a]t oral argument, counsel for Generali admitted that he has located even more lawsuits filed in California by Generali than the 24 found by plaintiffs." Id. at *3. Generali also appeared as the defendant in approximately 80 lawsuits in California without ever raising the issue of lack of jurisdiction. See id.

Moreover, Generali, in response to the sanctions motions, admitted two additional incorrect statements in its original moving papers: contrary to its original representation that Generali does not have a telephone listing in California, Generali acknowledged that there is a telephone listing in California for "Generali Insurance Company of Trieste & Venice"; and contrary to its original representation that Generali never advertised in California, Generali ran an advertisement in California in a publication entitled "Business Insurance" in conjunction with Aetna Insurance. See id. at *2-3.

560. Id. at *2.
561. Id. at *3; see also Denise Levin, Judge Sanctions Italian Insurance Firm, L.A. DAILY J., Mar. 24, 1992, at 2.
563. See Weinstein, supra note 512, at B8.
ful in transferring the case to another judge, who set aside the trial date.564

In November 1999, the Stern case settled.565 While the terms of the settlement were supposed to remain confidential, one source reported the settlement amount as $1.25 million,66 substantially less than the $10 million in insurance claims and $125 million in punitive damages sought by the plaintiff.567

Stern v. Generali became the first Holocaust insurance case to reach settlement in the modern era of Holocaust litigation. It is also the first case since Buxbaum v. Generali,568 resolved fifty-six years earlier, in which Holocaust survivors successfully sued for payment of a pre-World War II insurance policy.

ii. Other California Insurance Cases

Four other individual (nonclass) action cases remained in California state court against Generali.569 The same team of lawyers who filed Stern (and Stahl v. Victoria) also filed these four cases.570 Like in Stern, plaintiffs in these other actions are heirs of alleged Generali policyholders who perished in the Holocaust.571

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564. See Levin, supra note 512, at 1. Judge S. James Otero, the new presiding judge, agreed to review the constitutionality of HVIA, and scheduled hearings on the matter. See id. at 1.
566. See Holocaust Insurance Settlement Reported, supra note 565, at A4 (reporting $1.25 million, “according to people knowledgeable about the deal”).
567. See Weinstein, supra note 565, at 1.
568. For a discussion of Buxbaum, see discussion and notes supra Part II.A.
570. See discussion and notes supra Part IV.A.2.a.(iii), b.(i). (discussing the Stahl and Stern cases, respectively). The California attorneys, in contrast to the New York attorneys, have preferred to file individual actions in state court, rather than class actions in federal court.
571. See supra note 513-21 and accompanying text (providing information on the Stern plaintiffs).
seek payment on the policies and punitive damages. The causes of action are the same as those stated in *Stern*.

In May 1999, the same judge who denied Generali’s motion to dismiss in *Stern* likewise denied similar dismissal motions in three of the other cases.

On February 22, 2000, three of the four pending cases against Generali settled.

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572. See id.
573. See id.

The Court has read and considered the moving, opposition, and reply documents filed by the plaintiffs, defendants, and amicus curiae. The Court has also reviewed its ruling in *Stern v. Assicurazioni [Generali]* in which many of the same issues were raised and resolved. Although some factual distinctions exist between and among *Stern* and the moving plaintiffs, they are not legally significant, and the Court has found no reason to depart from its earlier conclusion that it has, and should exercise, jurisdiction over this defendant in these cases.

Id. at 2. As in *Stern*, at the hearing on the motion, the court announced that it would follow its tentative ruling and make that decision the court's final ruling. Also, as in *Stern*, the California Insurance Commissioner filed an *amicus* brief in opposition to Generali’s motions.

Like in *Stern*, plaintiffs suffered a setback in July 1999, when the cases were transferred to another judge, who is again considering Generali’s motions to dismiss. See *Stern* Reporter’s Transcript of Proceedings, supra note 565, at 2, 16 (confirming settlement of *Stern*, and setting a mandatory settlement conference for *Feldman, Friedman, Babos*, and *Sladek*, in which the president of Generali, located in Italy, was ordered to come to California to attend the settlement conference). Rejecting Generali’s plea that it was not necessary for the head of Generali to come to California, Judge Otero commented:

If there's a case that ever cries out for the head of a company to come down to participate in a settlement, it is this case. There is no other case that's ever crossed my desk where I would consider ordering a C.E.O. in because generally it's not necessary. *This case is probably the most significant case that's ever been given to me for resolution.*

Id. at 17 (emphasis added).

Additionally, there is one recently-filed California state court case against Riunione Adriatica, an Italian insurance company whose current majority owner is Allianz of Germany.

All these cases are presently proceeding through the pretrial process.

B. Defenses Presented by the European Insurers

The European insurance companies raised both substantive and procedural defenses to the lawsuits filed against them. Many of the defenses were either identical, or substantially similar, to the defenses made by the Swiss banks in the earlier litigation against them.577

For the substantive defenses, the European insurers argued that they were not under any legal obligation to pay claims issued by them or their subsidiaries before or after World War II.578 They maintained this legal argument even after agreeing to make payment.579 According to the European insurers, even if they made

576. See First Amended Complaint, Klein v. Riunione Adriatica di Sicurta S.p.A., No. BC 201983 (Cal. Super. Ct. served July 6, 1999) [hereinafter Klein First Amended Complaint]. This action combines claims of three Jewish families whose relatives, before perishing in the Holocaust, purchased insurance policies from Riunione Adriatica. See id. The Klein, Turner and Kaufman families seek payment on the policies. See id. ¶¶ 17-30 (referring to the Klein, Turner and Kaufman policies, respectively).

With regard to personal jurisdiction over Italy's Riunione Adriatica, plaintiffs allege in the complaint that Riunione Adriatica appeared as a party in California courts in at least twelve lawsuits. See id. ¶ 14. The complaint also attached documentation showing that in February 1998, Riunione Adriatica withdrew from the California insurance market. See id. Exhibit A.

The lawsuit pleads three causes of action under California law: (1) breach of the implied covenant of good faith and fair dealing; (2) breach of contract; and (3) violation of the California Business and Professions Code sections 17200 and 17500. These are the same claims made against Italy's Generali in Stern and in the consolidated Babos/Sladek/Friedman lawsuits. See discussion and notes supra Part IV.A.2.b. (discussing state court insurance litigation).

577. See Life Insurance and the Holocaust, supra note 375, at 94-100 (discussing statements of representatives of Germany's Allianz and Italy's Generali, and letters of Switzerland's Baloise Life and Winterthur Life written to NAIC, explaining reasons for denial of payment). On February 12, 1998, the Committee on Banking of the U.S. House of Representatives, chaired by Congressman James Leach, held hearings on the Holocaust-era insurance issues. See Hearing before the House of Representatives' Comm. on Banking, 105th Cong. 1 (1998). At the hearing, representatives of some of the European insurance companies testified as to why they are not legally obligated to pay on the insurance claims made from the Holocaust era. See id.

578. See Life Insurance and the Holocaust, supra note 375, at 95.

579. See id.
payments, it would be due to their goodwill and not because of any legal obligation owed to the Holocaust insurance claimants or their successors.\(580\)

For the procedural arguments, the insurers raised the same jurisdictional defenses as those presented by the Swiss banks.

1. Substantive Defenses

a. Nationalization of Local Offices

The insurance firms vigorously argued that because the postwar Communist governments of Eastern Europe nationalized their branch offices in the countries where the policies were issued, their obligations on the policies had been taken over by the nationalized insurance companies.\(581\)

In response, the insurance claimants pointed out that the insurance policies on which the claims were being made were never confiscated by any postwar Communist regime. Rather, prior to the Communist nationalizations, the Nazi government during World War II had already confiscated the assets of the Eastern European Jews, including the victims' insurance policies. In many instances, the Nazis forced the European insurers to pay on the policies to the German treasury.\(582\)

\(580\) See id. at 97-98.

\(581\) See, e.g., Henry, supra note 390, at 11. According to Henry:

In the postwar nationalizations, Generali [Insurance of Italy] lost all its East European businesses, 14 other companies it controlled, and 184 buildings. . . . "In expropriating and nationalizing the company's assets, the communist states of Eastern Europe assumed all Generali's liabilities in these countries," the company said in a statement. "This is not a Holocaust issue; it is a communist nationalization issue. . . . We are not sitting on the money like the Swiss banks. We lost everything."

\(582\) Due to these payments, the European insurers made an additional argument that the claims on some of the policies had already been paid to the Nazis as policyholders. See California Department of Insurance, Helping Holocaust Survivors and Heirs Reclaim What Is Rightfully Theirs, at 1 (Apr. 1999) (unpublished report on file with author) [hereinafter Cal. Dep't Ins. Rep.]. The claimants argued, however, that such payments "certainly [were] not the contractual relationship to which the policyholders had agreed and did not relieve insurers of their contractual obligations [to pay on the policies]." Id.
For the policies not confiscated by the Nazis, the claimants argued that the insuring event—the death of the insured—occurred during the war before any Communist takeover.\footnote{583} Therefore, the subsequent takeover of the local offices had no legal consequence, "particularly since the worldwide assets of these companies are available to pay the claims."\footnote{584}

Therefore, the claimants argued, the nationalization argument is specious and should be rejected in any Holocaust insurance lawsuit.\footnote{585}

The new, postcommunist Eastern European governments supported this position.\footnote{586} The new governments also maintained that they are not responsible to the claimants because postwar Germany never returned the policies to the nationalized successor firms and never compensated the firms nor the claimants for the Nazi confiscation.\footnote{587} Moreover, some Communist governments had

\footnote{583. See id. at 2.}
\footnote{584. Id. The report of the Insurance Commissioner of Washington State, directly addressing the issue of nationalization, concludes:}

Holocaust-era insurance obligations are not only unaffected by the passage of time, they are also unaffected by post-war World War II Communist regime confiscations in Central and Eastern Europe because the 'insurance events' triggering claims—the deaths and/or property losses of the policyholders—preceded such actions.

\ldots

Because such claims remain unpaid, and because there is legal basis to enforce payment through the U.S. legal system, a process still can be implemented to resolve them today, despite the passage of more than a half century.

\footnote{585. See Cal. Dep't Ins. Rep., supra note 582, at 2. According to the California Department of Insurance, which has taken the lead in arguing on behalf of the Holocaust insurance claimants, "The insurance companies insistence that claimants submit their claims to state-run agencies in eastern Europe [for payment] is both shocking and wrong." Id.}

\footnote{586. See Jiri Sitler, The Forgotten Victims, TRANSITIONS, Nov. 1998, at 32-33.}

\footnote{587. See id. As explained by Jiri Sitler, an historian with the Foreign Ministry of the Czech Republic and consultant to the President of the Czech Republic:}

The insurance firms argue that, because their branch offices in the region were nationalized after the war by the countries' communist governments, the firms were freed of any commitments. But these insurance policies were not confiscated by any post-war regime; the German government had already claimed them during World War II. 

All [Holocaust victims] had their property confiscated—expressly including insurance policies, and regardless of whether Nazis confiscated a specific insurance policy. [The Nazis] ... simply cashed in the policies ... .

Neither the Third Reich nor the post-war German government returned these assets to the legal Czechoslovak government.

\footnote{Id. at 33. The Eastern European governments are claiming, therefore, that present-day Germany, as the successor to the Nazi regime, might be liable for the claims. See Henry,}
already paid lump sum compensation to companies and individuals under earlier agreements negotiated with Western countries.\textsuperscript{588}

In May 1999, it was reported that five of the European insurers being sued agreed to drop the argument that nationalization of their local offices had cleared them of any liability to pay on the policies issued by the local offices.\textsuperscript{589} The concession was made at a negotiation session of the International Commission on Holocaust Era Insurance Claims held in London.\textsuperscript{590} It appears, however, that the concession was made only outside the litigation process, and the insurers could still make the argument in the suits filed against them. Moreover, only five of the more than one dozen insurers agreed to the stipulation.

\textit{supra} note 581, at 1.

The claimants' response to these arguments is simple: the European insurers should pay them; if the insurers' have a colorable claim against the current governments of Europe, the insurers should then seek reimbursement from these governments. \textit{See id.}

588. \textit{See} Sitler, \textit{supra} note 586, at 33. "The nationalization argument also is just another discriminatory measure against victims from Central and Eastern Europe. In fact, the Czechoslovak communist government entered into global agreements with Western countries, providing lump sums as compensation for companies and individuals in those countries whose Czech properties had been nationalized." \textit{Id.}

Moreover, with regard to Generali, it may have been partially compensated by the Italian government for the nationalization of its offices behind the Iron Curtain. \textit{See} John M. Goshko, \textit{Italian Insurer Accused of Hiding Compensation; Israel Lawmaker Levels Charge in Dispute with Holocaust Survivors, Heirs, WASH. POST, Jan. 16, 1999, at A22. In 1968, all Italian assets, liabilities and interests that have been nationalized [in postwar Czechoslovakia] were compensated by total amount of 2.6 billion [lira] paid to the Italian government [by Czechoslovakia] to be further administered under its exclusive responsibility. Furthermore . . . as part of the Agreement [between Italy and Czechoslovakia], 8102 shares of 'Assicurazioni Generali' were—among others—transferred to the disposition of the Italian government.


The [insurance] companies also agreed to back off from their insistence that they are not responsible for paying off policies that were issued in Eastern European countries, where insurance firms were nationalized by Communist regimes after World War II. The bulk of European Jews killed in the Holocaust lived in such countries.

\textit{Id.; see also} Alan Cowell, \textit{Insurers Agree to Pay on Victims' Pre-Holocaust Policies, N.Y. TIMES, May 7, 1999, at A3} (stating that "the companies agreed to assume responsibility for policies predating the postwar nationalization of insurance subsidiaries") (quoting Elan Steinberg, Executive Director, World Jewish Congress, an organization that participated in the negotiations).

590. \textit{See} discussion and notes \textit{infra} Part IV.C. (discussing the power of sanctions and the International Commission on Holocaust Era Claims).
The nationalization argument, therefore, remains a potent weapon to be used by the European insurance companies to deny payments on the policies issued by them.591

b. Failure to Pay Premiums

The European insurers relied on standard principles of insurance to argue that their obligations to pay on the policies ceased when, during the war, policyholders stopped making premium payments on the policies. An insurance policy is a contract, 592 and one of the terms of the contract is regular and timely payments of the premiums.593

The claimants argued that they should be excused from this requirement because their deceased relatives were unable to make premium payments, having either been murdered or interned in concentration camps with all their assets taken away.594

c. Policies Became Worthless

The European insurers argued that even if they are obligated to pay on the policies, the amount of payments should be minimal, since the policies were designated to be paid in currencies that either were greatly devalued or became worthless after World War II.595

The claimants argued, in response, that payments on the policies should include inflation and interest for over one-half century, and

591. For an excellent discussion of the nationalization issue, and a cogent analysis of why the seizure of insurance assets by post-World War II communist governments of Eastern Europe does not relieve the European insurers of legal liability, see Senn, supra note 372, at 21.
592. See, e.g., CAL. INS. CODE § 22 (West 1993) (stating that “insurance is a contract”); id. § 380 (stating that “the written instrument in which a contract of insurance is set forth, is the policy”).
593. See, e.g., id. § 480 (stating that “an insurer is entitled to payment of the premium”); id. § 484 (stating that “a policy may be canceled . . . for nonpayment of all or any portion of the premium”).
594. See Raine, supra note 398, at B1. “Ernest Smetana, 82, said the Italian firm Generali, which has a U.S. branch, told him his father’s policy was canceled for nonpayments of premiums. ‘But my father could not pay premiums from Dachau,’ where he was sent to die in 1938, Smetana said.” Id.
even punitive damages for the insurers' intransigence in refusing to honor the policies. Such amounts, the claimants asserted, more than exceed the loss of value through any currency devaluations.

In May 1999, at a negotiation session in London, five of the insurers participating in the International Commission on Holocaust Era Insurance Claims agreed to value the claims under a formula that would reflect present-day values, or "real values" of the policies.

According to the New York Times, "The agreement with the insurers [that was reached in London] is significantly different from other settlements of Holocaust claims because it takes into account a half-century of inflation, interest payments and currency depreciation, which could drastically magnify the size of payments."

While the exact formula for determining present-value was not finalized in London, estimates place the total payout that could be made by the five insurers on the Holocaust-era policies to range from $1 billion to $4 billion. For the first time, the European insurers, like the Swiss bankers almost a year earlier, agreed to begin uttering the dreaded "b" word: billion.

The mathematical implications for this agreement to pay present-value are enormous: for instance, a World War II-era insurance policy with a face value of $3,000 could now be worth between $100,000 to $300,000.

596. See id.


598. According to the Los Angeles Times: "Christopher Worthley, a spokesman for Munich-based Allianz AG, one of the five insurance companies participating in the talks, cautioned that there is still 'a considerable amount of work [left] to define what 'real value' truly means.'" Weinstein, supra note 589, at A12.

599. See Cowell, supra note 589, at A3.

600. See Marks & Egan, supra note 400. According to published reports, the five insurers participating in the negotiations in London declined to be interviewed or issue a statement after the London round was concluded. Therefore, they could not be questioned about details of the agreement or the amount of monies they were now willing to pay. See Cowell, supra note 589, at A3. However, according to one participant (representing the claimants), the insurers only agreed to recognize the present-value of the policies after Lawrence Eagleburger, head of the International Commission, threatened to "disclose their attitude to the press." Id.

601. See Avi Macblis & John Authers, Holocaust Compensation: Talks 'Heading for Crisis', FIN. TIMES (London), Apr. 23, 1999 at 14. The article discusses valuations as follows: Insurance groups say valuations should be based on a policy's original currency. Jewish groups want to convert policies into a stable currency and apply a compound rate of interest. A dormant policy valued by insurance companies at hundreds of current dollars, for example, could be worth nearly Dollars 100,000.
d. Sufficient Proof Lacking to Make Payment

The European insurers made arguments remarkably similar to those made by the Swiss banks as a basis to deny payment. Like the Swiss banks, the insurers demanded that the claimants claiming to be beneficiaries under the policies provide them with death certificates as proof that the insured had died. The insurers pointed to clauses in the policies requiring this document. Additionally, the insurers demanded that claimants provide the policies themselves.

according to the latter method.

Id.


Compare Alex Brummer & Jill Treanor, Holocaust Victims Win Breakthrough Deal Worth Billions, GUARDIAN (London), May 7, 1999, available in 1999 WL 16878887 (noting that “a policy with a face value of Dollars 3,000 could now be worth Dollars 10,000”), with Amanda Levin, State Dept. against Sanctioning Insurers Over Holocaust Claims, NAT’L UNDERWRITER LIFE & HEALTH-FIN. SERVICES ED., June 7, 1999, available in 1999 WL 1847248 (noting that “a policy that was worth $3,000 in the 1930s could be worth $300,000 at present day value”).

602. See Shelley Emling, Florida Holocaust Victims Pursue Insurance Claims, TIMES-PICAYUNE (New Orleans), Nov. 23, 1997, at B3. That article states:

Erika Brodsky, a resident of Coconut Creek, Fla., whose parents both died in Auschwitz . . . visited the offices of Generali [Insurance] in Vienna, Austria in 1960, the insurance company where her father worked as an agent, in the hopes of getting information on any policies he might have purchased. But she was met with a cold reception. “They wanted all kinds of documents, which was absurd,” she said, then added. “They didn’t hand out death certificates in Auschwitz.”

Id.

Adolph Stern, whose father also purchased an insurance policy from Generali and later perished in Auschwitz, received a similar reception. See Abrahamson, Searching for Justice, supra note 512, at 20. “A destitute survivor of the concentration camps, he walked into a Generali office in Prague in 1945 and tried to collect [on his father’s policy]. He says a Generali agent told him to produce a death certificate. He couldn’t, of course, and was unceremoniously ushered into the street.” Id.

603. See Insurers Meet in Israel for Holocaust Talks, supra note 595, at 25. Apparently, five European insurers that are part of the International Commission on Holocaust Era Insurance Claims will no longer insist on this requirement if a claim for payment is made through the International Commission. See id.; see also discussion and notes infra Part IV.C. (discussing sanctions imposed on insurance companies).

604. See Al Podgorski, Holocaust Survivors Push Claims, CHI. SUN-TIMES, Nov. 11, 1997, at 8. Survivors and their heirs claim that such proof requirements should be suspended. As explained by one Holocaust survivor: “Don’t forget, when we were liberated from the camps, we were naked and half dead and we didn’t have paperwork like insurance policies.” Id. (quoting John Fink, 77-year-old Holocaust survivor who was liberated from the Bergen-Belsen Concentration Camp).
In May 1999, Generali agreed to hand over a CD-ROM containing 100,000 names of prewar policyholders. At the outset of the litigation, Generali denied that it had records dating to prewar years, but in 1998 revealed that it had discovered an archive in its headquarters at Trieste, Italy, containing copies of policies. Generali then computerized the newly-discovered policies and turned over the computerized files in the CD-ROM format to the Yad Vashem Holocaust Research Institute in Israel, which contained the most extensive records of Holocaust victims and survivors in the world. Yad Vashem agreed to match its list with the Generali list to determine "how many of the [prewar] policyholders were indeed unpaid Holocaust victims."

The other insurers, however, refused to open up their files. Winterthur and Basler Lieben, two Swiss insurance companies, claimed that opening its books to inspection by U.S. regulators would be regarded as a violation of Swiss law.

Experience shows that publication of lists of policyholders is critical to discovering unpaid policies, and should be done by the insurance companies forthwith. For instance, in mid-1999, Avotaynu, Inc., a publisher of information on Jewish genealogy, released a list of 29,000 names that included Austrian Jews who were forced to declare their assets in 1938 upon the unification of Austria with Nazi Germany. The publication of the list led to an

According to another survivor: "[The insurance companies] asked for documents, but my family wasn't even allowed to take their driver's licenses with them, so the request is ludicrous. No one has the right to benefit from the misery of others, and that is just what these insurance companies are being allowed to do." Emling, supra note 602, at B3 (quoting James May, 76-year-old Holocaust survivor now residing in Florida).

606. See id. at 23.
607. Id. Unfortunately Generali, while agreeing to share the list with Yad Vashem, did not agree to make the list public. It agreed only to help those that bring claims. See Henry, supra note 390, at 11. Therefore, a son or daughter of a Holocaust survivor who suspects that they may be a beneficiary of an unpaid Generali wartime policy is unable to verify this information.
609. See id.
immediate match between a Holocaust-era policy and an heir to that policy living in Washington State. 611

e. Claimants Already Received Payment

West Germany paid certain Holocaust victims compensation after the war. 612 The insurance companies maintain such compensation covered all losses incurred by the victims during the Nazi era, including loss of insurance benefits. 613 Survivors who received payment from the German state, the insurers argue, have had their claims extinguished and are not eligible to receive further payment. 614

2. Procedural Defenses

a. Lack of Jurisdiction

In both the federal class action litigation and in the California state actions, the European insurers have asserted that courts in the United States lack jurisdiction over them. 615 The arguments are identical to those made earlier by the Swiss banks in their

611. See Washington State Insurance Commissioner Finds Policy through Internet, AGENCE FR.-PRESSE, Aug. 14, 1999, available in 1999 WL 2654417. The heir in question was only a boy when his father purchased an insurance policy. See id. The heir “could only remember that the family had insurance,” but did not know the name of the insurance company issuing the policy. Id. “Washington state insurance commissioner Deborah Senn said the [Avotaynu] database allowed her staff to find the cash value of the insurance policy . . . .” Id.

According to Senn, “[u]sing the Internet in this way is a tremendous resource for families who know that the insurance coverage existed but whose documentation and other evidence were lost or stripped from them in the Holocaust.” Publisher Releases List of Insurance Policyholders from Holocaust Era, BEST’S INS. NEWS, Aug. 16, 1999, available in 1999 WL 21818286; see also Living Heirs (visited Nov. 7, 1999) <http://www.LivingHeirs.com> (providing a link to Avotaynu list and other Holocaust-era property records).

Publication of lists can also lead to unexpected discoveries. For example, after the Swiss banks published their list of dormant account holders in 1997, U.S. Ambassador to Switzerland Madeline Kunin, who was born in Switzerland, was surprised to discover her mother’s name on the list of account holders. See Olson, supra note 397, at 7.


613. See id.


615. See Stern Defendants’ Memorandum of Points and Authorities Supporting Motion by Specially Appearing Defendants to Quash Summons and/or Dismiss or Stay, supra note 519, at 5-11.
Holocaust-era lawsuits, and revolve around the factual question of the extent of minimum contacts with the forum possessed by the defendant. In some cases the insurers have prevailed with the argument of lack of jurisdiction, while in others they have failed. The critical question is how much business has the defendant insurer conducted in the jurisdiction where it is being sued.

616. See id. Generali argued that:

Generali had no contacts at all with California until nearly 30 years after it issued the Policy [to its insured Mor Stern in 1929], and even today Generali has no office or employees in California, it keeps no records here, and it has no listings in any California telephone directories. Any exercise of jurisdiction over Generali based on claims related to an insurance policy issued in Prague to a Czech national, involving Czech currency, and reserved for with Czech assets, would violate Generali’s rights under the Due Process clause of the 14th Amendment.

Id. at 1 (footnote omitted).


618. In the case against Germany’s Victoria Insurance, the federal trial court found a lack of jurisdiction since Victoria has not:

(1) transacted any business within California; (2) had any agents or representatives in California to conduct business; (3) solicited any business within California; (4) had an office within California; (5) conducted any advertising, solicitation or other activity directed to any person or entity within California; (6) attempted to develop a national market through any participation in any entity or association; nor (7) had any accounts, assets, funds, monies, or property [in] California.

Stahl II Opinion, supra note 463, at 3. Moreover, even though Victoria’s parent, Munich Re, has substantial holdings in the United States, this Court may not properly assert jurisdiction over a corporate subsidiary on the basis of a corporate parent’s contacts with California in the absence of an alter ego relationship. . . . The Plaintiffs have made no showing that the subsidiaries here have acted in any fashion through the parent, Munich Re, or that the parent has acted as an alter ego for the subsidiary.

Id. at 3-4. In the case against Italy’s Generali, the California state court found that it has jurisdiction since

Generali has been admitted to transact insurance business in California since 1958. . . . [It] has designated an agent for service of process. . . . It is also authorized to do business [in California] as an alien insurer under [California] Insurance Code § 1580.

Execution of these documents by defendant reflects express consent to jurisdiction.

Additionally, Generali has brought suit in California courts to assert or protect its interests. . . . Although insurance sold in California represents only 1% of its world-wide business, it has sold insurance resulting in millions of dollars in premiums paid by California residents—$27 million in 1997 alone.

Stern, 1999 WL 167546, at *1. For additional discussion of both the questions of personal jurisdiction and forum non conveniens in the Holocaust-era insurance cases, see Gerstel &
b. Forum Non Conveniens

Like every defendant in Holocaust-era litigation, the European insurers have argued that even if jurisdiction exists, the complaints should be dismissed on the ground of forum non conveniens. The difference between the forum non conveniens arguments made by the Swiss bank defendants and the German and Austrian companies, on one hand, and the European insurers, on the other, is that the insurers, in almost all of these cases, are opting to have the

Lewis, supra note 512, at 72.

619. See, e.g., Stern Defendants' Memorandum of Points and Authorities Supporting Motion by Specially Appearing Defendants to Quash Summons and/or Dismiss or Stay, supra note 519, at 2. The defendants argue:

This case belongs in European courts, not in a California court. All of the relevant documents are located in Europe, all of the potential witnesses reside in Europe, all of the substantive issues are governed by European law, most if not all of the evidence—both documentary and testimonial—will be in languages other than English, and the potential third-party defendants, whose presence is required for complete relief, are governmental entities that are immune from suit here but not in Europe. . . . Accordingly, to permit this case to proceed in California would be both inconvenient and prejudicial.

Id.

Part of the forum non conveniens argument is the assertion made by defendants in all of the Holocaust-litigation cases that if the matter is brought to trial, the court will be forced to adjudicate difficult issues of foreign law and international law, and also deal with facts over a half-century old. See, e.g., Stahl II Victoria's Motion to Dismiss, supra note 460, at 17, 20. Attempting to dismiss the case at the pleading stage, the defendants have focused on this burden, hoping that the court will be unwilling to undertake it. For a typical example of such an argument, see id. Victoria argues that:

Because the claims in this action will be decided under the substantive laws of either Germany or Belgium, without dismissal this Court would have the burden of alternatively serving as a German or as a Belgian judge. The Court would also have the burden of determining how the laws [of] these countries changed during the 67-year period from 1931 through 1998, which will require an understanding of each country's contract and insurance laws, as well as laws on the nationalization of insurance companies, restitution for confiscated insurance policies, and corresponding release of issuing insurance companies. History records changes in governments in Germany from the Weimar Republic when the one known policy was issued, through the era of the Third Reich . . . through occupied post-World War II Germany, until the present Federal Republic of Germany. Belgium underwent similar but less drastic changes in governments and legal systems during this 67-year period.

[Applying foreign law here] would create a monumental burden for both the Court and the parties that could easily be avoided by litigating plaintiffs' claims in the European forums familiar with the languages and controlling substantive laws. The Supreme Court, the Ninth Circuit, other circuits, and this Court have held that “the need to apply foreign law favors dismissal.”

Id. (citations omitted).
claims decided in the new and fragile legal systems of the post-Communist nations of Eastern Europe. The defendants in the other Holocaust-era lawsuits are seeking, or sought, alternative adjudication in the developed legal systems of Western Europe. Faced with a decision about whether to dismiss the lawsuit in the United States in favor of litigation in Poland, Hungary, the Czech Republic or even Yugoslavia, a court in the United States is unlikely to accept the forum non conveniens argument, especially when the claimants are elderly Holocaust survivors residing in the United States.

620. But see Stahl II Victoria's Motion to Dismiss, supra note 460 at 1, 25. That motion states:

The action should be dismissed on the separate and independent ground of forum non conveniens, because either Belgium (where one insurance policy was issued) or Germany (where defendant [Victoria] conducted business) is clearly a more convenient forum to adjudicate all of plaintiffs' claims.

These two countries, whichever one plaintiffs choose, have full, efficient, speedy, meaningful, and impartial legal systems, procedures, and remedies. In other words, dismissing this case will not deprive plaintiffs of a legal tribunal for their claims. The European jurisdictions whose laws govern this case have modern, full, and hospitable judicial systems with adequate civil procedures and due process which can efficiently and completely adjudicate plaintiffs' claims far better than can a California-based court.

Id. at 1, 25.


The Czech Republic is committed to the rule of law by its Constitution. The civil judicial system in the Czech Republic is typical of other countries in Europe, providing appropriate procedures and protections to plaintiffs in civil matters. In the Czech Republic, an aggrieved party with a claim against an insurance company may seek relief through the courts. Insurance cases normally take approximately one or two years to litigate in the Czech courts. The Czech judiciary operates independently of political and commercial influence.

Based upon my review of the Complaint, it is my opinion that Czech courts would recognize the subject matter of the plaintiffs' claims.

Id.

622. The European insurers have argued that if the courts of the Eastern European countries are not acceptable fora for adjudication of these suits then, at the least, the courts of the countries where these insurers are headquartered are acceptable alternative fora. See, e.g., Stern Defendants' Memorandum of Points and Authorities Supporting Motion by Specially Appearing Defendants to Quash Summons and/or Dismiss or Stay, supra note 519, at 12-13 (arguing that "courts in either the Czech Republic or Italy are well equipped to resolve disputes of the kind alleged in the Complaint") (emphasis added). Basically, the strategy of the defendants is to have the case tried anywhere in the world except the United States, for fear of U.S.-style litigation. For discussion of preference by plaintiffs and dislike
c. Choice-of-Forum Clause

Some of the prewar insurance policies being litigated contain a choice-of-forum clause, stating that the forum for resolving any dispute between the parties would be in the European country where the policy was issued. Generally, modern law holds that in the absence of grave injustice, international forum-selection agreements should be upheld. At least one court, however, has held that the forum-selection clauses found in prewar policies written in Eastern Europe are not enforceable.

by defendants of litigation in the United States, see discussion and notes supra Part III.A.2.

623. See Stern Declaration of Jaroslav Sodomka, supra note 621, ¶ 35, at 10. For instance, in Stern v. Generali, the Generali policies issued in prewar Czechoslovakia contained a clause that tracked a provision of the then-applicable Czech Insurance Code, specifying Czech courts as the exclusive forum for actions against Generali. See id. In the Stern case, the applicable forum-selection clause in the insurance policy purchased by Mor Stern from Generali in April 1929 read: “Any lawsuit under the insurance contract brought against the Company shall be settled before the competent Court in Prague.” Id.

In addition, the applicable provision of the Czech law stated: “The court having jurisdiction of legal actions against an insurer which are based on an insurance relationship is the court in whose district the branch of the insurance company which concluded the contract is located.” Id. ¶ 34, at 10 (quoting Art. 12 of Czechoslovakian Insurance Contract Law No. 501 (Dec. 23, 1917), and Art. 12 of Law No. 145 (July 3, 1934)).

In Stahl v. Victoria, the Victoria policy issued in Belgium in 1933 read: “The company and the policyholder each chose Belgium as their domicile. Accordingly, for any disputes that may arise from this contract, the courts of Belgium shall have sole competence.” Stahl II Declaration of Gert Schlosser, supra note 452, ¶ 8, at 28 (quoting the Victoria policy issued to Stahl).


625. See Tentative Rulings, Babos v. Assicurazioni Generali S.p.A. at 2-3, No. BC 188680 (Cal. Super. Ct. filed May 28, 1999). The ruling, which became the court’s trial ruling, states: Here, the public policy of the State of California with respect to the precise type of litigation under scrutiny could not have been more explicitly stated [referring to California’s Holocaust Victims Insurance Act, CAL. CIV. PROC. CODE § 354.5 (West Cum. Supp. 1999)]. . . . To compel California residents to attempt to litigate these cases in foreign tribunals, (where there is no assurance they could proceed because of statute-of-limitations bars) would utterly defeat that public policy interest.

Id. It is unclear whether forum-selection clauses will be enforced in fora other than California, since California’s HVIA specifically holds that a forum-selection clause in these policies does not control. See Cal. CIV. PROC. CODE § 354.5 (West Cum. Supp. 1999).
C. The Power of Sanctions: The International Commission on Holocaust Era Insurance Claims

The European insurance companies, in response to the lawsuits, began to follow the game plan invented by the Swiss banks during their struggle with the Holocaust-era claims.

The insurance companies realized that a useful weapon utilized by the Swiss in the litigation filed against them was the creation of a commission headed by a prominent American politician or diplomat (preferably Jewish) who could propose a settlement less costly than compromises or judgments reached in U.S. courts and make arguments either to delay the court process or plead for dismissal of the lawsuits altogether.\(^\text{626}\)

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\(^{626}\) See Abrahamson, Searching For Justice, supra note 512, at 35. Another useful Swiss invention, copied by many companies being sued by Holocaust survivors, is to hire Jewish lawyers from some of the most prominent law firms in the United States to defend them—preferably counsel with important connections to the organized Jewish community. See id.

For instance, in the Stern v. Generali litigation in California, Italy's Generali dismissed its original counsel, Coudert Brothers, after losing the motion to dismiss and hired a new lawyer—Kenneth J. Bialkin, a partner at the powerhouse New York firm of Skadden, Arps, Slate, Meagher & Flom. During his lengthy career, Bialkin has also led several prominent Jewish institutions, among them the Anti-Defamation League. "In part," Bialkin says, "I'm in it to see if we can bring it to closure, and everybody gets out of it in a dignified way."

Id. Countered William Shernoff, a lead plaintiffs' counsel in the Stern case, I just think there's something wrong here, that these pillars of the Jewish community-type of people, well-connected, well-respected, are taking money [in legal fees] from this insurance company to try to beat down and destroy the claims of these survivors. What the hell am I missing here?

Id. (alteration in original). The Jerusalem Post quotes an unnamed member of the International Commission on Holocaust Era Insurance Claims, obviously representing the Holocaust claimants and referring to Bialkin, as follows:

"I feel he's using years of service to the Jewish community to now perform a great disservice to Holocaust survivors. A Jewish lawyer can be a Jewish lawyer for anyone, but someone who calls himself a Jewish leader... has no business trying to defend the position of those who did not pay Holocaust victims. Period."


"I'm doing what I think is right, I'm going to try to perform it honorably, I think in the end it will be viewed as a service to the Jewish people, but I recognize that it can blow up in my face... I'm a big boy, I did what I thought was appropriate... and I'm prepared to be judged by my peers."

Id. (quoting Bialkin). For an excellent discussion of the ethical and moral concerns faced by law firms and individual lawyers in representing companies who have been sued by Holocaust survivors, see David Segal, Past vs. Future: Nazi-Related Suits Put Law Firms on Defensive,
For example, the Swiss created and funded the so-called International Committee of Eminent Persons ("ICEP"), headed by Paul Volcker, the distinguished former head of the Federal Reserve Board.

The European insurance companies' version of the Volcker-style ICEP is the International Commission on Holocaust Era Insurance Claims, led by a sufficiently-heady American, former Secretary of State and long-time diplomat Lawrence Eagleburger.\(^{627}\)

Moreover, like in the Swiss banks scenario, state officials had a powerful tool they could use to pressure the insurance companies to come to the bargaining table. Insurance is regulated state-by-state, and the individual state insurance commissioners could threaten the European insurance companies with expulsion from their states if the companies refused to negotiate a settlement.\(^{628}\) It is no surprise,

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\(^{627}\) See John Authers & William Hall, Committee on Holocaust Claims Convenes to Appoint a Chairman, FIN. TIMES (London), Oct. 21, 1998, available in 1998 WL 20854326. One of the insurance companies that agreed to participate in the International Commission, Zurich Insurance Group of Switzerland, went one step further by virtually copying the Swiss banks' ICEP concept. In advertisements placed in major newspapers throughout the United States, entitled "A Message from Zurich Insurance to Holocaust Survivors and Heirs," Zurich explained:

Zurich Insurance Group remains committed to thoroughly investigate and evaluate all inquiries on life insurance policies from the World War II era and to honor all justified claims. Zurich believes that it has in place a just, compassionate and equitable process for addressing claims of Holocaust survivors and heirs of Holocaust victims.

To further underline its commitment, Zurich has also formed an independent four-person International Commission of Eminent Persons. Its members are: John C. Whitehead, former Deputy Secretary of State during the Reagan Administration and currently Chairman of the Board of the International Rescue Committee; Rabbi Arthur Schneier, President of the Appeal of Conscience Foundation and Senior Rabbi of New York City's Park East Synagogue; Margrith Bigler-Eggenberger, former Justice of the Swiss Federal Supreme Court, and Gyorgy Suranyi, President of the National Bank of Hungary. The Commission has been set up to review and help resolve Holocaust-related life insurance cases submitted to the company.


\(^{628}\) See Probe into Insurance Pay-Outs, FIN. TIMES (London), Oct. 31, 1997, at 5. "Insurance is regulated on a state by state basis in the U.S., and European insurers need a license from the commissioner before they can trade in a state. [Florida Insurance Commissioner Bill Nelson] said: 'Many of these European companies now have operations in the United States. That's our hook.'" Id.

An interesting question—beyond the purview of this article—is whether the expulsion of a foreign insurance carrier from a state for failure to honor Holocaust-era claims is constitutional. For a related discussion on this point, see text and notes supra Part III.C.3., discussing the constitutionality of the use of economic sanctions by state and local
therefore, that the six insurance companies that agreed to participate in the International Commission process all sold insurance in the United States, and that one of the six companies, Switzerland's Basler Leben, brazenly withdrew from the Commission process soon after it stopped selling insurance and closed shop in the United States.629

The International Commission is composed of thirteen members: six representing the insurers and European insurance regulators,630 six representing various Jewish groups631 and the State of Israel,632 and a chairperson.633 Originally, six insurance companies, represent


629. See Letter from Bruno Dallo, General Counsel of Basler-Lebens-Versicherungs-Gesellschaft, to Lawrence S. Eagleburger, Chairman, The International Commission on Holocaust Era Insurance Claims (Jan. 11, 1999) (on file with author). That letter provides:

No longer with U.S. affiliates, and no longer subject to regulatory sanctions—that is, absent the duress that forced Basler Leben to sign the MoU in the first place—[Basler Leben] cannot put itself at the risk “consensus” achieved by others, including carriers who still function within the Commission, in fear of regulatory sanctions, public reprisals and onerous legislative requirements.

Id. (emphasis added).

630. See European Insurers Agree to Holocaust Settlement, BEST'S INS.NEWS, May 7, 1999, available in 1999 WL 5826620. The five insurance companies originally agreeing to participate in the Commission were: France's AXA; Germany's Allianz; Switzerland's Winterthur Leben (Life) (owned by Credit Suisse Bank), Zurich, and Basler Leben (also known as Baloise Life).

Italy's Generali joined the Commission after its $100 million settlement unraveled, see infra notes 638-39 and accompanying text, and Basler Leben withdrew from the Commission after it stopped selling insurance in the United States. See supra note 629 and accompanying text. "The insurers that have agreed to take part in the commission all conduct business in the United States." Levin, supra note 512, at 1.

631. See European Insurers Agree to Holocaust Settlement, supra note 630.


633. A potential problem with the International Commission is that the attorneys representing both the individual and class action plaintiffs have been left out of the Commission process. See, e.g., Battle Brews on Insurance Pact, FORWARD, Aug. 28, 1998, at 3, available in 1998 WL 11416497. According to plaintiffs' attorney Edward Fagan:

"The [National Association of Insurance Commissioners ("NAIC")] is putting politics ahead of claimants' rights.... The memorandum of understanding does not allow for survivor claimants to have parity or a voice in the process. The document... doesn't promise money, it doesn't promise time frames, it doesn't give survivors a say. But it does make a lot of insurance commissioners big-time political stars."

Id. (quoting Edward Fagan). Another plaintiffs' lawyer, Linda Gerstel, "called the insurance
ing twenty-five to thirty percent of the prewar European insurance market, agreed to participate in the International Commission. 634

Basler Leben's withdrawal in January 1999 from the International Commission 635 left only five companies participating. To date, the five insurance carriers have been unsuccessful in convincing the other European companies sued to join the nonadversarial International Commission process. 636

The International Commission process began in August 1998 when the selected insurance companies signed a so-called Memoran-

 commissioners' process 'a bureaucratic-laden process that repeats a lot of the mistakes of the Volcker Commission.' Id. Added Gerstel: "We don't withdraw the lawsuits." European Insurance Firms Make Deal, Holocaust Survivors Won't Drop Suits, AGENCE FR.-PRESSE, Aug. 26, 1998, available in 1998 WL 16585768. Countered Elan Steinberg, of the World Jewish Congress:

"Maybe the lawyers are upset because we have said that we will tell the court that we think this money should not go to lawyers. Whether it's insurance claims or bank accounts, most of these assets are without identifiable heirs. That belongs to the Jewish people and Holocaust survivors. We do not want one group of Holocaust survivors to have a superior claim over others." Battle Brews on Insurance Pact, supra, at 3 (quoting Elan Steinberg).

Time will tell whether keeping the lawyers out was a wise move.

Legally, the International Commission has no effect on the ongoing lawsuits against the European insurance companies. Practically, however, the work of the International Commission invariably will have a significant impact upon the fate of the lawsuits. To date, Lawrence Eagleburger, unlike Paul Volcker in the Swiss bank litigation, has not intervened in any of the insurance litigation. If and when he does, undoubtedly the judges presiding over various insurance suits will carefully listen to his views.

634. See Carole Landry, 44 Countries Pledge To Return Holocaust-era Assets, AGENCE FR.-PRESSE, Dec. 3, 1998, available in 1998 WL 16652355. But see Norman Kempster, 44 Nations Set Guidelines for Retrieving Nazi Loot, L.A. TIMES, Dec. 4, 1998, at A8 (stating that 25% of the prewar European insurance market will participate); Immunity Sought for WWII Insurers, AP ONLINE, May 20, 1999, available in 1999 WL 17805700 (stating that 30% of the prewar insurance market will participate, citing Stuart Eizenstat, the Clinton Administration's "point man" on Holocaust reparation issues); Insurers Meet in Israel for Holocaust Talks, supra note 595, at 25 (stating that 35-40% of prewar insurance market will participate).

635. Basler Leben withdrew because, subsequent to its entry, it left the U.S. insurance market. No longer having any affiliates in the United States, it was no longer subject to pressure by the state insurance regulators. Without this leverage, the NAIC could no longer convince Basler Leben to negotiate with them. See Letter from Bruno Dallo, General Counsel of Basler Leben, to International Commission on Holocaust Era Insurance Claims (Jan. 14, 1999) (on file with author) (withdrawing from the International Commission and canceling its agreement to the Memorandum of Understanding). Surprisingly, even though it withdrew from the International Commission process, Basler Leben still stood by its previous commitment to pay $5 million to a fund set up by the International Commission and contribute an additional $600,000 to the Commission's operating budget. See id. at 1.

636. At a December 1998 Holocaust conference in Washington, D.C., for 44 nations, "Hungary and the Czech Republic said companies in their countries will also participate [in the International Commission process]." Kempster, supra note 634, at 48. However, this never occurred.
dum of Understanding ("MOU") with the National Association of Insurance Commissioners ("NAIC").

That same month, and exactly one week after the Swiss bank settlement, Generali announced that it had settled with plaintiffs’ lawyers the claims against it for $100 million. However, the settlement rapidly unraveled, since Generali wanted the $100 million to be its maximum payout, while the claimants’ representa-

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637. The NAIC is an organization composed of the primary insurance regulator of every state and territory of the United States. The NAIC formally became involved with Holocaust Era Insurance Claims in September 1997, six months after the first insurance lawsuit was filed in the United States, when it created the NAIC Working Group on Holocaust and Insurance Issues. The 21-state Working Group was headed by Deborah Senn, Washington State Insurance Commissioner. See The Pursuit of Justice, WASH. STATE INS. COMM. REP., Feb. 11, 1998, at 1-2 (on file with author).

From September 1997 to February 1998, the Working Group held six public hearings throughout the United States. See Life Insurance and the Holocaust, supra note 375, at 81-82. The Insurance Forum published this report as a “Special Holocaust Issue”; it contains an excellent discussion of the issues, including statements from both claimants and representatives of some of the insurance companies involved. See id.

In April 1998, the NAIC established a nine-member Holocaust Task Force, chaired by Glenn Pomeroy, Insurance Commissioner of North Dakota and NAIC’s president. See id. at 83 (subsuming the Working Group).

That same month, the insurance commissioners from New York and California (Neil Levin and Chuck Quackenbush, respectively), and later joined by the insurance commissioner from Florida (William Nelson), the states with the largest Jewish populations, directly approached four European insurance companies (Allianz of Germany, AXA/UAP of France, Generali of Italy, and Zurich of Switzerland) and signed a nonbinding Memorandum of Intent ("MOI") to resolve the insurance issues. See Memorandum of Intent (Apr. 4, 1998) (on file with author); see also Henry Weinstein, Creation of Holocaust Insurance Panel OKd, L.A. TIMES, Apr. 9, 1998, at A3. Two Jewish organizations, the World Jewish Congress and the Claims Conference, also signed the MOI. See id. One of the goals of the MOI was the creation of an international commission to settle the Holocaust-era insurance claims through a nonadversarial process, an idea credited to former Senator Alfonse D’Amato. See id. The preliminary MOI led to the signing of a more formal Memorandum of Understanding ("MOU") in August 1998, and the creation of the International Commission. See Memorandum of Understanding (Aug. 24, 1998) (on file with author).

In October 1998, Lawrence Eagleburger was chosen to head the International Commission. See John M. Goshko, Holocaust Panel Tries to Enlist Eagleburger as Chairman, WASH. POST, Oct. 22, 1998, at A33. The three commissioners from New York, California, and Florida have taken the lead in representing the NAIC at the International Commission negotiation sessions. See id.

638. See Goshko, supra note 393, at A3. The settlement was coordinated by former Senator Alfonse D’Amato. See id. Originally, it was reported that the settlement would be $65 million. See Henry, supra note 581, at 1.

Apparently, the $100 million figure was agreed on because that was “the amount [Generali] received in settlement from the communists for seizing Generali assets.” Gersten, supra note 372, at 7.
tives viewed this amount as a "floor," with additional payments to be made by Generali in the future.\textsuperscript{639}

With settlement abandoned, Generali, originally not one of the parties signing the MOU, signed the document and joined the International Commission.\textsuperscript{640}

In November 1998, the European insurers who were original members of the International Commission made their initial contribution: $90 million to a humanitarian fund for Holocaust victims and an additional $5 million "preliminary start-up fund [for the Commission] to hire staff and open offices in London and Washington."\textsuperscript{641}

\begin{footnotesize}
\begin{enumerate}
\item See John Authers & Avi Machlis, Generali's $100M Offer Unlikely to be Enough, FIN. TIMES (London), Aug. 21, 1998, at 4, available in 1998 WL 12260412. For instance, Deborah Senn, Washington State Insurance Commissioner, asserted that "claims on Generali's insurance policies belonging to Holocaust survivors and heirs could 'easily be within the billion dollar range or more.'" \textit{Id.}
\item See European Insurance Firms Make Deal, Holocaust Survivors Won't Drop Suits, \textit{supra} note 633.
Curiously, Baslen Leben, which withdrew from the International Commission in January 1999, nevertheless still agreed to contribute $5 million towards the $90 million fund and to pay $600,000 of the Commission's first annual administrative budget. \textit{See Letter from Bruno Dallo, General Counsel of Basler-Leben-Versicherungs-Gesellschaft, to Signers of the MOU and to the Chairman, Vice-Chairman, Members, Alternatives and Observers of the International Commission on Holocaust Era Insurance Claims (Jan. 14, 1999) (on file with author) (announcing Basler Lieben's resignation from the Commission).} Basler Leben balked at contributing $15 million, or one-sixth of the total amount that Lawrence Eagleburger suggested should be paid by each of the six insurers. \textit{See id.}
Stuart Eizenstat, the Clinton Administration's "point-man" on Holocaust restitution issues, praised the establishment of the fund and stated that under the Commission plan, all of the $90 million or more would go to needy victims. "If the cases are adjudicated in the courts, he said, the cost for lawyers, auditors and others would far exceed $90 million." Kempster, \textit{supra} note 634, at 48.
To date, it is still open to debate whether Eizenstat's assessment is correct. The commission route has not shown, to date, to be more successful than the litigation process. In fact, litigation, so far, has yielded much greater and more expeditious results than the commission process. \textit{See, e.g., supra Part IV.A.2.b. (discussing the California lawsuits against Generali and their successful settlements).} Looking at the Volcker Commission precedent, the Volcker Commission, for instance, has taken too long and has failed even to meet its own deadline. The costs of the Volcker Commission have also been high. It might be questioned, therefore, whether Eagleburger, the former top diplomat, can do better than Volcker, the former top banker. Already, one can ask why the International Commission requires an initial operating budget of $5 million. The amount appears unnecessarily large. \textit{See Rebecca Spence, Holocaust Insurance Team Racking up Millions in Expenses as Survivors Wait, FORWARD, July 30, 1999, reprinted in <http://www.forward.com/BACK/1999/99.07.30/news>.} By the time the Commission finishes its work, its expenditures are expected to be much higher than $5 million.
\end{enumerate}
\end{footnotesize}
Monthly meetings of the International Commission were held in 1999, in Washington, D.C., London, and Jerusalem. At these meetings, Chairman Eagleburger was successful in moving forward the negotiations between the five insurers on the one side, and the consortium of state insurance commissioners, Jewish organizations, and Israel on the other.

At the May meeting in London, the Commission achieved a significant breakthrough when the insurers agreed to abandon

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642. See id.

643. According to published reports, prior to the May 1999 meeting in London, the International Commission's work was stalled. See Avi Machlis & John Authers, *Jewish Groups Warn of Holocaust Dead Crisis*, FIN. TIMES (London), Apr. 23, 1999, at 3. The article states: "The commission is in deadlock after four months of talks. Little progress has been made on issues including the valuation of policies, the allowance to be made for inflation and the problem of dealing with claims against companies nationalized by east European communist governments after the war." Id. Elan Steinberg, representing the World Jewish Congress at the Commission, commented: "The meeting on May 6 [in London] is a critical moment. At that point we will be able to see whether this experiment will work or not. Flesh and blood claimants will have to know that there's an independent process by which their claims can be fairly determined." Id.


At the conference, a bipartisan group of California officials that included California Governor Gray Davis and California Insurance Commissioner Chuck Quackenbush, issued a stern warning to the European insurers. See Sense, supra. Governor Davis announced: "We come to send a message [to the insurance companies]. You can pay now or we guarantee you will pay more later." Sense, supra. Commissioner Quackenbush stated: "There is a limit to our patience. When they feel the heat, they will see the light." Wohlgelernter & Tugend, supra note 373. Concurrently, the California Department of Insurance began running full-page ads, including ads in the London newspapers where the Commission meeting was to be held, chastising the insurance companies.

Under a bold headline of "Time Is Running Out" the ad began as follows:

For sixty years, insurance companies have profited by not paying on insurance policies issued to Jews and others who were murdered by the Nazis during the Holocaust. The average age of survivor is 80 years old. Meanwhile, the average Californian only lives to age 74. Every year, thousands of survivors pass away. If these people are to achieve any measure of justice from the companies that took advantage of them, it must occur now.

Cal. Dep't Ins., *Time is Running Out*, May 1999 (advertisement run by the California Department of Insurance). A second ad was even harsher. It began:

THE INSURANCE COMPANIES. After the Holocaust, they broke their promise. [Here a large graphic of the word "promises" broken in half]. They lied. They said, "Give us a little money each week and if something bad happens to you we'll take care of your family." Well something bad happened. Something really bad, and the insurance companies didn't live up to their end of the bargain. And they still haven't.

Cal. Dep't Ins., *The Insurance Companies*, May 1999 (second advertisement run by the
their two most potent arguments: (1) that they need not pay because their offices were nationalized by the postwar Communist governments, and (2) that the values of their unpaid prewar-issued policies were now negligible. Rather, the companies agreed to a “formula that reflects present-day values . . . [which] could result in billions of dollars in payments.”

In the wake of progress made in London, then-Undersecretary of State Stuart Eizenstat (now Deputy Secretary of the Treasury) urged insurance commissioners to place a moratorium on sanctions or threat of sanctions against the five insurers that are part of the International Commission.

California Department of Insurance). Both ads then provide information about the efforts of the California Department of Insurance in obtaining payment on Holocaust-era insurance policies. Both ads conclude with the following statements: “It’s about restitution, it’s about justice and its about time. Haven’t they been waiting long enough?” Time is Running Out, supra; The Insurance Companies, supra.

The strategy worked and the London meeting provided a breakthrough in negotiations.

644. See Weinstein, supra note 589, at A12; see also Cowell, supra note 589, at A3.
645. Cowell, supra note 589, at A3; see also Brummer & Treanor, supra note 601. Applying “present day” or “real” value, “a policy that was worth $3,000 in the 1930s could be worth $300,000 at present day value.” Levin, supra note 512. A spokesperson for Allianz, however, stated that “there remains ‘a considerable amount of work to define what ‘real value’ truly means.’” Ron Lent, Real Value to be Paid on Nazi Era Claims, J. of COM., May 11, 1999, at 12A, available in 1999 WL 6377295.

The Israeli delegate to the talks assessed the May London meeting as follows: “We have made a step forwards but we have not reached our destination yet.” John Mason & John Authers, Holocaust Era Insurance Deal Reached, FIN. TIMES (London), May 7, 1999, at 3.

646. See Levin, supra note 512. According to Eizenstat, the Clinton Administration’s top official on Holocaust reparation issues:

“In light of the commission’s recent breakthroughs, sanctions against companies participating in the commission would gravely undermine the commission’s work . . . We appeal very strongly to the insurance commissioners of all 50 states to recognize the importance of a safe harbor for all those insurers who are actively working within the commission . . . [S]anctions would be counterproductive and not justified, given the progress that the International Commission has now made . . . [I]mposing sanctions would be detrimental to keeping those already in the commission working in a cooperative way.”

Id. (quoting Stuart Eizenstat).

Eizenstat did acknowledge that “[t]here’s more to be done.” Id. He also expressed a preference for the commission process over litigation in the United States: “Litigation would take years, if not decades to be completed.” Id. He added, “We believe the commission is the best vehicle for resolving Holocaust Era Insurance Claims because it brings together many of the interested parties in a cooperative, nonconfrontational process.” Immunity Sought for WWII Insurers, supra note 634.

It is noteworthy that, in the Swiss bank litigation, Eizenstat also urged state (and local) officials not to impose sanctions. See discussion and notes supra Part III.C.3. (discussing sanctions in the Swiss bank litigation). His advice was not followed, and the Swiss banks, rather than withdrawing from the talks in response to threats of sanctions (as
Unfortunately, no final agreements were reached at the June 1999 meeting in Jerusalem, even though Eagleburger had earlier promised that payments to survivors would begin soon after the Commis-

Eizenstat feared), capitulated, and more than doubled their settlement offer. See id.

In a letter to Eizenstat, California state Senator Tom Hayden specifically referred to
these events, pointing to them as a guide on how to best deal with the European insurers:
As a concrete example, last year in a phone conference with approximately 17
Jewish leaders over the Swiss bank settlement, you counseled a settlement
which was significantly lower than the final one. I was very aware of this
consultation because, at the time, I had introduced legislation calling for a one-
year moratorium on California pension investments in Swiss firms. In the end,
as a result of the legislative pressure and that of survivor representatives, the
final settlement was significantly greater than what you had proposed
originally.

Letter from California state Senator Tom Hayden to Stuart Eizenstat, Undersecretary of
State (June 3, 1999) (on file with author).

Of the New York-California-Florida troika of insurance commissioners at the talks,
the New York and California insurance commissioners, the two most powerful with the
largest constituency of Holocaust survivors, declined to comment on Eizenstat's suggestion.
Florida Insurance Commissioner Bill Nelson publicly signaled his agreement with Eizenstat:
"[N]ow would not be a good time to impose sanctions. The International Commission made
a lot of progress over this past year and it had a major breakthrough [at the May London
meeting]. Commissioner Nelson is prepared to take strong actions if he feels the process is
no longer moving forward." Id. (statement of Dan McLaughlin, Nelson's press secretary).

Two California legislators, both authors of important California legislation dealing
with Holocaust Era Insurance Claims, spoke out against Eizenstat's suggestion of "going
easy" on those insurers who are participating in the commission process. California state
Senator Tom Hayden stated:
U.S. Undersecretary of State Stuart Eizenstat recently opposed state action on
behalf of Holocaust survivors . . . . That strategy has failed to produce results for
survivors for 50 years. There has been more progress than ever before in the
past three years since states like California embarked on a strategy of
legislation, regulation and litigation. Only when these [insurance] firms see
that their niche in the California market is threatened will they settle these
historic claims.

Hayden Criticizes U.S. State Department for Attempted Weakening of California Holocaust
Knox specifically criticized the International Commission procedure:
After months of deliberations, the commission's proceedings have not resulted
in a payment of a single claim. The industry's involvement with the commission
is entirely voluntary, and there is no mechanism to enforce its decisions . . . .
The insurers' game plan is obvious—delay until the claimants, many of whom
are elderly, die or give up. In the meantime, make a pretense of cooperating
with the commission, without making real concessions. The antipode to this
strategy is to exert the unparalleled economic leverage of California state
government over the recalcitrant insurers desiring to do business in our
lucrative market. It is the right thing to do and could be the catalyst for more
meaningful progress at the international commission.

B17.
Eagleburger then set his own deadline: At the time of the next meeting of the Commission, on July 21-22, 1999, in Washington, D.C., all outstanding issues would be settled.

The July 1999 meeting ended without an agreement. As a result, in August 1999, Eagleburger, announced his first directive: The European insurers would have to pay approximately ten times the face-value of the policies they issued.

As of January 2000 it remains unclear whether the European insurers, forced to abide by Eagleburger’s directives, will continue to work with the Commission. It is also possible that Eagleburger might resign from the Commission if his directives are not followed.

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647. See Machlis & Authers, supra note 601. “I hope we can start the payment of claims shortly after the May meeting.” Id. at 3 (quoting Eagleberger’s statement regarding payments).

648. See Wohlgelernter, supra note 601, at 3A. “Eagleburger said he will personally resolve any disputes among the commission members that are outstanding by that date. ‘You can throw me out if you don’t agree,’ one source quoted him as saying.” Id. By June 1999, Generali Insurance still had not agreed to release to the public the list of 100,000 names of outstanding policies.

Michael Kleiner, an Israeli parliamentarian who headed an Israeli government committee on Holocaust-era insurance, urged Eagleburger to immediately release, and post on the Internet, the names of the 100,000 unpaid Generali policyholders from the prewar era. He stated:

“I told him if he really wants to have a breakthrough in Jerusalem, he must force an immediate release on the Internet of the list of 100,000 names presented by Generali in May [1999]. People are not coming forward because they don’t have evidence; they don’t know if they have a policy. They are neither approaching the Israeli committee nor the American committee.”

Wohlgelernter, supra note 395, at 5 (quoting Michael Kleiner).

Eagleburger did not follow this suggestion. Rather, at the June 1999 meeting in Jerusalem, the Commission was only authorized to provide funding to the Yad Vashem Holocaust Center in Israel to match its list of Holocaust victims with the 100,000 names on the CD-ROM given by Generali to Yad Vashem in May 1999.


650. This multiplier is a rough approximation, and does not include a discount for World War II currency devaluations and other adjustments. The actual payout may be substantially less than the 10X multiplier. See Robert S. Greenberger, Holocaust Settlement May Be Near, WALL ST. J.-EUR., Aug. 4, 1999, at 13, available in 1999 WL 18410725; Barry Schweid, Eagleburger Panel Reaches Formula for Insurance Payback, JERUSALEM POST, Aug. 10, 1999, at 4, available in 1999 WL 9006899.
If Eagleburger resigns, the entire Commission process might be abandoned.\textsuperscript{651}

In February 2000, the Commission, after numerous delays, announced that it would finally begin a claims program\textsuperscript{652} akin to the programs set up in the Swiss banks and Austrian banks settlements. However, even while announcing the start of the Commission's claims process, "Eagleburger said he didn't know how many people have such claims or how much they're owed..."\textsuperscript{653}


\textsuperscript{653} Id. To determine the number of claimants, the International Commission began placing ads in newspapers that same month soliciting claimants to submit their names to the Commission. The initial ad, which appeared on February 20, 2000, was well done. It contained the headline \textit{Suppose Your Family Had a Holocaust Era Insurance Policy and You Just Didn't Know about It?} Appearing below the headline banner was a prewar-framed-family photo of parents and an infant child. The text below the aged photograph read:

If you are a Holocaust survivor, you may have a legitimate unpaid Holocaust era life, education or dowry insurance claim and the opportunity exists for you to receive payment. You can file claims through a new Claims Resolution Process set up by the International Commission on Holocaust Era Insurance Claims.

The Commission consists of representatives of United States insurance regulators, five European insurance companies and their subsidiaries, the State of Israel, worldwide Jewish and Holocaust survivor organizations and European regulators as observers.

The unique Claims Resolution process provides individuals with a central source for information on, investigation into, and payment of those outstanding policies, without any charge to the claimant.

\textit{Suppose Your Family Had a Holocaust Era Insurance Policy and You Just Didn't Know About It?}, L.A. TIMES, Feb. 20, 2000, at A34 (advertisement). The ad then provides the International Commission Web site and telephone number, and a simple form to be mailed in to obtain further information. \textit{See id.}
V. STOLEN ART CLAIMS

The Nazis stole an estimated 220,000 pieces of art from both museums and private collections throughout Europe. It took 29,984 railroad cars, according to records from the Nuremberg trials, to transport all the Nazi-stolen art back to Germany.

The value of this plundered art exceeded the total value of all artwork in the United States in 1945. The value of the art stolen by the Nazis is astounding: $2.5 billion in 1945 prices, or $20.5 billion today.

Museums suspected of currently possessing Nazi-stolen art include the Louvre in Paris and the Hermitage in St. Petersburg.


Two years later, Feliciano was sued in France in a $1 million defamation lawsuit by the children of Georges Wildenstein, a famous World War II art dealer whom Feliciano, in his book, accused of collaborating with the Nazis. See Author Accused of Libeling Art Seller to Testify Today: Writer Said to Have Hinted Dealer Had Ties to Nazis, BALTIMORE SUN, May 12, 1999, at 18A, available in 1999 WL 5185254. The suit claimed that Feliciano's book "scared away major Jewish-American clients and caused 'considerable commercial damage.'" Id. (quoting the lawsuit). In June 1999, the French court dismissed the lawsuit, and the defendants vowed to appeal. See French Court Rules against Wildenstein, Jewish Nazi-Linked Art Dealer, AGENCE FR.-PRESSE, June 23, 1999, available in 1999 WL 2626943.


657. See List Reveals Names of Nazi-era Looters, supra note 656, at C3 (providing an estimate by Francis Taylor, director of the New York Metropolitan Museum of Art). In November 1998, the World Jewish Congress announced that it found a list of 2,000 people involved in the Nazi looting of art in the U.S. National Archives. See id. The list includes nationals of "Germany, Austria, France, Switzerland, Holland, Belgium, Italy, Spain, Portugal, Sweden and Luxembourg, and some of the most prominent art dealers in Europe." Id. The list, running 11 pages and cross-referencing various individuals and companies in ten nations, can be found on the Web site of the Art Newspaper, an art trade journal. See Art Newspaper.Com (visited Jan. 20, 2000) <http://www.theartnewspaper.com>.
Museums in the United States also have been discovered holding art stolen during World War II. Since 1997, a number of prominent American museums have been embarrassed to find that their collections include Nazi-stolen art that made its way to the United States after the war. \footnote{659}

It appears that no museum in the world is immune. In July 1999, an impressionist masterpiece looted by the Nazis appeared in the Israel Museum in Jerusalem. \footnote{660}

\begin{itemize}
\item See Lee Rosenbaum, *Nazi Loot Claims: Art with a History*, WALL ST. J.-EUR., Jan. 14, 1999, at 14 [hereinafter Rosenbaum, *Nazi Loot Claims*]. The World Jewish Congress, among others, has labeled Nazi-stolen art that has not been returned to their owners as World War II’s “last prisoners of war.” \textit{Id}.
\end{itemize}

1It was somewhat of a shock when, in the ongoing debate over returning art stolen by the Nazis to the rightful owners, curators and museum directors, those guardians of the spiritual heritage, became stony-faced warders of loot. That is, when they weren’t running for cover.

It is something less than charming that these men and women, trained so meticulously to make judgments for our culture in a free society, have become the mirror image of their old Soviet counterparts: Don’t ask questions. Don’t answer questions. Deny. Accuse the victim.

\begin{itemize}
\item What I find most interesting... is that it comes so late, with almost everyone safely dead—when a generation of owners, dealers, and curators can safely plead ignorance, when the evidence has become murky with age.
\end{itemize}

“\begin{itemize}
\item What will happen if the courts allow wholesale restitution to heirs?”
\item “Think of the upheaval... Everything once belonged to someone. None of us will be safe.”
\end{itemize}

Complicated stuff, of course. But suppose we deal only with the “Art of the Possible,” with events and objects and families who survive, at least in memory. If the art world were to vigorously pursue the truth about plundered art—if they were to offer this small token—it would make the great collections and the great institutions in question spiritually richer. Where their treasures once hung, they could display their virtue with pride. They could publicly right their wrong.


\footnote{660} See Fiachra Gibbons, *Looted Masterpiece in Israel*, GUARDIAN (London), July 23, 1999, available in 1999 WL 22081488. The painting, Camille Pissarro's *Boulevard Montmartre, Printemps, [Spring] 1897*, came from a large prewar collection of Max Silberberg, a German-Jewish businessman from Breslau who died in the concentration camps. \textit{See id.} “The Pissarro is thought to be worth in excess of pounds 5 million.” \textit{Id}. Mr. Silberberg’s only surviving heir is Gerta Silberberg, his daughter-in-law, who fled Germany with her husband Alfred, Max’s son, in 1939. \textit{See id.}

After the war, the Pissarro ended up in the hands of a private European collector, and
According to experts, the disposition of art found to be looted during World War II is even more complex than the issue of Nazi-stolen gold and other Holocaust-era claims. First, so much art is then passed through a series of owners before turning up in the Israel Museum in 1997. See id. The museum received the painting as a donation from the New York-based Loeb family who bought the painting in 1960. The London-based European Commission on Looted Art, see discussion infra note 661, traced the painting to Jerusalem. See id.

Mrs. Silberberg, 85 years old, has lived modestly in the same house in Leicester, England for the last 40 years. See id. Only a month earlier, in June 1999, the German government returned to her a Van Gogh drawing "worth pounds 3.3 m[illion]," id., and a work by Van Marees. See Douglas Davis & Alastair Grant, Van Gogh's Rightful Return, JERUSALEM POST, Sept. 24, 1999, at 6B, available in 1999 WL 9008507; Giles Whittell, Looted Matisse Returns to Heirs, TIMES (London), June 15, 1999, at 5, available in 1999 WL 8001183. Both were held by the National Gallery in the former East Berlin. See Davis & Grant, supra, at 6B; Whittell, supra, at 5.

661. For an excellent country-by-country analysis of the problem of Nazi-stolen art, and the various efforts to deal with it, see Marilyn Henry & Hubertus Czernin, Owning Up, ARTNEWS, May 1999, at 68, available in 1999 WL 9955656.

In late 1998, 44 nations held a conference in Washington, D.C., to address the problem of how to deal with Nazi-stolen assets, including art found throughout the world. See Kempster, supra note 654, at F1. At the conclusion of the conference, the delegates agreed on "comprehensive guidelines intended to identify artworks looted by Nazis during World War II, locate the prewar owners and settle conflicting claims to property worth billions of dollars on today's market." Kempster, supra note 634, at A8. Unfortunately, the guidelines proposed by the U.S. delegation could not be made legally binding. See id. As a result, they have made little impact in the art world, and are rarely discussed today.


Due to the complexity of the problem, at least four organizations are working on the issue. In the United States, the World Jewish Congress has formed the Commission for Art Recovery ("CAR"), whose mission is to "identify and locate art stolen by the Nazis and their collaborators, and register claims for the victims of Nazi art theft." Commission for Art Recovery of the World Jewish Congress (visited June 25, 1999) <http://www.wjc-artrecovery.org>. CAR is located in New York and can be reached at (212) 521-0102. See id. Its Web site contains a claim form to notify CAR of a lost Nazi-stolen artwork. See id. CAR will enter the information on the artwork "into a computer database and compare [1] with provenance data, insurance company and museum records, Nazi confiscation lists, and other resources in an effort to locate stolen art and aid in its recovery." Id. CAR is chaired by Ronald S. Lauder, art collector, philanthropist, heir to the Lauder cosmetics fortune, former U.S. Ambassador to Austria, and chairman of New York's Museum of Modern Art ("MOMA"). See id. By holding two positions—chairman of MOMA and head of CAR—Lauder was being pulled in opposite directions in the Schiele case. See discussion and notes supra Part V.C. (discussing the MOMA/Schiele litigation). While CAR is concerned about restoring Nazi-
at stake that a large-scale return of such World War II-looted art "could disrupt the art market, especially for French Impressionist paintings, which were a favorite target of Nazi looters."\footnote{662} Second, unlike the claims of Nazi-stolen gold, dormant Swiss accounts, or use of slave labor, where the perpetrators knew—or at least, should have been substantially on guard—that they were engaging in wrongful activities, many (though not all) present owners of Nazi-looted art bought the artworks in good faith, without any knowledge

stolen art to its former owners, MOMA sought to return the Schiele paintings back to Austria. \textit{See Judith H. Dobrzynski, Man in the Middle of the Schiele Case, N.Y. TIMES, Jan. 29, 1998, at E1.}

A second organization involved with the issue in the United States is the Holocaust Art Restitution Project ("HARP"), located in Washington, D.C., and affiliated with the B'nai B'rith Klutznick National Jewish Museum. \textit{See Holocaust Art Restitution Project} (visited Nov. 7, 1999) <http://www.lost.art.org>. HARP can be reach at (202) 857-6500. \textit{See id.} HARP was involved in the research conducted by the Seattle Art Museum that led to the return of a Nazi-stolen Matisse to the heirs of its pre-World War II owner. \textit{See Holocaust Art Restitution Project Announces Its Involvement in the Restitution of Four Works Plundered by Nazis, U.S. NEWswire, June 21, 1999, available in 1999 WL 4637007.}

In Europe, the European Commission on Looted Art ("ECLA"), founded in London in March 1999 by the European Council of Jewish Communities, seeks to trace Nazi-stolen art. \textit{See New Group to Speed up Rescue of Nazi Looted Art, JERUSALEM REF., Mar. 29, 1999, at 4, available in 1999 WL 9687654 (describing work of ECLA); Eliahu Salpeter, Homeward Bound, HAA'RETZ (Israel), June 24, 1999, available in 1999 WL 17468764 (describing work of ECLA); Anne Simpson, Face to Face with Anne Webber: Every Picture Tells a Tragic Story, HERALD (London), June 28, 1999, at 26, available in 1999 WL 21173499.}

The Holocaust Educational Trust ("HET") has been actively involved in tracing Nazi-stolen art, both in the United Kingdom and elsewhere. \textit{See, e.g., Francis Elliot, Scots Galleries in Row over Nazis' Looted Art, SCOTLAND ON SUNDAY, July 4, 1999, at 1, available in 1999 WL 5909820 (discussing HET and discovery of possible Nazi-looted art in the National Galleries of Scotland); Andrew Gilligan, Hunt for Nazi Looted Art in British Messes, SUNDAY TELEGRAPH (London), Aug. 15, 1999, at 18, available in 1999 WL 19847298 (discussing HET report on Nazi-stolen art found in the United Kingdom).}

Finally, an art trade journal, \textit{Art NEWSPAPER}, published on its Web site in January 1999, a list issued in 1946 by the U.S. Office of Strategic Services of individuals involved in art trade with the Nazis. \textit{See The Art Trade Under the Nazis: The Not So Secret List} (visited Jan. 20, 2000) <http://www.theartnewspaper.com>. The preface to the list, which contains over 200 names, sets out the widespread scope of trade and looting in art during World War II. It states:

When Jacqueline Kennedy employed Stephan Boudin to redecorate the White House, did she know that, as head of [the] famous firm of Jansen, he also redecorated the Reichsbank in Berlin under the Nazis? This is one of the piquant facts which emerges from the 1946 U.S. Office of Strategic Services list published here in its entirety. This list has to be used with care because, by its own admission, many allegations against individuals are "reported". Nonetheless, it gives an extraordinary panorama, especially for Paris, of the art trade in war time. Much of this trade was not illegal, even if it was collaborationist.

\textit{Id. at 1.}

\textit{662. Kempster, supra note 654, at F1.}
or suspicion of their controversial heritage. Finally, these good faith purchasers are often pitted against claimants who may not even be the original owners from whom the artwork was stolen, but surviving—sometimes distant—relatives of the victims.

While the task of restoring Nazi-stolen art to its rightful owners is difficult, it must be done. As eloquently explained by one commentator:

[W]hy bother with recovering it at all? Plundering is, after all, the handmaiden of war. And the world’s museums are filled with objects lifted during conflicts from the Romans on.

But this is no Elgin Marbles controversy. The Nazis weren’t simply out to enrich themselves. Their looting was part of the Final Solution. They wanted to eradicate a race by extinguishing its culture as well as its people. This gives these works of art a unique resonance, the more so since some of them were used as barter for safe passage out of Germany or Austria for family members. The objects are symbols of a terrible crime; recovering them is an equally symbolic form of justice.

To date, unlike in the other Holocaust-era claims litigation, less than a handful of lawsuits have been filed in the United States involving World War II-looted art. Since each lawsuit involves a

663. See id. The article notes:
Rabbi Marvin Hir, Dean of the Simon Wiesenthal Center for Holocaust Studies in Los Angeles . . . express[s] sympathy for owners who innocently bought paintings without knowing they had been stolen. “In no way should these people be faulted,” Hir said. “They were misled themselves. It is not the same as the Swiss bankers who knew in advance that it was Nazi gold” they were acquiring.

Id.

664. See Rosenbaum, Will Museums in U.S. Purge Nazi-Tainted Art!, supra note 659, at 37. For instance, in the claim of Dead City III, the Nazi-looted painting by Egon Schiele, held by an Austrian museum and detained in the United States in 1998 while on loan to MOMA in New York, the claimants to the painting were the “widows of the sons of the victim’s cousin,” not even the blood relatives of the victim from whom the Nazis stole the painting and who perished in the Holocaust. Id.

665. Gibson, supra note 655, at W11.

specific artwork, all were individual lawsuits, rather than class action litigation. Each lawsuit will be discussed separately below.

A. Goodman v. Searle

In August 1998, the first case scheduled to reach trial for Nazi-stolen art, Goodman v. Searle, settled.

The case involved the artwork *Landscape with Smokestacks*, an 1890 work by Edward Degas (the “Degas”) that made its way to the United States from Europe.
Prior to the war, the painting belonged to Friedrich and Louise Gutmann, a prominent Dutch couple of Jewish descent who had converted to Christianity. Friedrich Gutmann purchased the Degas in 1932.\textsuperscript{670}

In April 1939, Friedrich Gutmann, anticipating the oncoming war, sent the Degas to an art dealer in Paris for safekeeping.\textsuperscript{671} The dealer placed the work, along with other artworks belonging to the Gutmann family, in storage in Paris to protect them from seizure by the Germans during World War II.\textsuperscript{672} The Degas then disappeared.

In 1944, Friedrich and Louise Gutmann perished in Nazi death camps.\textsuperscript{673}

After the war, the Gutmann children, Lili and Bernard, attempted to locate their parents’ possessions,\textsuperscript{674} including the artworks sent to Paris.

In 1994, Simon Goodman, one of Bernard’s sons, discovered the Degas in the United States.\textsuperscript{675} It was owned by Daniel Searle, a Chicago pharmaceutical tycoon.\textsuperscript{676} Searle purchased the painting in

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\textsuperscript{670} See Terri Sforza, Search for Justice, ORANGE COUNTY REG., Mar. 24, 1998, at A10, available in 1998 WL 2619641. Friedrich Gutmann was raised in a prestigious banking family, and founded his own bank in Holland after World War I. See id. Gutmann assembled an impressive art collection over the years, including works by Botticelli, Gainsborough, Holbein and three modern art pieces, which included the Degas pastel. See id.

\textsuperscript{671} See id.

\textsuperscript{672} See id.

\textsuperscript{673} See id. In 1943, the Gutmanns attempted to escape from Nazi-occupied Holland to Italy, where their daughter Lili was living. See id. They were captured by the Nazis and sent off to concentration camps. See id.

\textsuperscript{674} See id. Prior to their deaths, Friedrich and Louise relinquished many of their valuable possessions to the Nazis under a “forced sale.” See Peter Huck, Possession: The Hunt for Looted Art, AUSTL. FIN. REV., Nov. 27, 1998, available in 1998 WL 20236328.

\textsuperscript{675} See Plaintiffs’ Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment at 16-17, Goodman v. Searle, No. 96-C-6459 (N.D. Ill. filed Jan. 27, 1998) [hereinafter Goodman Plaintiffs’ Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment]. In 1994, the Degas was displayed at New York’s Metropolitan Museum of Art (on loan from Searle), as a result of which Simon Goodman discovered its existence in the United States. See id. Prior to that time, plaintiffs believed that the Degas had been in Russia, shipped there by the victorious Soviet forces. See id. at 17-18. In 1961, the West German government, in restitution proceedings brought by Bernard and Lili, informed them that its own efforts to find the Degas and other Gutmann art had proved fruitless and that “further investigations hold no prospect of success.” Id. at 17. The West German government then paid 50% of the value of the Degas to the Gutmann estate, not being able to determine whether the painting had been removed from Paris to East or West Germany. See id. at 10.

\textsuperscript{676} See Telephone Interview with Nick Goodman (Jan. 15, 1999). After the collapse of the Soviet Union in 1991, the Goodman brothers began to look for the Degas again, hoping to find a record of it in the newly-opened Soviet archives. See id. As part of this search, one day
The Gutmann heirs demanded the return of the work. When Searle refused, the heirs filed a lawsuit in New York, which was transferred to federal court in Chicago.

Plaintiffs were Lili Gutmann, now in her mid-70s, and her two nephews, Nick and Simon Goodman, sons of Bernard, who died in 1994.

Searle claimed that the Degas was not stolen, but rather sold by Friedrich Gutmann when he began experiencing financial difficulties during World War II. Plaintiffs countered that no bill of sale or other proof of the painting being sold existed, even though “sales of other Gutmann paintings during the war are well-documented.”

Moreover, according to plaintiffs, Searle either was, or should have been, aware of the Degas’s checkered pedigree, or provenance, since

[a]ccording to the “Provenance” that Searle obtained when he purchased the [Degas] from Emile Wolf in 1987, the [Degas] had passed through the hands of Hans Wendland—a card-carrying Nazi who the U.S. government interrogated and concluded was instrumental in the trade of art looted by the Nazis in France—and Wendland’s brother-in-law, Hans Fankhauser.

Simon Goodman was leafing through art books at the U.C.L.A. Art library, where, to his amazement, he discovered a photo of the Degas and confirmed its presence in the United States in the private collection of Daniel Searle. See id.


See id. at 1. Plaintiffs made a written demand on December 5, 1995 to have the Degas returned, and Searle refused the demand in writing on December 15, 1995. See id.

See id. at 1 (citing Consent Order, Goodman v. Searle, No. 96 Civ. 5316 (S.D.N.Y. entered Sept. 24, 1996)). Both parties agreed to the transfer. See id.

The Gutmann children changed their last name to Goodman after the war.


Goodman Plaintiffs’ Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, supra note 675, at 3.

Id. Defendant Searle relied on the expertise of the curators from the Art Institute of Chicago. See Walter V. Robinson, Holocaust Victims’ Heirs Given Share of a Degas, BOSTON GLOBE, Aug. 14, 1998, at A1, available in 1998 WL 9148291. “But according to pre-trial depositions . . . two museum curators missed evidence pointing to flaws in the [painting’s] ownership records, including the fact that it was once owned by Hans Wendland, perhaps the most successful wartime fence for art looted by the Nazis.” Id.
Searle also argued that plaintiffs' claims were barred by either statute of limitations or laches\textsuperscript{684} since, according to the defendant, plaintiffs "reasonably should have known of the location of the landscape long before Searle bought it."\textsuperscript{685}

\textsuperscript{684} See Defendant's Memorandum of Law in Support of Motion for Summary Judgment at 10-15, Goodman v. Searle, No. 96-C-6459 (N.D. Ill. filed Jan. 13, 1998) [hereinafter Goodman Defendant's Memorandum of Law in Support of Motion for Summary Judgment]; Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment on Statute of Limitations Defense at 3-10, Goodman v. Searle, No. 96-C-6459 (N.D. Ill. filed Dec. 8, 1997) [hereinafter Goodman Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment on Statute of Limitations Defense]. The federal court hearing the case was sitting in Illinois and the defendant, Searle, wanted the court to apply Illinois law. \textit{See id.} Plaintiffs wanted New York law to apply. \textit{See Goodman Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment on Statute of Limitations Defense, supra} note 677, at 4-12. New York law appeared to be more favorable to plaintiffs, since an action for return of stolen art against a good faith purchaser of the art (an action for replevin) is timely in New York if brought within three years after the purchaser refuses the true owner's demand that the property be returned, otherwise known as the "demand and refusal rule." \textit{See} Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429 (N.Y. 1991) (adopting "demand and refusal" rule for determining statute of limitations); \textit{see also} Hawkins et al., \textit{supra} note 661, at 52, 55-69 (criticizing New York's "demand and refusal" rule since, according to the authors, "former owners will be able to prevail over innocent purchasers even after decades of inaction [by former owners] in attempting to locate the missing work").

Under Illinois law, in contrast, the statute of limitations in a stolen art context is more strict, determined by the so-called traditional "discovery rule," which requires plaintiffs, former owners, or heirs to prove that they conducted a reasonably diligent search for the art. \textit{See} Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 288 (7th Cir. 1990). New York has specifically rejected the discovery rule on the ground that it would "place the burden of locating stolen artwork on the true owner and [would] foreclose the rights of that owner to recover its property if the burden is not met [and, as such, would] encourage illicit trafficking in stolen art [in New York]." \textit{Solomon R. Guggenheim Found.}, 569 N.E.2d at 431 (N.Y. 1991).

Plaintiffs claimed that New York law applied in this diversity action—even though the Degas was located in Chicago when the suit was filed, defendant Searle resided there, and plaintiffs are not residents of New York—because the action involved the ownership of a stolen artwork purchased by defendant on the New York art market, and the Degas was in New York when plaintiffs demanded its return. \textit{See Goodman Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment on Statute of Limitations Defense, supra} note 677, at 3 (discussing Searle's contacts with New York). Plaintiffs argued that their action met the New York statute of limitations since they brought their lawsuit within three years of Searle's refusal to return the Degas to them. \textit{See id.} at 2.

\textsuperscript{685} \textit{Goodman} Defendant's Memorandum of Law in Support of Motion for Summary Judgment, \textit{supra} note 684, at 11. As support, Searle argued that the Goodmans should have been aware of the Degas' presence in the United States as a result of the following: (1) publication of two books, in 1968 and 1974, which included information about the Degas and its location; and (2) exhibits at three college museums in the United States (the Fogg Museum at Harvard, the Rhode Island School of Design, and the Finch College Museum) in 1965, 1968, and 1974, respectively, featuring the Degas. \textit{See id.} at 6-7.
Plaintiffs countered that they diligently pursued a search of the painting for over fifty years, and could not locate it until its exhibition in New York.

These competing contentions were never fully settled, as the parties reached a compromise and ended their dispute on the eve of trial.

Under the settlement, Searle and the plaintiffs agreed to share ownership of the Degas. Searle donated his one-half interest to the Art Institute of Chicago, where Searle is a trustee, and the museum agreed to purchase the plaintiffs' one-half interest. The Degas will hang in the museum, with the designation: "Purchase from the collection of Friedrich and Louise Gutmann and a gift of Daniel C. Searle."

686. See Goodman Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, supra note 675, at 3-4 (citations omitted). Plaintiffs claimed that they reported their losses immediately after the war to the Allied Forces and to government officials in France, Germany and Holland. . . . [as well as] to the international police organization known as Interpol at Scotland Yard. They consulted art experts; presented photographs of the paintings on television . . . and listed the [Degas] in a stolen art registry maintained by the International Foundation for Art Research ("IFAR") as soon as they learned of IFAR's existence.

Id.

687. See id. at 16-17.


689. Teri Sforza, Rival Claims on Nazi-Looted Art Resolved, ORANGE COUNTY REG., Aug. 14, 1998, at 1. The deal almost unraveled, as the parties could not agree on the present value of the painting. See Rosenbaum, Nazi Loot Claims, supra note 659, at 14. Searle bought the Degas in 1987 for $850,000, at the top of the art market. See id. The Art Institute of Chicago agreed to use its acquisition funds to pay the Gutmann heirs for their one-half interest in the Degas, with the price to be determined by averaging two independent appraisals. See id. This value came to $437,000, based on a $300,000 appraisal by Christie's auction house and $575,000 by a New York art dealer. See id. According to Nick Goodman, "'We are hoping to talk to Christie's to see if they will reconsider' . . . . If the appraisals stand, he said, 'we will be out-of-pocket . . . by about $100,000,'" as a result of pursuing the litigation. Id. (quoting plaintiff Nick Goodman).

In late fall 1999, almost one year after the compromise was announced, the settlement was finalized. See id. Christie's slightly raised its appraisal so that the plaintiffs, according to Nick Goodman, were "at least able to break even." Telephone Interview with Nick Goodman, supra note 676. "Overall, I'm pleased with the result," Nick Goodman stated. Id. "The painting was brought back to the family, it is now hanging in a beautiful museum, and, most importantly, we significantly raised public awareness of this issue." Id. In June 1999, the Art Institute began publicly displaying the Degas, and Nick Goodman flew to Chicago personally to view it. See id.
B. Rosenberg v. Seattle Art Museum

In June 1999, the second Nazi-stolen art case to reach litigation (and the first against an American museum), Rosenberg v. Seattle Art Museum ("SAM"), also settled. The case involved the artwork *Odalisque*, a 1928 painting by Henri Matisse, which belonged to Paul Rosenberg, one of the most prominent and wealthy art dealers in prewar France.

Because Rosenberg was Jewish, he fled France for the United States in 1941, after the Nazi occupation of France a year earlier. The Nazis then seized more than 400 of his paintings, including some of the greatest works of modern art in prewar Europe.

Rosenberg returned to Paris after the war and, by the time he died in the late 1950s, managed to recover most of the stolen works. The *Odalisque*, however, remained missing. In August 1997, the Rosenberg family found it hanging in the Seattle Art Museum.

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691. See JoAnn Lewis, Museum to Return Looted Artworks: Matisse Taken by Nazis Will Go to Owner's Heirs, WASH. POST, June 17, 1999, at C1.

692. See Rosenberg Complaint, supra note 690, ¶ 9. The painting is also known as *Oriental Woman Sitting on Floor*. See id.

693. See id. ¶ 10; see also FELICIANO, supra note 654, at 52-74 (describing Paul Rosenberg's background); Kenneth Jost, *A Family Fights for a Stolen Matisse*, CQ RESEARCHER, Mar. 26, 1999, at 265 (describing Paul Rosenberg's background). Paul Rosenberg acquired the *Odalisque* in 1929, one year after it was painted by Matisse, and the painting was part of Rosenberg's personal art collection. See Rosenberg Complaint, supra note 690, ¶¶ 9-11.

694. See id. ¶ 17.

695. See id. ¶ 14.

696. See id. ¶¶ 17-19.

697. See id. ¶ 28. According to the complaint and a 1999 study conducted by the Holocaust Art Restitution Project ("HARP"), see supra note 661, the *Odalisque* found its way from Paris, France, to Seattle, Washington, in the course of 50 years as follows:

In early 1940, Paul Rosenberg placed the painting for safekeeping in a bank vault outside Paris, in anticipation of the Nazi offensive against France. See Rosenberg Complaint, supra note 690, ¶ 13. In 1941, the "Einsatzstab der Dienstellen des Reichleiters Rosenberg" (the "ERR"), a Nazi-party group that conducted looting activities on behalf of Hermann Goering and other Nazis, seized the painting from the bank vault. See id. ¶ 14. The ERR shipped the painting back to Paris, and in 1942, traded it, and another painting (by Gauguin) it considered "degenerate art," for a painting from the Renaissance period. See id. ¶ 15.

Nazi records show the trade was made with a shady German art dealer who, interrogated by the Allies after the war, claimed that he shipped the painting along with others to a warehouse in Germany, but that the shipment never arrived. See Robin Updike, "Odalisque" Project Was Lengthy, Thorough, SEATTLE TIMES, June 16, 1999, at E6, available in 1999 WL 6277916 [hereinafter Updike, "Odalisque" Project Was Lengthy, Thorough]. "So
Plaintiffs Elaine Rosenberg and Micheline Nanette Sinclair, the daughter-in-law and daughter, respectively, of Paul Rosenberg, brought suit in July 1998 to recover the painting. Plaintiffs' complaint contained two causes of action: a request for a declaratory judgment that plaintiffs are the current owners of the *Odalisque*; and an action for replevin, seeking the return of the painting.

we suppose he was lying,” said [the HARP researcher commissioned by the Seattle Art Museum (“SAM”) to trace the provenance of the painting]. ‘It's obvious that he lied about many things; this would make sense.” *Id.* (quoting the HARP researcher).

In early 1954, the painting turned up in Paris, at Galerie Drouant-David, a now-defunct art gallery. *See id.* Soon after, the *Odalisque* crossed the Atlantic Ocean, when the Paris gallery sold the painting to Knoedler & Co., a renowned art dealer in New York. *See id.*

How the Paris art gallery obtained the *Odalisque* is unknown, and the 1999 HARP report "was unable to verify the whereabouts of the painting between 1941 and 1954, when the painting was acquired by Galerie Drouant-David, of Paris." Robin Updike, *SAM to Return Matisse Stolen during WWII*, SEATTLE TIMES, June 15, 1999, at A1, available in 1999 WL 6277818 [hereinafter Updike, *SAM to Return Matisse Stolen during WWII*].


The *Times of London* describes the unusual means of how the Rosenberg family discovered the whereabouts of the painting:

In [1996], Prentice Bloedel, a Canadian timber magnate, gave the painting to the Seattle Art Museum. Shortly afterwards[,] a book called *The Lost Museum: The Nazi Conspiracy to Steal the World’s Greatest Works of Art* was published, in which the author, Hector Feliciano, cites the painting as one of many plundered by the Nazis. He stated that it was stolen from Rosenberg.

A grandchild of Bloedel, who is now dead, recognised the illustration in the book as matching the painting that had been given to the museum. The Bloedel family then contacted the Rosenbergs. *Varadarajan, supra*, at 11.

According to another account: “At a party in 1997, the grandson of the Bloedel’s [sic] was flipping through the book [Feliciano’s *The Lost Museum*], when he spotted the picture and recognized it as the one hanging in his grandparents’ home. He began the search for its original owners.” Karen Lowe, *Matisse Painting Stolen by Nazis to Be Returned*, AGENCE FR.-PRESSE, June 15, 1999, available in 1999 WL 2623461.

*See Rosenberg Complaint, supra* note 690, ¶ 7. Plaintiffs are the sole surviving heirs, since Paul Rosenberg and his wife and their other child, a son, are now deceased. *See id.* ¶ 7. The daughter, Micheline Sinclair, resides in Paris, France, and the daughter-in-law, Elaine Rosenberg, resides in New York City, New York. *See id.* ¶¶ 5-6.

*See id.* ¶ 33-40.

*See id.* ¶¶ 41-46. According to the complaint, on October 17, 1997, two months after learning of the location of the *Odalisque*, plaintiffs demanded the painting’s return. *See id.* ¶¶ 28-30. On June 12, 1998, after failing to reach a resolution of the matter with the
In August 1998, SAM, in turn, sued Knoedler & Co., claiming that the gallery committed fraud, negligent misrepresentation, and breach of warranty of title when, in 1954, it sold the painting to the Bloedels.\textsuperscript{701} SAM, which received the painting as a gift, nevertheless sought $2 million in compensation, the fair market value of the \textit{Odalisque}.\textsuperscript{702}

In March 1999, Knoedler filed a motion to dismiss SAM’s third party complaint for lack of jurisdiction, arguing that it did not do

plaintiffs, SAM formally refused to return the painting. \textit{See id.} \textsuperscript{701} 31-32.

According to the \textit{Times of London}:
Although the museum initially said that it would have preferred a settlement reached by mediation, it later expressed a preference for the dispute to go to court as a test case. In court, the museum’s lawyers hope to resolve the role played in the painting’s history by Knoedler & Company, the renowned Manhattan art dealer which bought \textit{Odalisque} in 1954 from a gallery in Paris. Varadarajan, \textit{supra} note 697, at 11.


In one way, at least, the Seattle museum is fortunate: It has a gallery to sue. Knoedler celebrated its 150th anniversary in 1996, although it is no longer a family business. (Armand Hammer, the late financier, bought the company in 1971, and it is now controlled by his foundation). [sic] “Not a heck of a lot of galleries are left that did business” shortly after the war, particularly in European art, said Richard Gray, the president of the Art Dealers Association of America.

business in Washington State.\textsuperscript{703} The district court denied Knoedler's motion.\textsuperscript{704}

In June 1999, SAM finally agreed to return the painting to the Rosenberg family\textsuperscript{705} after obtaining the findings of a research study from the Holocaust Art Restitution Project ("HARP"), confirming that the \textit{Odalisque} in their possession, indeed, had been stolen by the Nazis from Paul Rosenberg.\textsuperscript{706}

\textsuperscript{703} See Rosenberg v. Seattle Art Museum, 42 F. Supp. 2d 1029, 1031 (W.D. Wash. 1999); see also Dobrzyński, \textit{Loot-Holders Learn That Honesty Can Be Tricky}, supra note 702, at G3. The article explains:

\begin{quote}
Knoedler . . . said through its lawyer that it had nothing to do with the museum dispute because its dealings were all with the Bloedels, not the museum. "I don't know of any case where a museum has gone to someone who never dealt with them and tried to extract money from them," said Lewis B. Clayton of Paul, Weiss, Rifkind, Wharton & Garrison in Manhattan. "The only people who could press a claim are the Bloedels." The museum[,] said its lawyer, John A. Reed of David Wright & Tremaine in Seattle, has standing in the suit as the Bloedels' successor.
\end{quote}

\textsuperscript{704} See Rosenberg, 42 F. Supp. 2d at 1037-38. The district court found that it lacked jurisdiction over SAM's claims for breach of contract and negligent misrepresentation, but that it had jurisdiction over SAM's claims against Knoedler for fraud. See id. Under principles of pendent jurisdiction, the court continued to exercise jurisdiction over all of SAM's claims against Knoedler. See id.


\textsuperscript{706} See Lewis, supra note 691, at C1. SAM, apparently, paid HARP $10,000 to determine the provenance of the \textit{Odalisque}. See id.

The HARP report, according to Mimi Gates, director of SAM:

\begin{quote}
answers several crucial questions about the history of the painting. . . . [It] prove[s] the painting is the one taken by the Nazis from the vault where Rosenberg hid his collection. The report also makes clear that Rosenberg, who died in 1959 after moving his art business to New York, never again saw the painting or had the chance to bring it back into his collection. This is a pivotal point, since it apparently proves Rosenberg never sold the painting to anyone.
\end{quote}

\textit{Updike, SAM to Return Matisse Stolen during WWII,} supra note 697, at A1.

Moreover, according to another SAM director, "it took time to determine the
SAM’s litigation against Knoedler, however, continues. The trial court dismissed the cross-action in October 1999, but SAM is appealing.

In an interesting footnote to the dispute, the painting now hangs at the Bellagio Hotel and Casino in Las Vegas, having been sold by the Rosenbergs to casino mogul Steve Wynn shortly after it was returned to them.

Ownership of this particular ‘Odalisque’ because Matisse made several paintings named ‘Odalisque.’” Lowe, supra note 697.

After obtaining the HARP study, SAM’s board of directors unanimously approved the return of the painting to the Rosenberg family. See McMahon, supra note 697, at 10A. “Now that we’ve had thorough research, and now that the HARP report is completed, this is the right thing to do,” stated Mimi Gates, SAM’s director. Updike, SAM to Return Matisse Stolen during WWII, supra note 697, at A1.

For a discussion of the HARP study, see Robin Updike, ‘Odalisque’ Project Was Lengthy, Thorough, supra note 697, at E6. Two HARP researchers “spent more than a year sifting through old exhibition catalogs and documents before piecing together a partial history of ‘Odalisque.’ The research was old-fashioned: Tracing looted art is not the sort of thing you can do on the Internet. . . . The report was several months late.” Id.

Ronald S. Lauder, director of New York’s Museum of Modern Art and head of CAR, “praised the museum’s actions: ‘This is the first time an American museum has returned art work like this. This is very important.’” McMahon, supra note 697, at 10A (quoting Ronald Lauder).

ARTnews, an art trade publication, has summarized the factual dispute between Knoedler and SAM as follows:

According to the museum, when Knoedler sold the Odalisque to the Bloedels, the gallery documented the painting’s exhibition history. But the gallery omitted the fact that the catalogues for two exhibitions cited, at the Petit Palais in Paris in 1937 and at the Carnegie Institute in Pittsburgh in 1938, state that the Odalisque was on loan from Paul Rosenberg. Responding to Mrs. Bloedel’s later questions about the painting’s provenance, Knoedler sent her a letter explaining that the painting had actually been loaned to both exhibitions by Matisse himself, and “was without doubt in his possession through 1938.” The museum’s current lawsuit against Knoedler was filed to determine who actually had title to the painting: either the gallery misrepresented the painting’s provenance, the museum charges, or the Rosenbergs’ claim of rightful ownership may not be valid.

Patricia Failing, Suit to Fit, ARTNEWS, Oct. 11, 1998, at 56, available in 1998 WL 19732869. Apparently, the HARP study proved the Rosenbergs’ ownership claim to be valid, and the representation made to the Bloedels by Knoedler to be incorrect.


709. See Christine Clarridge, Matisse Returned by SAM Now in Las Vegas Casino, SEATTLE TIMES, Sept. 5, 1999, at B2, available in 1999 WL 6291451. Undoubtedly, it is now getting a larger audience than while it was hanging at the SAM.
C. The Museum of Modern Art ("MOMA")/Schiele Litigation

The New York MOMA held an exhibition of work by the Austrian painter Egon Schiele from October 1997 to January 1998.710

As part of this exhibition, the Austrian government, through the government-financed Leopold Foundation,711 loaned MOMA two Schiele paintings: Dead City III and Portrait of Wally.712

While the paintings were on exhibit, the heirs of two individuals who perished in the Holocaust contacted MOMA claiming that the paintings were Nazi-stolen artworks.713 The heirs requested that the paintings remain in New York pending determination of their ownership.714

MOMA denied this request, informing the heirs that the paintings would be shipped back to Europe.715

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711. See Wood, supra note 655, at 6. Dr. Rudolph Leopold, a retired Austrian ophthalmologist, acquired the largest collection of Schiele art in the world. In 1994, Leopold, in order to pay his back taxes, sold the collection to the Austrian government, which established a foundation and museum in his name and appointed him as a director of the museum for life. See id.


713. See Wood, supra note 655, at 6.

714. See Judith H. Dobrzynski, Modern Is Urged to Play Solomon in Paintings Dispute, N.Y. TIMES, Jan. 1, 1998, at E1. Portrait of Wally is alleged to have been stolen from Lea Bondi Jaray, and Dead City III is alleged to have been stolen from Fritz Grunbaum. See id.


Kathleen and Rita Reif, of New York, and the wives of the nephews of Fritz Grunbaum, are claiming Dead City III on behalf of the Grunbaum heirs. See id. Exhibit 2 (attaching a Letter from Kathleen E. Reif and Rita Reif to Glenn D. Lowry, Director of MOMA (Dec. 31, 1997)).

715. See Marilyn Henry, MOMA to Send Disputed Paintings to Barcelona, JERUSALEM POST, Jan. 6, 1998, at 7 ("The museum said late Sunday that it would ship the exhibit to its next stop, Barcelona, this week. Although it had expressed sympathy for the claims, MOMA said it was bound by a contract to return the pictures.").
Hours before the paintings were to be returned to the Austrian government, Robert Morgenthau, the Manhattan District Attorney, was able to stop their departure from New York. Morgenthau did so by empaneling a grand jury to conduct a criminal investigation of the ownership of the paintings. The grand jury then issued a subpoena duces tecum ordering MOMA to appear as a witness before it, and to produce the two paintings, thereby preventing their departure.

MOMA filed legal proceedings in New York state court to quash the subpoena. The parties agreed that the paintings would remain in the United States, in the custody of MOMA, pending the resolution of this dispute.

In its application, MOMA argued that the subpoena was issued in violation of section 12.03 of the New York State Arts and Cultural Affairs Law. See N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney 1999); see also infra note 721 and accompanying text.

The heirs, therefore, tried another legal maneuver. Instead of a civil lawsuit, they filed a criminal complaint with the Manhattan District Attorney, who then began a criminal investigation regarding the ownership dispute. See Hughes, supra note 716.

The grand jury issued a subpoena to MOMA ordering the production of both paintings the next day, January 8th, at 3:00 p.m. The date of production, at MOMA's request, was continued to January 23rd. See id. On January 22nd, MOMA filed a notice of motion to quash the subpoena before the Supreme Court of New York, which began the instant proceedings.

Affairs Law ("ACAL"). According to MOMA, ACAL section 12.03 prevented the issuance of a grand jury subpoena upon MOMA ordering the production of the paintings.

In May 1998, a New York Supreme Court judge ruled in favor of MOMA, holding that the Manhattan District Attorney should not have ordered the seizure of the paintings while their disputed ownership was being investigated.

In March 1999, the Appellate Division of the Supreme Court reversed.

Contrary to the ruling of the trial judge, the appellate court held that ACAL section 12.03 is not intended to affect criminal proceedings, such as the one being conducted by Morgenthau. Specifically, the appellate court held that a subpoena to appear before a grand jury and produce evidence "does not authorize or call for a seizure in any meaning of the word." Not constituting "seizure," the issuance of a subpoena duces tecum upon MOMA was not violative of section 12.03 prohibiting "any seizure . . . upon any work of fine art."

In September 1999, the New York Court of Appeals, in a six to one decision, reversed. The Court of Appeals held that ACAL section 12.03, through its use of "unconditional language"—"no process" and

721. See N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney 1999). ACAL section 12.03 states:
No process of attachment, execution, sequestration, replevin, distress or any kind of seizure shall be served or levied upon any work of fine art while the same is enroute to or from, or while on exhibition or deposited by a nonresident exhibitor at any exhibition held under the auspices or supervision of any museum, college, university or other nonprofit art gallery, institution or organization within any city or county of this state for any cultural, educational, charitable or other purpose not conducted for profit to the exhibitor, nor shall such work of fine art be subject to attachment, seizure, levy or sale, for any cause whatever in the hands of the authorities of such exhibition or otherwise.

Id.


725. See id.

726. Id. at 6.

727. Id. at 5.

"or any kind of seizure"—prohibits the carrying out of an exception for criminal proceedings. 729

The court held that the legislative history of section 12.03 supported this view. 730 Conceding that the statute originally was enacted in reaction to a civil seizure of an artwork, 731 the court nevertheless held that "a comprehensive reading of the history reveals a consistent, unyielding legislative intent to promote artistic and cultural exchanges by creating a climate in New York [State] free from the threat of seizure by judicial process and by encouraging nonresidents to share their works of art with the public." 732 The court concluded: "The statute's 'no loopholes' approach compels our holding that Arts and Cultural Affairs Law § 12.03 is not limited to civil process." 733 The Court of Appeals also disagreed with the lower appellate court's holding that a grand jury subpoena does not amount to a "seizure" within the meaning of section 12.03. 734

Relying on "the United States Supreme Court's definition of 'seizure' as 'some meaningful interference with an individual's possessory interests in . . . property," 735 the court held that "in the context of this case the subpoena rises to the level of 'meaningful interference with [the lender's] possessory interest' for purposes of section 12.03. 736

729. Id. at 541. According to the court: "Indeed, there is no limiting language in section 12.03; the words are unqualified. Hence, on facial reading of the statute, we are confident that the words—unrestricted as they are—are not limited to civil process." Id.
730. See id.
731. See id. ("[T]he impetus for this statute was a civil lawsuit involving the civil seizure of artwork on display at a Buffalo museum . . . ").
732. Id.
733. Id. at 542.
734. See id. at 543.
735. Id. (quoting United States v. Jacobson, 466 U.S. 109, 113 (1983)). The court also relied on the dictionary definition of seizure to support its conclusion. The opinion states:

"Seizure," as used in everyday parlance, is understood to mean "the action or an act of seizing, or the fact of being seized; confiscation or forcible taking possession." "Seize" in turn is defined as "to put in possession" or "to take possession of (goods) in pursuance of a judicial order."

Id. (citing OXFORD ENGLISH DICTIONARY (2d ed. 1989)).
736. Id. (alteration in original). The court of appeals acknowledged that "a subpoena of this kind generally does not authorize the seizure, impoundment or other disruption in possession of property, and is not intended to deprive its custodian of control." Id. However, the court found it critical that [the paintings, which were scheduled to leave New York well over a year and a half ago, are still present in this State and an indictment has not been forthcoming. As a practical consequence of the subpoena, the Museum has been and would continue to be precluded indefinitely from returning the paintings to the Leopold Foundation. We conclude that the subpoena here has interfered
The court of appeals's decision, based upon both the language and legislative history of section 12.03, cannot be faulted as unreasonable. As the lower appellate court and the sole dissenting judge in this court pointed out, however, an emphasis on other language of the statute and other parts of legislative history of section 12.03 yields a contrary conclusion.737

The New York Court of Appeals's decision, however, did not end the Schiele saga. Despite being freed from the restraints of the grand jury subpoena, one of the paintings still could not be returned to Austria.738

On the very day that the court of appeals issued its decision, Mary Jo White, the U.S. Attorney for the Southern District of New York, stepped into the picture. In conjunction with the U.S. Customs Service, she filed a federal civil action seeking the forfeiture of Portrait of Wally, one of the two Schiele paintings.739 That evening,

significantly with the Leopold Foundation's possessory interests in the paintings by compelling their indefinite detention in New York, and thus effectuating a seizure.

Id. at 547 (Smith, J., dissenting). As the dissenting judge aptly explained: Significantly, at one point in the statute, the term "seizure" is sandwiched between the words "attachment" and "levy," words which have no application in criminal law. The Legislature would not have placed a term with dual application in criminal and civil law between two exclusively civil terms if it intended its meaning to be both criminal and civil. . . . [T]he conclusion is inescapable; without any other criminally relevant terms in the statute, the term "seizure," which follows a listing of civil remedies, connotes civil seizures.

Id. (Smith, J., dissenting). As the dissenting judge pointed out, and the majority conceded, the impetus underlying the enactment of section 12.03 was a civil lawsuit, [filed in 1968, against] a well-known, out-of-State artist [whose loaned artwork to a Buffalo museum was seized through a prejudgment attachment]. Alarmèd at the circumstances under which the art was seized, the [New York] Legislature responded by mending a gap in the then-existing law that allowed local creditors to seize fine art exhibits under a host of provisional remedies. According to the complaint, the painting is subject to forfeiture pursuant to 18 U.S.C. § 545 and 19 U.S.C. § 159a(c) (1994) because there is probable cause to believe that the painting is stolen property under Austrian law that was imported into the United States in violation of law. See Amended Verified Complaint ¶¶ 8-11, United States v. Portrait of Wally, No. 99 Civ. 9940 (S.D.N.Y. filed Sept. 27, 1999) [hereinafter Portrait of Wally Amended Complaint]. The U.S. Attorney did not make a forfeiture claim against Dead City III, the other Schiele painting, since the evidence that this painting was stolen art is not as strong.

737. See id. at 547 (Smith, J., dissenting).


739. See Complaint, United States v. Portrait of Wally, No. 99 Civ. 9940 (S.D.N.Y. filed Sept. 21, 1999) [hereinafter Portrait of Wally Complaint]. According to the complaint, the painting is subject to forfeiture pursuant to 18 U.S.C. § 545 and 19 U.S.C. § 159a(c) (1994) because there is probable cause to believe that the painting is stolen property under Austrian law that was imported into the United States in violation of law. See Amended Verified Complaint ¶¶ 8-11, United States v. Portrait of Wally, No. 99 Civ. 9940 (S.D.N.Y. filed Sept. 27, 1999) [hereinafter Portrait of Wally Amended Complaint].
the U.S. Attorney obtained a federal seizure warrant preventing the painting from leaving the United States.\textsuperscript{740} The warrant was obtained based upon a finding of "probable cause to believe that the Defendant in rem's stolen property [was] imported and introduced into the United States contrary to law."\textsuperscript{741} A few days later, with the painting still in New York, the Bondi heirs filed a federal lawsuit seeking a declaratory judgment that \textit{Portrait of Wally} belonged to them.\textsuperscript{742}

The Schiele saga continues.

D. Warin v. Wildenstein\textsuperscript{743}

In July 1999, a new Nazi-stolen artwork case was filed in the United States.\textsuperscript{744} The case involves rare manuscripts, and the parties are well-known personalities in the art world.\textsuperscript{745}

The case involves eight rare Christian prayer books, valued at approximately $15 million, which allegedly belonged to Alphonse Kann, a renowned Jewish art collector in France.\textsuperscript{746} The prayer books, known as \textit{Book of Hours}, dating from the fifteenth through seventeenth centuries, are now in the possession of Wildenstein & Co., an international art gallery, which "has long been a legend in

\textsuperscript{740} See Seizure Warrant No. 99 MAG 1668, United States \textit{v. Portrait of Wally}, No. 99 Civ. 9940 (S.D.N.Y. filed Sept. 21, 1999) ("The move came hours after a state court said the painting could go back."); see also Holland, supra note 738.


\textsuperscript{746} See Warin \textit{Complaint}, supra note 743, ¶ 29. The prayer books are written in parchment, are hand-lettered, and contain elaborately-designed color illustrations of religious figures. See id. They were commissioned by wealthy European families during the Middle Ages. See id. ¶ 43; see also Arena, supra note 745, at 8.
the art world for holding in stock greater masterpieces than any other gallery.\footnote{Barker, supra note 745, at 50. The Wildensteins' collection of art holdings is estimated to be worth $5 billion. See Arena, supra note 745, at 8.}

The lawsuit, filed in New York state court, alleges that the manuscripts were part of Kann's collection of 1200 artworks, stolen by the Nazis from his villa on the outskirts of Paris in 1940 after Kann fled from France to England.\footnote{See Warin Complaint, supra note 743, ¶ 32. After the war, Kann remained in London, and died in 1948. See id. ¶ 7.}

Plaintiffs are Kann's heirs: Francis Warin, the surviving son of Kann's nephew, and En Memoire D'Alphonse Kann, a French association comprised of Kann's other heirs, beneficiaries, and descendants.\footnote{See id. ¶¶ 11-14.}

The complaint alleges that the manuscripts reappeared at Wildenstein & Co. in 1996 (bearing a Nazi inventory marking "ka" and a number), indicating that they were from the Kann collection.\footnote{See id. ¶ 35. The designation "ka" stands for "Kann, Alphonse." One of the eight manuscripts has since been sold by Wildenstein & Co., with the other seven still in the gallery's collection. See id. ¶¶ 38-39; Bensinger, supra note 745, at B2.}

The defendants, 81-year-old Daniel Wildenstein and his two sons, Alec and Guy, maintain that the manuscripts did not belong to Kann. Rather, the Wildensteins claim that the prayer books were part of the personal collection of Georges Wildenstein, their family patriarch, also Jewish, whose Paris art gallery likewise was looted by the Nazis.\footnote{See id. ¶ 35. The designation "ka" stands for "Kann, Alphonse." One of the eight manuscripts has since been sold by Wildenstein & Co., with the other seven still in the gallery's collection. See id. ¶¶ 38-39; Bensinger, supra note 745, at B2.}

The defendants asserted a claim that the Kann claim to the manuscripts is based upon a mixup committed by the Nazis after both families' collections were looted.\footnote{According to the New York Times, the Kann heirs were able to make their claims against Wildenstein & Co. for the manuscripts as a result of the work of Hector Feliciano, after publication of his book The Lost Museum. See Feliciano, supra note 654; see also Alan Riding, Stalking a Claim to Art the Nazis Looted, N.Y. TIMES, Sept. 3, 1997, at C12. Interestingly, in 1999, shortly before filing this action, the Wildensteins filed suit in France against Feliciano for defamation, claiming that in his book, Feliciano wrongfully accused the Wildenstein family of dealing in Nazi-stolen artwork during the war. The French trial court dismissed the lawsuit, and the Wildensteins are appealing that ruling. See Bensinger, supra note 745, at B2; see also U.S. Writer Wins Case of Slander, DAILY NEWS, June 24, 1999, at 10A, available in 1999 WL 19853039.}

\footnote{See Bensinger, supra note 645, at B2. While Alphonse Kann fled from France to England, George Wildenstein fled, in 1940, from France to the United States. See Arena, supra note 645, at 8.}

\footnote{See Arena, supra note 745, at 8.}
Wildensteins, the Nazis housed their family’s collection in the same building as the looted Kann collection, and marked the manuscripts that came from the Wildenstein collection with “ka” in error.\textsuperscript{753}

The case is presently proceeding through the pretrial process in New York state court.

\textbf{E. The Failure of Litigation}

The experience of taking the above-described stolen art cases to court shows that their litigation is prohibitively expensive. For this reason, two of the cases involving Nazi-stolen art have settled.\textsuperscript{754} The MOMA case is still ongoing, undoubtedly because it was first brought by the New York District Attorney, with far greater resources than the private plaintiffs in \textit{Goodman} and \textit{Rosenberg}, and is now being carried on by the U.S. Attorney. Therefore, the adversarial litigation system may not be the best method for resolving the claims involving Nazi-stolen art, unlike the situation for the other Holocaust-era claims.\textsuperscript{755}

\textsuperscript{753.} \textit{See id.} That article states:

“...The claims of the Alphonse Kann heirs are groundless. The manuscripts in question were lawfully in the possession of the Wildenstein family at the time they were looted from the Wildensteins by the Nazis.” The attribution of ownership to Kann, he added, “was a mistake originally made by the Nazis and subsequently compounded by Allied authorities.”\textsuperscript{Id.} (quoting Guy Wilderstein).

\textsuperscript{754.} \textit{See Henry, supra note 688, at 3.} According to Thomas Kline, attorney for the plaintiffs in \textit{Goodman v. Searle}, “I am almost at the point where I would say that if the art is worth less than $3 million, give up.”\textsuperscript{Id.} (quoting Thomas Kline). In the \textit{Goodman} litigation, “[t]he costs of the case were prohibitive, and the [plaintiffs] once resorted to placing an ad in the Anglo-Jewish press asking for donations for a legal defense fund.”\textsuperscript{Id.; see also Marilyn Henry, \textit{Recovering Looting Art: A Rich Man’s Game}, \textit{Jerusalem Post}, Apr. 3, 1998, at 17 (discussing costs of litigating the \textit{Goodman} case); Varadarajan, \textit{supra} note 697, at 11.} In the \textit{Rosenberg} case, plaintiffs were also unhappy to have been forced to litigate the matter. “[Plaintiff] Elaine Rosenberg . . . said: ‘There is no justification for the Seattle Art Museum forcing the Rosenberg family to incur the expense and delay of bringing a lawsuit.’”\textsuperscript{Id.}

\textsuperscript{755.} \textit{See Dobrzynski, supra note 661, at E1.} According to Ronald S. Lauder, chairman of the Museum of Modern Art and head of World Jewish Congress’s Commission for Art Recovery: “If we treat each case—and there’ll be hundreds—as front page news, with lawyers and seizures, we’ll never succeed in getting this moving in the right direction.”\textsuperscript{See id.} at E6 (quoting Ronald Lauder).

In February 2000, a dispute involving the painting \textit{Madonna and Child in a Landscape}, painted by the sixteenth-century German Renaissance master Lucas Cranach the Elder, settled without litigation. See James Rosen & Tom Hamburger, \textit{Sisters Lay Claim to N.C. Museum as Nazi Loot, NEWS & OBSERVER} (Raleigh, N.C.), Nov. 7, 1999, at A1, \textit{available in} 1999 WL 2776644. The painting, valued at as much as $750,000, is one of the most prized works in the North Carolina Museum of Art, located in Raleigh, North Carolina. \textit{See id.} In November 1999, the painting was claimed by two elderly sisters from Austria. \textit{See
Since the issue arose, various proposals have been made on how to best handle these claims outside the litigation process.

According to both parties in the Goodman v. Searle litigation:

[T]he best approach to these complex issues would be a formal mechanism for mediation or arbitration, balancing the interests of legitimate claimants, innocent owners, and the public that most benefits if those works now in museums can remain there. Ideally, negotiators could draw on a stash of public and private money to compensate legitimate claimants.\(^7\)

This solution, however, may not be practicable. "The idea of a 'universal solution' involving a pool of money that would be used to pay claimants, like the one that Swiss banks recently agreed to establish, seems attractive theoretically. But it runs into problems because there is no comparable single source of money for an art fund."\(^7\)

To date, the community of museums, galleries, and art dealers seems unwilling to create such a fund. Instead, the professional art world leaves each defendant who unluckily ends up with a Nazi-stolen artwork to fend for itself. This practice continues despite the lack of communal responsibility within the art world after World War II by turning a blind eye towards art that suddenly appeared in the marketplace with a suspicious provenance.\(^7\)

\(^{id.}\) The painting was stolen from the sisters' great-uncle in Austria by the Gestapo, and then wound its way from European art dealers to dealers in New York, New York, then to a wealthy California couple and, eventually, to the North Carolina museum, which acquired the painting in 1984. \(^{See id.}\) After investigating the provenance of the painting, the museum decided that it rightfully belonged to the sisters. \(^{See Emily Yellin, North Carolina Art Museum Says It Will Return Painting Tied to Nazi Theft, N.Y. TIMES, Feb. 6, 2000, at 22.}\) 756. Rosenbaum, Nazi Loot Claims, supra note 659, at 14 (discussing a proposal made by Ralph Lerner, one of defendant Searle's attorneys and "seconded by his adversary, Mr. [Simon] Goodman"). "Winner-take-all litigation, only cost-effective for the most expensive art, is 'a terrible waste of money, no matter how it comes out,' observed Mr. Goodman." \(^{Id.; see also Dobrzynski, Loot-Holders Learn that Honesty Can be Tricky, supra note 702, at G3}\) "It might be in the interest of the art community—auction houses, dealers, museums—to contribute to the solution.' They could justify 'communal reasons' for their participation, he argues, perhaps the way industry groups sometimes pay into a fund to settle class-action claims." \(^{Id.}\) (quoting Ori Soltes, former director of the Klutznick Jewish National Museum in Washington, D.C., which originated the HARP project).

757. Dobrzynksi, No Easy Route to Discovering Nazi Plunder, supra note 702, at 6.

758. \(^{See Dobrzynski, Loot-Holders Learn that Honesty can be Tricky, supra note 702, at G3.}\) "When the idea of levying a tax on dealers and auction houses, or their transactions, has come up at symposiums and conferences, it has not won resounding support from the art trade, with few people in the business feeling a responsibility for what happened in the war." \(^{Id.}\)
Another proposal, issued by the Task Force on the Spoliation of Art During the Nazi/World War II Era,\(^7\) created by the Association of Art Museum Directors ("AAMD"), has been to issue guidelines to museums to expedite both discovery and handling of Nazi-stolen art.\(^6\) However, the AAMD guidelines have been criticized as vague,\(^6\) and so far have been unsuccessful in either uncovering any artwork or returning disputed works to their owners.\(^7\)

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> The Association of Art Museum Directors recognizes and deplores the systematic unlawful confiscation of art that was one of the many horrors of the Holocaust and World War II. The Association is committed to implementing a mechanism for coordinating full access to the newly available documentation on this wide-scale confiscation of art. In keeping the AAMD's Code of Ethics, the Association reaffirms the commitment of its members to weigh, promptly and thoroughly, claims of title to specific works.

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760. See Rosenbaum, Nazi Loot Claims, supra note 659, at 14; see also Patricia Failing, Suit to Fit, ARTNEWS, Oct. 11, 1998, at 56, available in 1998 WL 19742869.


761. See Rosenbaum, Nazi Loot Claims, supra note 659, at 14. For instance, for guidelines D2 and E2, no guidance is given as to what constitutes a "legitimate" claim. See AAMD Task Force Report, supra note 760, Part II, Guidelines D.2 & E.2. The suggestion to museums to "offer to resolve" the legitimate claim in "an equitable, appropriate, and mutually agreeable manner" is meaningless, and provides no specifics as to what a museum should do when faced with a claim that it possesses art stolen during World War II. See id.

These guidelines, and the creation of a Museum Task Force, appear to be more a public relations exercise, rather than a real attempt to deal with the problem. Manhattan District Attorney Robert Morgenthau appears to agree that the Task Force will have a minimal impact. See Walter V. Robinson, Judge Rejects Seizure of Disputed Paintings from a N.Y. Museum, BOSTON GLOBE, May 14, 1998, at A4. Referring to his case against MOMA, Morgenthau stated: "I am pleased to learn that 53 years after the end of World War II, museum directors have established a task force to address the question of looted art. Would they have done so if it had not been for our investigation?" Id.; see also Walter V. Robinson, Judge Rejects Seizure of Disputed Paintings from a N.Y. Museum; DA Rebuffed on Art Nazis May Have Looted, BOSTON GLOBE, May 14, 1998, at A4.

For additional discussion and critique of the AAMD guidelines, see Rosenbaum, Will Museums in U.S. Purge Nazi-Tainted Art?, supra note 659, at 37.

762. See Rosenbaum, Nazi Loot Claims, supra note 659, at 14. The AAMD claims credit, however, for the return of Matisse's Odalisque to its rightful owners. See Lowe, supra note 697 ("The Seattle Art Museum did the right thing. They followed the guidelines set out for
In late 1998, in reaction to the *Schiele* case, a proposal began circulating in New York that would change existing New York law to limit the time during which art theft victims could recover stolen objects.\footnote{63} Presently, under New York's "demand and refusal rule," an art theft victim does not have to take action until the victim locates the stolen art object.\footnote{64} A three-year statute of limitations begins to run when the victim's demand to return the stolen object is refused.\footnote{65} Under the proposal, a victim of an artwork theft would have, in all instances, six years to file suit in New York to recover the theft.\footnote{66} The victim must also register the theft with the Art Loss Register ("ALR"), a privately-owned, for-profit directory database of 50,000 stolen and missing artworks.\footnote{67} Failure by a victim to register the stolen artwork with ALR could immunize a good faith purchaser from suit.\footnote{68} Purchasers would also be required to check with ALR before their purchase to show their "due diligence" as a good faith buyer.\footnote{69} Holocaust victims would be allowed more time—ten years, according to some—to make claims, or be forever cut off from claiming looted art.\footnote{70}

Similar criticisms can be made for the so-called Washington Principles, an 11-point plan created at the December 1998 Conference on Holocaust Era Assets held in Washington D.C. and attended by delegates from 44 countries. \footnote{See Kempster, *supra* note 654, at F1.} The 11 guidelines are extremely vague, "call[ing] for such steps as opening museum archives to facilitate provenance research, publicly announcing unrestituted art, and devising a 'just and fair solution' for looted works whose owners cannot be identified." \footnote{Henry & Czernin, *supra* note 661, at 68.} Moreover, the Washington Principles are nonbinding. "They are moral commitments . . . how they are applied is up to governments, individual auction houses, galleries, and museums." \footnote{Id. (quoting J.D. Bindernagel, State Department senior coordinator of the Washington Conference).}


ALR, an international for-profit clearinghouse that began operations in 1991, represents a complex alliance of London insurance brokerages, such as Lloyd's of London; major auction houses, including Sotheby's, Christie's and Phillips; and IFAR [the International Foundation of Art Research, established by a group of attorneys, art historians, and scientists to study and combat fraudulent art practices]. . . . Dealers, collectors, museums, and other interested parties can register items with ALR in either New York or London or can search the register for a small fee. The service is free to all police authorities. \footnote{Id.} \footnote{768. See Hochfield, *supra* note 763, at 57.} \footnote{769. See id.} \footnote{770. See id.}
The proposal, remarkably similar to one made in a 1995 law review article written in the aftermath of *Solomon R. Guggenheim Foundation v. Lubell*,771 was opposed by the various groups dealing with Nazi-stolen art, including HARP and CAR.772 A major practical problem was how the register will make itself known. . . . [T]heft victims' "could protect their rights in New York State only by knowing about this law and knowing about this registry. But there's nothing in the proposal about how the registry is going to inform someone who lives in Kiev or Ankara or Beijing or New Delhi that if they don't register their stolen object, and it turns up in New York, they have no chance of reclaiming it."773

Finally, the private market may also offer a partial solution. In August 1998, the *Financial Times* reported that museums and galleries may soon be able to purchase insurance to cover losses due

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771. See 569 N.E.2d 426, 429 (N.Y. 1991) (adopting a "demand and refusal" rule for statute of limitations); see also Hawkins, supra note 661, at 89-94. For an additional discussion of that article, see infra note 777.

772. See Hochfield, supra note 763, at 57. The proposal was backed by Ashton Hawkins, general counsel to the Metropolitan Museum of Art, and Ronald S. Tauber, chairman of ALR. See id.

773. Hochfield, supra note 763, at 57 (quoting Constance Lowenthal, director of CAR). Another objection was "to the idea that a single database is adequate for research into Holocaust claims, which are usually vague. "There are hundreds of thousands of missing artworks of all sorts. . . . The great majority of them will never be recovered and claimed because they can't be identified." Id. (quoting Willi Korte, vice-chairman of HARP).

A partial solution, at least to the problem of informing buyers and sellers of art worldwide, is the creation of a database accessible to anyone in the world on the Internet. Already, such an online registry is being created in Germany. German museums would post descriptions of artworks with a suspected provenance at this online registry, and would list their entire collection of prewar artworks and cultural objects acquired after 1933. See Carol J. Williams, *Web Site to List Artworks Lost to the Nazis*, *L.A. Times*, Jan. 16, 2000, at A28. The Web site for the registry is <http://www.beutekunst.de>. The registry has a launch date of March 2000 and will make it possible for Holocaust survivors or their heirs to learn whether works stolen from their families may have found their way to museums in Germany. See id.

The Czech government is now also turning to the Internet as a solution to its problems in locating Nazi-stolen art. See *Government Draws List of Former Jewish Property*, *CZECH NEWS AGENCY*, Jan 12, 2000, *available in 2000 WL 6919746*. The article states:

Some 2,500 items of art from the state collections originate from the property confiscated by Nazis during World War II from the Czech Jewish community, according to a report by the government commission of victims of the Holocaust given to the cabinet today.

Commission head Deputy Premier Pavel Rychetsky said that the commission intended to publish the pictures of the items on the Internet. "If descendants of some of those families are found by chance . . . it is our will to return the property to its original owners," Rychetsky said.

Id. The article does not list a Web site.
to disputes over the rightful ownership of art. An insurance policy, to be offered by J&H Marsh & McLennan and underwritten by Lloyd's of London, will cover legal costs of defending lawsuits over so-called ‘defective title’ as well as losses if a judgment goes against the museum leading to the return of artwork. Coverage is available with limits up to $50 million.

While existing law in the United States may be favorable to the heirs of past owners of Nazi-stolen art by never giving good title to the present owners, even if they are entirely innocent (in contrast to some European systems), plaintiffs filing lawsuits in the United States find such suits to be expensive, slow, and often ineffective.

Because these are all individual suits, the cost spreading benefits of class action litigation are not available for these cases. Each plaintiff must bear the costs of their own suit. While the insurance policy offers a way to transfer these costs, it is not a substitute for a legal remedy that is available to all potential claimants at once.

The authors of the article recognize the limitations of the current legal framework and propose a solution that involves the creation of a confidential, computerized international art theft registry. This registry would allow former owners and purchasers to check the provenance of art before purchase. However, the proposal has not yet gained widespread acceptance.

The principle under English common law is based upon the adage in Latin: "Nemo dat quod non habet." This means that a thief cannot transfer good title, since the thief never had good title in the first place. As the authors of the article explain, "The tort of conversion is unique in that it permits a plaintiff [former owner] to recover property or money damages from a defendant [present good faith possessor] who is by definition innocent of any wrongdoing or of inflicting harm to the plaintiff."
claimant must bear the total amount of expenses and, unless the work of art is highly-prized, an attorney is unlikely to handle the case on a contingency basis.780

An alternative dispute resolution mechanism would be the best method of resolving future disputes of such claims.781 Also, something else is required. As put by one commentator: "The key to resolving all such disputes is goodwill. As Evan Maurer, director of the Minneapolis Institute, recently told the local press, 'There is no statute of limitations on doing the right thing.'"782

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780. See Smadar Shefi, The Treasures Were Returned to Their Owners—And Sold, HA’ARETZ (Israel), June 30, 1999, available in 1999 WL 17469079. The heirs of the past owners of the art are unlikely to be wealthy, and, therefore, unable to hire an attorney on a fee basis. As explained by a commentator:

It is reasonable to assume that many of the stolen works would be put up for sale if they were returned to their legal owners’ descendants. The families of the collectors who were robbed have lost the source of wealth that made this kind of collecting possible. This, by the way, is one reason for the paucity of claims filed by heirs—it is extremely costly to undertake legal proceedings against collectors, museums and government institutions that, unwittingly, are in possession of stolen property.

Id.

781. See Alan G. Artner, Ethics and Art Museums Struggle for Correct Response to Stolen Art Claims, CHI. TRIB., Aug. 16, 1998, at 6, available in 1998 WL 2888288. Both CAR and the AAMD “are in favor of mediation between claimants and museums once a legitimate instance arises.” Id. According to Constance Lowenthal of CAR:

[O]ne of the reasons we would like mediation to be considered is that then the people who are guiding the negotiations are really familiar with the constraints, the needs, the ethics, and the ways of the art world—which most judges are not. It is very specialized. And while many judges would love to have such a case, it’s almost always their first.

Id. James Wood, Director of the Art Institute of Chicago, agrees:

These cases are tremendously emotional. They often get tried in the press. When that happens, it introduces other aspects and positions harden. If either party really feels he could win [a lawsuit], mediation will not help. But most cases are pretty gray. And those are the kind of situations that can be resolved through mediation, skillfully applied. With a jury trial, who knows?

Id.

782. Rosenbaum, Nazi Loot Claims, supra note 659, at 14 (quoting Evan Maurer).
VI. SLAVE LABOR CLAIMS

A. Background

Between eight and ten million people were forced to work as slave laborers in factories in Germany and throughout occupied


According to the Nuremberg judgment, "[t]he German occupation authorities did succeed in forcing many of the inhabitants . . . to work for the German war effort, and in deporting at least 5,000,000 persons to Germany to serve German industry and agriculture." The Nurnberg Trial, 6 F.R.D. 69, 123 (1946). The Tribunal quotes Himmler as stating, "[W]e have 6-7 million foreigners in Germany." Id. at 124.

N.B. "Nürnberg" is the German spelling for the city. See RANDOMHOUSE UNABRIDGED DICTIONARY 1331 (2d ed. 1993). The F.R.D. is one of the only English-language texts where the German spelling of the city name is used. It is more commonly known as "Nuremberg," which is the English spelling and the one used throughout this article, except when citing to the F.R.D.

784. The term "slave" is a misnomer. As explained by Benjamin Ferencz, one of the American prosecutors at Nuremberg, in his incisive treatise:

The Jewish concentration camp workers were less than slaves. Slavemasters care for their human property and try to preserve it; it was the Nazi plan and intention that the Jews would be used up and then burned. The term "slave" is used in this [book] only because our vocabulary has no precise word to describe the lowly status of unpaid workers who are earmarked for destruction.


The Germans used the term "Zwangsarbeiter" (forced laborer) to describe their slave laborers. See Authors, supra note 783, at 14.

According to plaintiffs' attorney Deborah Sturman, the term "Zwangsarbeit" is a sanitized German term for forced labor. There were always clear distinctions in the manner the various slaves were treated. (Himmler issued clear orders detailing such minutiae as how many calories, blankets and hours of free time each class of "sub-humans" was to receive. So, for example, Ukraniens and Poles were to receive fewer calories and blankets than Czehs.) The most severe treatment was reserved for those to be annihilated through labor (Vernichtung durch Arbeit). Less severe treatment was afforded those who were to be treated as capital assets. But, there too distinctions were made. Distinguishing the groups of laborers . . . is necessary to . . . take[] into account the degree of the victims' suffering. In fact, more discreet distinctions could be made, for example, between those slaves (i) which were household maids and butlers (good treatment); (ii) who worked on farms (generally satisfactory treatment); (iii) who worked in industry (bad treatment); and (iv) those who were earmarked for extermination (deathly treatment)."

Letter from Deborah Sturman to Professor Michael Bazyler, supra note 359, at 3-4.

In the recent lawsuits against German companies, plaintiffs' lawyers have begun to distinguish between "slave laborers" and "forced laborers," defining the former as "concentration camp inmates earmarked for extermination" and the latter as "conquered
Europe during World War II. Historians estimate that approximately 700,000 of these are still alive today, with some estimates placing the number as high as 2.3 million slave labor survivors. An historical study in August 1999 based upon Nazi records discovered in newly-opened Soviet archives revealed the vast array of German companies that "profited from what has been

civilian population and prisoners of war." See, e.g., Class Action Complaint and Jury Demand ¶ 22, Rosenberg v. Continental AG, No. 99 CV 01892 (D.N.J. Apr. 26, 1999); Class Action Complaint and Jury Demand ¶ 13, Nittenberg v. BMW AG, No. 99 CV 0756 (D.N.J. Feb. 19, 1999). However, such a distinction was never adopted by the Nuremberg Tribunal. See The Nurnberg Trial, 6 P.R.D. at 123-26 (discussing slave labor policies of the Nazis). The Ferencz treatise likewise uses the terms "slave labor" and "forced labor" interchangeably. In the Swiss bank litigation, the same attorneys also did not make a distinction between the two terms. See discussion and notes infra Part III.A. (discussing federal class action lawsuits against the Swiss). The two recent court decisions in the Iwanowa and Degussal/Siemens lawsuits also used the terms interchangeably. See discussion and notes infra Part V.C. & D. (discussing lawsuits filed and dismissed to date).

For these reasons, this article will not distinguish between the two terms. Rather, the term "slave labor," adopted at Nuremberg, is used herein to describe the work of all those forced to toil for the Nazis. But see Letter from Deborah Sturman to Professor Michael Bazyler, supra note 359, at 3-4.

785. As explained by Miles Lerman, chairman of the Washington D.C. Memorial Council and a Holocaust survivor himself:

It was not coincidental that IG Farben or any other industrial complex in Germany settled themselves around Auschwitz-Birkenau. They were getting labour for 10 cents a day. We are interested not in the dollars and cents but the fact that it was by design. They were trying to utilise and benefit from every aspect of the prisoners. First, their labour, then they were gassed for their hair, their gold teeth and even their bones were crushed and used as fertiliser. Richard Wolfe, Putting a Price on the Holocaust, IRISH TIMES, Mar. 16, 1999, at 15, available in 1999 WL 14002124 (quoting Miles Lerman).

786. See Authors, supra note 783, at 14 (estimating 700,000 living); Roger Cohen, German Companies Set up Fund for Slave Laborers under Nazis, N.Y. TIMES, Feb. 17, 1999, at A1 (citing the figure of 1.6 million surviving slave laborers, with over 500,000 living in Poland alone, according to Michael Witti, German lawyer representing slave laborers); Fifth of Nazi-forced Laborers Still Alive, DESERET NEWS (Salt Lake City), Aug. 21, 1999, at A7 (discussing report issued by Nathan Associates, a Virginia-based economic consulting firm hired by plaintiffs' attorneys, estimating that about 2.3 million people who survived enslavement by the Nazis are still alive). But see id. (estimating that 100,000 to 200,000 slave laborers and about 600,000 ex-forced laborers are alive today and would qualify for any compensation).

In November 1998, the American television program Dateline NBC profiled the slave labor issue. For a transcript of the program, featuring interviews with former slave laborers living in the United States see Dateline: Just Rewards? German Companies that Used Jewish Slave Labor Being Sued Now for Damages (NBC television broadcast, Nov. 10, 1998), available in 1998 WL 2261035.

787. Since the Soviet Red Army liberated Auschwitz and many other German concentration camps, the Nazi records languished in Soviet archives until the breakup of the Soviet Union in 1991 and are only now becoming available to historians. See Douglas Davis, Documents Reveal Ford Was Part of the Auschwitz Industrial Complex (visited Aug. 22, 1999) <http://www.jta.org/aug99/22-ford.htm>. The new study was conducted by historians at the Auschwitz Museum in Poland, who pored over the Soviet archives for several years before revealing their findings. See id.
dubbed the ‘Holocaust bonanza.’ Over 400 German companies exploited the large pool of slave labor the Nazis made available to German private industry. Of the 400 companies, 92 companies used slave labor from Buchenwald, 57 from Mauthausen, 52 from Dachau, and 51 from Auschwitz.

While postwar West Germany paid reparations to some Jewish victims of Nazi persecution, slave laborers were specifically excluded from receiving payment. Former German slave laborers found themselves in a “Catch-22” type of situation: the German government claimed that it was not obligated to make payments to them, since the laborers worked during the war for private German industry; German industry, on the other hand, argued that any payments should come from government coffers, since the postwar German regime was the legal successor to the Third Reich. The


789. See LeBor, supra note 788, at 8. According to plaintiffs’ attorney Deborah Sturman, the number of companies which used slave labor exceeded 20,000. According to Ulrich Herbert, the foremost expert on the subject, there wasn’t a company in Germany with more than 10 employees which didn’t use slave or forced labor. There were also many with fewer than 10 employees which did. There were even numerous households with slave laborers as maids and butlers.

Letter from Deborah Sturman to Professor Michael Bazyler, supra note 359, at 4.

790. See id.; see also Davis, supra note 787. One of the companies discovered to have recruited slave laborers from Auschwitz was Ford Werke A.G., Ford Motor Company’s German subsidiary. For allegations and litigation against Ford, see discussion and notes infra Part VLC, D. (discussing the lawsuits filed and their dismissals, respectively).

791. See Traynor, supra note 783, at 19. Since the 1950s, Germany has paid approximately $70 billion in reparations. See id. But see Cohen, supra note 786, at A1 (citing figure of $80 billion); Roger Cohen, Talks on Holocaust Reparations Held, L.A. TIMES, Feb. 9, 1999, at A9 (citing figure of $60 billion). In addition, Germany “more recently . . . has paid DM1.5 bn into trust funds set up in eastern Europe, in Moscow, Minsk, Kiev and Warsaw for Nazi victims, including those forced to work for German industry.” Authors, supra note 783, at 14. For a discussion of German reparation payments, see generally CHRISTIAN PROSS, PAYING FOR THE PAST: THE STRUGGLE OVER REPARATIONS FOR SURVIVING VICTIMS OF THE NAZI TERROR (Belinda Cooper trans., 1998).

No German industrialist was brought to trial at Nuremberg for use of slave labor. See Mathew Lippman, War Crimes Trials of German Industrialists: The “Other Schindlers,” 9 TEMPLE INT’L & COMP. L.J. 173, 266 (1995) (footnote omitted). After Nuremberg, the United States initiated prosecutions of representatives of three German firms: Flick, Farben, and Krupp. See id. Found guilty, the corporate defendants, however, served short prison terms. See id. By the early 1950s, they were released and allowed to return to lead their firms in postwar West Germany. See id. As summarized by one recent study: “The [German] industrialists left prison and almost immediately regained their place at the pinnacle of power.” Id.
German firms maintained that the Nazi regime forced them to use slave laborers to support the German wartime economy during World War II.792

B. The German Fund Proposal and Fear of American Litigation

In October 1998, the new center-left Chancellor of Germany, Gerhard Schroeder, reversed his predecessor, Helmut Kohl,793 and announced the creation of a fund to compensate former slave laborers and others not covered under existing German reparation law.794 By that time, however, plaintiffs' lawyers in the Swiss bank litigation, buoyed by the success of their $1.25 billion settlement, had already begun filing suits in American courts against various German—and even American—companies seeking damages for their use of slave labor during World War II.795 Even announcements by

792. See Germany to Compensate Nazi Slave Laborers, 'Forgotten Victims', L.A. TIMES, Oct. 21, 1998, at A8. "Since World War II, Germany has paid billions in compensation to Holocaust victims: Yet it rejected claims of back wages for slave laborers, saying the companies involved were responsible . . . . Most German firms, though, argued that the government, as legal successor to the Nazi regime, should be accountable." Id.

According to Bernard Graef, head of Volkswagen archives, "From a legal position the crimes of the Nazis were a state crime, and the issue of slave labour compensation must be addressed to the [German] government." Adam Lebor, Holocaust Slaves Set to Gain Compensation, INDEPENDENT (London), Aug. 22, 1998, at 15.


794. See Traynor, supra note 783, at 19. The new chancellor appointed his chief-of-staff, Bodo Hombach, to head a joint German government-industry group to work out the mechanics of such a fund. See id. In July 1999, Hombach was replaced by Otto Graf Lambsdorff, a highly-respected member of the opposition, former economics minister and a count. See Andrew McCathie Berlin, Nazi Ghost Still Not Banished, AUSTL. FIN. REV., July 30, 1999, at 37, available in 1999 WL 19335541.

In November 1998, some former slave laborers living in the United States announced that they would fight plans to set up the compensation group, desiring instead to "settle their claims individually or on a class-action basis" in U.S. courts. German Ex-slave Workers Plan Action, supra note 783.

795. According to Michael Hausfeld, a lead attorney in the Holocaust litigation cases, "The Swiss banks settlement dramatically changed the landscape of restitution on behalf of victims from all other sources" . . . . Among other companies "responsible for wrongly appropriating, inverting or outright stealing assets from the victims of the Holocaust," Mr. Hausfeld said, there is a sense that "if the Swiss banks were beaten, there really is no hope for them."

some German companies in late 1998 that they would set up commissions to investigate their role during the Nazi era\textsuperscript{796} and voluntarily make payments to their former slave laborers still alive.\textsuperscript{797} did not dissuade "slave labor" plaintiffs and their lawyers from continuing their lawsuits.\textsuperscript{798}

... the campaign by Jewish organizations for restitution has had a rude awakening. Far from dying down, the number of European banks, insurance companies and industrial companies that are under pressure to make similar settlements is snowballing.

According to Edward Fagan, [another lead attorney in Holocaust litigation]: "We all did a disservice to survivors when we allowed the public perception to be focused towards just looking at the Swiss banks as the Nazi banks. They weren't the only ones, and the origin was back in Germany". . . .

According to Mr. Fagan, many of his clients want "another Nuremberg," preferably with a German bank or industrial company.

... Authors, supra note 783, at 14.

\textsuperscript{796}. See Barry Meier, Chronicles of Collaboration: Historians Are in Demand to Study Corporate Ties to Nazis, N.Y. TIMES, Feb. 18, 1999, at C1. A favorite method taken up by German and American companies to counter the class action litigation and shore up their public image, in the wake of accusations of Nazi-era dealings, has been to "try to come clean" by hiring prominent academics to research the companies' role during the Hitler era and issue a report of their findings. See id. As reported by the New York Times, "the lawsuits have also created a mini-boom for...[World War II-era] historians and research [scholars]."\textsuperscript{797}

The Swiss and American companies are emulating a strategy invented in Switzerland. In 1996, the Swiss government, to counter the widespread bashing of the Swiss (and, to its credit, to face up to its history), set up "the Independent Commission of Experts, an independent group of internationally recognized historians chaired by Professor Francois Bergier . . . to examine Switzerland's relationship with Nazi Germany." Settlement Agreement, supra note 265, at 1. The Bergier Commission then began issuing highly respected--and critical--reports of the Swiss role during World War II. See Marilyn Henry, Swiss Helped Nazis by Shutting Borders to Fleeing Jews, JERUSALEM POST, Dec. 12, 1999, at 1. This method countered criticisms that the Swiss are trying to hide their dealings with the Nazis. See id.

\textsuperscript{797}. See Advertisement: Volkswagen AG Humanitarian Fund for Granting Aid to Former Forced Laborers, L.A. TIMES, Dec. 4, 1998, at A11 (publicizing the fund in a full-page VW ad); Carol J. Williams, VW Setting up Fund to Pay Nazi-era Slave Laborers, L.A. TIMES, Sept. 12, 1998, at A6 (announcing a $15 million private relief fund for their former slave laborers by Volkswagen); IG Farben to Set up Holocaust Fund, WALL ST. J., Aug. 19, 1999, at A10 (announcing a $1.6 million fund to compensate wartime slave laborers by a notorious German chemicals concern that worked thousands to death in Nazi camps and manufactured death gas). A spokesperson for the IG Farben survivors group called the amount "laughably small" and demanded that the company, ordered by the Allies to be liquidated after the war, complete its liquidation and distribute to survivors $11 million in assets that it still holds. See Survivors Want Gas Co. Liquidated, AP ONLINE, Aug. 16, 1999, available in 1999 WL 22034473.

\textsuperscript{798}. As explained incisively in the Los Angeles Times:

But as young Germans seek to move out of the war's shadows and establish a "post-postwar" society governed from Berlin, a rash of lawsuits demanding compensation for tens of thousands of wartime slave laborers is undermining the argument that Germans have earned the right to move on. The captains of the industry have not even paid their financial debt to wartime victims, argue advocates for the claimants, much less reached the end of moral atonement.
As reported by the *Economist*:

Now that Switzerland's two largest banks have settled . . . the finger is pointing at German and Austrian firms that benefitted from slave labor during the second world war. Since the $1.25 billion Swiss settlement earlier this year, the number of lawsuits against such companies has snowballed . . . The list of firms now accused reads like a who's who of corporate Germany: it includes Siemens, BMW, Volkswagen, Daimler-Benz, MAN and Phillip Holzmann, as well as two Austrian groups, Voest and Steyr-Daimler-Puch. The number of targeted firms may soon reach 100.799

Hoping to stop the litigation in its tracks, the German government and industry announced in February 1999 the establishment of a $1.7 billion fund to compensate slave laborers.800 German Chancellor Gerhard Schroeder made it obvious that the fund was being created as a means to shortcut lawsuits filed against German industry in the United States.801 Such admission is astounding because it

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800. See *Cohen*, supra note 786, at A1. The so-called “Remembrance, Responsibility and the Future Fund” is being set up “to answer the ‘moral responsibility of German firms with regard to such issues as forced laborers, Aryanization and other injustices during the Nazi regime.’” Id. (quoting German Prime Minister Gerhard Schroeder). In February 1999, at the time of the announcement, Schroeder predicted that payments to slave laborers would begin by September 1, 1999, exactly sixty years after Germany attacked Poland, marking the start of World War II. See id. The September 1 deadline was not met. See *infra* notes 811-12 and accompanying text.

Moreover, according to a German lawyer representing the slave laborers, the estimated 1.6 million slave labor survivors of World War II (with more than 500,000 living in Poland) would receive only $1000 each if payments were divided equally. See *Cohen*, supra note 786, at A1 (quoting attorney Michael Witti). Ironically, the longer the issue of slave labor compensation is perpetuated, the fewer survivors will be left, with more monies going to each still-living survivor. See id.

801. See *Cohen*, supra note 786, at A1. In the February 1999 announcement, Chancellor Schroeder explicidy stated that the fund was being established “to counter lawsuits, particularly class action suits, and to remove the basis of the campaign being led against
explicitly demonstrates the strength of the American system of justice.

Fear of American litigation led the Germans to capitulate and agree to pay the slave laborers. Until the lawsuits were filed in the United States, both German industry and the German government were able to avoid dealing with the issue.

Under the plan announced by Chancellor Schroeder in February 1999, the slave labor fund would have been financed entirely by German industry, with twelve prominent German companies originally agreeing to participate. The German government would not be making any contribution to the fund, but was expected to establish a state “German Federal Fund” in the future.

German government and industry then began negotiations with various Jewish organizations and plaintiffs’ attorneys in the United States on the details of the fund. The first meeting was held at the State Department, and chaired by then-Undersecretary of State Stuart Eizenstat, the Clinton Administration’s “point man” on Holocaust issues. The major obstacle, like in the negotiations with
the Swiss banks, was money. Both plaintiffs' attorneys, representing
the uncompensated slave laborers, and American Jewish leaders
unanimously felt that the $1.7 billion offered by the Germans was
woefully inadequate. 806

In June 1999, as the German companies scheduled a news
conference in Berlin on the eve of the second negotiating session to
be held in Germany and to announce some specifics about the fund
that they named “Remembrance, Responsibility and the Future,”
negotiations almost broke down. 807 While this announcement was
positively described by some as “the first comprehensive proposal
raised on slave labor issues by German firms since lawsuits on these
matters were first filed,” 808 the claimants’ representatives and
Jewish leaders severely criticized this unilateral move by the
Germans. 809 In fact, this unilateral announcement made in the

806. See id. “The sticking point really is the numbers . . . . Although the talks have been
    going on since February [1999], the sides are some way apart.” Id. (quoting Alissa Kaplan,
    Jewish Claims Conference spokeswoman).
807. See Henry Weinstein, Firms Offer Fund for WWII Slave Labor, L.A. TIMES, June 11,
    1999, at A1. Claimants and their representatives also criticized the unilateral nature of this
    public announcement by the German firms. See id. According to Michael Hausfeld, one of the
    claimants’ attorneys:

    We were led to believe . . . that we were engaging in a process where there would
    be working groups and a confidential exchange of information and ideas, leading
    each side to assess the viability of a workable resolution . . . . Instead they
    unilaterally . . . announce a program that is totally unacceptable in tone and

    terms.  
    Id. at A35. Hausfeld’s co-counsel, Melvyn Weiss, stated that “plaintiffs’ lawyers would
    continue to press the lawsuits.” Id. Weiss stated that he “would participate in no further
    meetings until the German companies agreed to engage in what he called meaningful
    negotiations.” Id.

    American Jewish leaders also “expressed dismay about the German plan.” Id. Stuart
    Eizenstat “told representatives of the German companies . . . . that their move had not been
    helpful to the process and that aspects of the [fund] proposal were unacceptable.” Id.
808. Id. at A35.
809. See id. Four major criticisms were leveled at the German companies’ June 1999
    proposal. First, former slave laborers, their representatives, and Jewish leaders all agreed
    that $1.7 billion, which appeared to be the amount the German consortium was offering, did
    not even come close to being considered adequate compensation. See id. As eloquently put by
    Professor Burt Neuborne, one of plaintiffs’ counsel, “[t]he human heart simply isn’t big
    enough to provide enough money for what happened to these people.” Id. (quoting Burt
    Neuborne). Melvyn Weiss, another lead counsel for the plaintiffs, stated, “[w]e’re not going
to buy into a prepackaged plan that’s going to be shoved down the victims’ throats. Who are
they kidding—$1.7 billion?” German Companies Withhold Payments, SUN-SENTINEL (Ft.

    Second, the claimants also found it ironic that the German companies were calling
their establishment of the fund a voluntary “humanitarian” act while insisting, at the same
time, that “no payments would be made until they got assurances that the lawsuits [in the
United States] would be dismissed.” Weinstein, supra note 807, at A35. According to Professor
Neuborne, “[c]alling this charity is absurd.” Id. (quoting Burt Neuborne). Elan Steinberg, of
midst of intense negotiations very much resembled the tactic of the Swiss banks. In July 1998, in the midst of their negotiations with the same representatives of the Holocaust victims, the banks publicly announced their “final offer” of $600 million that they later abandoned.810

By September 1, 1999, the talks were at an impasse. While the German government and German industry had hoped to begin making payments to former slave laborers by that date, which marked the sixtieth anniversary of the start of World War II, negotiations adjourned in late August 1999 without a settlement.811 Failing to meet the September 1 deadline, Germany then set for itself a “millennium deadline,” hoping to reach a comprehensive settlement and start making payments to the elderly survivors in the twentieth century.812

the World Jewish Congress, stated: “This is not a charitable contribution. It is an obligation. This is compensation for material wrongs inflicted.” Id. (quoting Elan Steinberg).

Third, the German proposal called for the size of the payment to each claimant to be “pegged to pension levels in the countries where a survivor lives-means that individuals in the United States and Canada would get considerably more than people in Eastern Europe and Russia.” Id. According to Rabbi Marvin Hier, head of the Simon Wiesenthal Center in Los Angeles, “[t]he question is how much did people suffer,’ not whether they live in the United States or Russia.” Id. (quoting Rabbi Marvin Hier).

Fourth, to qualify for the fund, “an individual would have [to have worked as] a forced laborer [for] at least six months.” Id. The World Jewish Congress’s Elan Steinberg called this requirement “macabre,” “inequitable,” and “clearly unacceptable.” Id.


810. See discussion and notes supra Part III. (discussing litigation against the Swiss banks).

811. See Edmund L. Andrews, Germany: Slave Talks Adjourn, N.Y. TIMES, Aug. 27, 1999, at A6; see also Cohen, supra note 803, at A11. The article states:

   Negotiations over compensating slave laborers from the Nazi era were adjourned in Bonn with lawyers representing survivors and German industrial companies still far apart. American class-action lawyers are demanding up to $20 billion, more than 10 times what the companies have proposed. The [German] Government had hoped to reach a full agreement by Sept. 1, but many participants said a deal is still months away.

Id.

812. But see Roger Cohen, Germany: Schroder on Slave Talks, N.Y. TIMES, Sept. 8, 1999, at A11. That article states:

   After a meeting with leading German industrialists, Chancellor Gerhard Schroder said financial claims from American and German lawyers representing forced laborers exploited by the Nazis were “completely unrealistic.” His remarks
While no payments were made to Holocaust survivors in 1999, the parties were able to reach a “pre-end of millenium” agreement of some sort: On December 17, 1999, Germany and some participating German corporations agreed to settle the slave labor claims for 10 billion German marks, or approximately $5.2 billion.813

Id. 813. See Norman Kempster, Agreement Reached on Nazi Slave Reparations, L.A. TIMES, Dec. 15, 1999, at A1; Carol J. Williams, Germany Pledges $5.2 Billion for Slave Laborers, L.A. TIMES, Dec. 18, 1999, at A1. The settlement was for 10 billion German (Deutsche) marks [DM 10 billion], but the U.S. dollar figure will fluctuate depending on the relative values of the two currencies.

The settlement was a classic compromise, akin to the result achieved in the Swiss banks settlement negotiations. See discussion and notes supra Part III.C.,D. (discussing the Swiss banks settlement). Initially, the German government and participating industry doubled their offer from the original $1.7 billion (to be funded exclusively by German industry) to $3.3 billion. The figure was then raised to $4.2 billion, with German industry pledging $2.6 billion and the German government offering to contribute $1.6 billion. See Kempster, supra, at A1. The German government then began soliciting other German corporations to join the effort and pledge to make contributions. When it became clear that additional contributions from German industry were not forthcoming, the German government “sweetened their offer by $1 billion” for a total matching contribution of $2.6 billion. Kempster, supra, at A13. The claimants’ representatives, including the class action attorneys, then lowered their demands and accepted the offer. See id. As the agreement now stands, the German government and participating German corporations will each contribute five billion German marks, or $2.6 billion to the settlement. See Williams, supra, at A5.

For a statement by President Clinton praising the settlement, see William J. Clinton, Remarks on Action by Germany to Compensate Nazi Regime Victims of Forced Labor and an Exchange with Reporters, 35 WKLY. COMP. PRES. Docs., Dec. 20, 1999, available in 1999 WL 12655371. The $5.2 billion settlement “satisfies the requirements of those representing the victims. We close the 20th century with an extraordinary achievement that will bring an added measure of material and moral justice to the victims of this century's most terrible crime. It will help us start a new millennium on higher ground.” Id.

For a criticism of the settlement, see Tom Hayden, Ex-slave Laborers Deserve Far Better; Holocaust: Rich Firms Get Good Press with Token Payments, but What about the Victims?, L.A. TIMES, Dec. 30, 1999, at B11. The article states:

Survivors of slave labor under the Nazis will be awarded only $790 each for back pay and a lump sum of $7,894 each in recognition of the 55-year delay. Those who were exploited as “forced labor,” such as Nazi prisoners working in agriculture, will get a mere $5,000 each. Why is this agreement being hailed by the Clinton administration as a historic milestone when, in any other context, it would be dismissed as a slap on the wrist of the bully?

Id. (providing an editorial by California state Senator Tom Hayden, author of slave labor compensation law in California).

It appears, however, that the $5.2 billion settlement is the best that could be accomplished at this time. The stark reality is that Holocaust survivors are dying at the rate of 10% a year, and so further delays would only reduce the number of survivors who could obtain some measure of justice during their lifetime. See id. As explained in an editorial:

Critics of the deal scoff with reason at this attempt to put a price tag on
As of March 1, 2000, however, the parties were still negotiating the details of the $5.2 billion settlement, including the critical issue of distribution. Moreover, while the moneys have been pledged, “moral restitution” for Nazi crimes. Nobody can pretend that the paltry sum of $7,500 per slave laborer, or any dollar amount for that matter, could ever right the heinous historical crimes involved. But, however unsatisfactory, monetary damages are accorded an important role, sometimes a symbolic one, in our jurisprudence as a means of assigning, and accepting responsibility.

For those aged... surviving slave laborers, the amount of the checks will surely not be as significant as their symbolic meaning, as a statement from the world and from the German people that what was done to these workers was wrong and has not been forgotten.


Otto Graf Lambsdorff, the German government representative to the slave labor negotiations, testifying before the U.S. Congress on the settlement, was straightforward. He stated: “Believe me, I wish I had greater funds available for distribution. But 10 million marks is what we got and what was agreed upon by all the participating parties after long and arduous negotiations.” Hearing of the Committee on Banking and Financial Services of the U.S. House of Representatives, 106th Cong. 6 (2000) (statement of Dr. Otto Graf Lambsdorff, Special Representative of the German Chancellor for the Foundation “Remembrance, Responsibility, and the Future”) [hereinafter Statement of Dr. Otto Graf Lambsdorff].

On February 9, 2000, Lambsdorff stressed that the settlement terms still need to be completed. He stated: “Now, details need to be worked out, compromises have to be found, comprehensive legislation needs to be finalized and passed by the German Bundestag [Parliament], since half of the funds are being made available by the German Government with taxpayers’ money.” Statement of Dr. Otto Graf Lambsdorff, supra note 813, at 4.

Deputy Treasury Secretary Eizenstat, testifying the same day, agreed. He stated:

I want to emphasize that despite the critical importance of what was agreed in Berlin on December 17, [1999], final settlement requires subsequent agreements on a number of issues, most importantly on an equitable allocation of the DM 10 billion among various groups and classes of claimants, and on the substance of the legislation that will define the administrative structure and operation of the German Foundation.

Hearing of the Committee on Banking and Financial Services of the U.S. House of Representatives, 106th Cong. 3 (2000) (statement of Deputy Treasury Secretary Stuart E. Eizenstat) [hereinafter Statement of Deputy Treasury Secretary Stuart E. Eizenstat]. Focusing on the all-important detail of the amount of payment to each victim, Lambsdorff, in his testimony, stated that:

the largest part of the 10 billion mark endowment is intended for direct payment to victims, especially to former slave and forced laborers, most of whom live in Central and Eastern Europe. . . . Former slave laborers who were interred in concentration camps shall receive up to 15,000 German marks [approximately $7,800]; former forced laborers up to 5,000 German marks [approximately $2,600].

Statement of Dr. Otto Graf Lambsdorff, supra note 813, at 3 (emphasis added).
they have yet to be received. The German government must enact legislation to fund its one-half share of the $5.2 billion, and German industry must make an actual payment into the program. As a result, the various lawsuits against the German companies are still pending.

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Eizenstat, in his congressional testimony, did not mention a specific payment amount to be allocated to each victim, but stated that the proposed settlement "will be the mechanism through which those who worked as forced and slave laborers and those who suffered at the hands of German companies during the Nazi era can receive dignified payments." Statement of Deputy Treasury Secretary Stuart E. Eizenstat, supra, at 1 (emphasis added). Of course, Holocaust victims might vehemently disagree with both Eizenstat and Lambsdorff that the above-quoted sums amount to "dignified payments."

With regard to expenses, Lambsdorff explained that "300 million marks [approximately $156 million] are earmarked for administration costs, including lawyers' fees." Statement of Dr. Otto Graf Lambsdorff, supra note 813, at 4. Eizenstat explained that these "[a]dministrative expenses shall be paid from interest on deposited funds," and will not be taken from the 10 billion marks corpus. Statement of Deputy Treasury Secretary Stuart E. Eizenstat, supra, at 4.

815. See Henry, Germany Said Ignoring Terms of Slave-Labor Deal, supra note 814, at 3.

816. See id. The article states that: "More than 110 German companies have agreed to participate in the fund, although they have not yet collected half the industrial pledge of DM 5 billion. On Friday, Preussag, an electricity and tourism concern with annual sales DM 32 [billion], became the 111th to join, according to news accounts." Id.

817. See German Economy Foundation Initiative Steering Group, Preamble (visited Feb. 22, 2000) <http://www.stiftungsinitiative.de/eindex.html>. Having the lawsuits dismissed and, thereby, buying legal peace for the German companies from further litigation in the United States is an indispensable part of the settlement. As explained:

For the Foundation to be established and for the funds to be made available, it is an indispensable prerequisite that the enterprises have full and lasting legal certainty, in other words, that they are safe from legal action in the future. Even in connection with this legal closure desirable legal peace is to be achieved.

Id.

The legal mechanism for giving Germany and its industry legal peace in the United States is the filing by the U.S. government, upon resolution of the outstanding issues in the settlement, of a "Statement of Interest" in (1) all presently outstanding lawsuits against German firms, recommending to the courts that the suits be dismissed; and (2) a promise, through some form of an executive agreement between President Clinton and German Chancellor Schroeder, that the U.S. government would file such additional statements in the event that any other slave labor claimant brings a lawsuit against a German firm in the United States. See Statement of Deputy Treasury Secretary Stuart E. Eizenstat, supra note 814, at 5; Statement of Dr. Otto Graf Lambsdorff, supra note 813, at 5-6.

Deputy Treasury Secretary Eizenstat describes the global scope of the settlement as follows: "We are working to ensure that the Foundation's coverage is so broad that the United States will be able to file a Statement of Interest in U.S. courts in all cases brought against German companies arising out of the Nazi era." Statement of Deputy Treasury Secretary Stuart E. Eizenstat, supra note 814, at 5. German industry, therefore, will be obtaining the same protection from lawsuits as obtained by Swiss industry in the August 1998 settlement with the Swiss banks. See discussion and notes supra Part III.D. (discussing Swiss bank litigation).

Consequently, the December 17, 1999 announcement of the preliminary settlement brought a halt to the filing of additional suits against German firms in American courts.
If the settlement is completed, the first payments are expected to reach recipients “within the course of this year.”

C. Suits Filed to Date

To the distress of the German government and industry, the announcement of a proposed slave labor fund and subsequent negotiations did nothing to stop the lawsuits. In fact, on the very day that the fund was being announced in Germany, a new federal class action lawsuit was filed in the United States against Bayer, one of the fund companies. The suit alleged that Bayer participated in cruel medical experiments at Auschwitz conducted by the infamous Dr. Josef Mengele.

1. Iwanowa v. Ford Motor Co.

Surprisingly, the first slave labor action filed in the United States was not against a German company, but against the American automotive giant Ford.

In a federal class action suit filed in March 1998 in Newark, New Jersey, while the action against the Swiss banks was still ongoing, Ford Motor Company was accused of “knowingly accepting substantial economic benefits” from the use of forced labor in Nazi Germany during World War II through its German subsidiary, Ford Werke A.G. Also a defendant, Ford Werke A.G. was alleged to have

While the U.S. government cannot stop a former slave laborer from filing a lawsuit in the future against a German firm in our courts, the contemplated intervention of the U.S. government on behalf of any defendant German firm that is sued makes it practically impossible for any such suits to succeed. For an example of the U.S. government successfully intervening through a “Suggestion of Interest” to have a lawsuit dismissed, see Jackson v. People's Republic of China, 596 F. Supp. 386 (N.D. Ala. 1984).

818. Statement of Dr. Otto Graf Lambsdorff, supra note 813, at 2. For updated information on the settlement, posted by the German parties to the agreement, including a list of German companies participating, see German Economy Foundation Initiative Steering Group, Preamble (visited Feb. 22, 2000) <http://www.stiftungsinitiative.de/eindex.html>.


"knowingly earned enormous profits from the aggressive use of forced labor under inhuman conditions."  

According to the complaint, Ford Werke A.G., which has been doing business in Germany since 1925 and is headquartered in Cologne, was an aggressive bidder for forced laborers dragooned into Germany from occupied Europe by the Nazi war machine.  

"By 1942, 25% of the work force utilized by Ford Werke A.G. were unpaid, forced laborers. By 1943, the percentage of unpaid, forced laborers at Ford Werke A.G. had grown to 50%, where it remained for the remainder of the war years."

The complaint alleged that "[t]he use of unpaid, forced laborers by Ford Werke A.G. was immensely profitable [to the extent that] Ford Werke A.G.'s annual profits doubled by 1943."  

Following the war,

Ford Werke A.G. continued to produce trucks at substantial profit at a time when much of Europe was devastated, benefiting from economic reserves and production capacity that had, in large part, been derived from the work of unpaid, forced laborers. By 1948, Henry Ford II was able to arrive in Cologne to celebrate the 10,000th truck to roll off the post-war Ford (Cologne) assembly line.

The suit claimed that Ford Werke A.G., unlike subsidiaries of other American-owned companies, was never nationalized or confiscated by the Nazis, and that the parent Ford maintained a controlling 52% interest in the German subsidiary during the war years.

The plaintiff, Elsa Iwanowa, a citizen and resident of Belgium, is alleged to have performed, from 1942 to 1945, unpaid "forced labor under inhuman conditions for Ford Werke A.G." at its Cologne plant.  

In October 1942, Iwanowa, then age sixteen and residing in Russia, is alleged to have been "abducted by Nazi troops and transported to Germany with approximately 2,000 other children."

822. Id.  
823. See id. ¶ 6.  
824. Id. ¶ 10.  
825. Id. ¶ 12.  
826. Id. ¶ 14.  
827. See id. ¶ 15.  
828. Id. ¶¶ 1-2, 24-28.
[and purchased] along with 38 other[s] ... by a representative of Ford Werke A.G." to work at the Cologne plant.\textsuperscript{29}

Plaintiff's class action was "on behalf of herself and all members of the Class, that is, all persons who were compelled to perform forced labor for Ford Werke A.G. between 1941 and 1945."\textsuperscript{30} The suit sought disgorgement of "all profits and economic benefits"\textsuperscript{31} earned from forced labor by Ford and its German subsidiary, as well as punitive damages "arising out of defendants' knowing use of forced labor under inhuman conditions."\textsuperscript{32}

In a public response to the lawsuit, Ford countered that "the plant was under Nazi control during the war and that, although 'dividends were accumulated from German operations' on the parent company's behalf, Ford never received them."\textsuperscript{33} A company spokesperson added: "It must be said that by anyone's measure this was one of the darkest periods of history mankind has known."\textsuperscript{34}

Ford, in response to the complaint, filed two motions to dismiss. The motions were consolidated, but not heard until March 8, 1999, almost exactly one year after filing of the lawsuit.\textsuperscript{35}

The district court took the extraordinary step of holding a full-day hearing on the motions, and requested further documentation and briefing from the parties.\textsuperscript{36}

When the district court scheduled an additional hearing in early August 1999, Ford brought in the "big guns." Warren Christopher, President Clinton's former Secretary of State, appeared at the

\textsuperscript{29} Id. ¶ 25.
\textsuperscript{30} Id. ¶ 29.
\textsuperscript{31} Id. ¶ 38.
\textsuperscript{32} Id. at Prayer for Judgment ¶ 4.
\textsuperscript{34} Id. at D7 (quoting a statement made by Ford regarding the war). Ironically, "Holocaust historians said that since the war Ford has compiled a distinguished record in its relations with the American Jewish community and Israel, and in memorializing the Holocaust. Ford took the extraordinary step [in 1997] of sponsoring the film, 'Schindler's List', which was broadcast on NBC without commercials." Blaine Harden, Suit Allege Ford Unit Used Forced Labor in WWII, WASH. POST, Mar. 5, 1998, at A4.
\textsuperscript{36} See Telephone Interview with Burt Neuborne, Plaintiff's Attorney (Mar. 19, 1999).
hearing as counsel for Ford. Moreover, “Christopher was not the only high-powered lawyer for Ford. Walter Dellinger, who was acting U.S. Solicitor General in 1996 and 1997, also appeared in court.”

Not long after the hearing, and while the court was still considering Ford’s motion, new historical evidence appeared that came back to haunt Ford. Newly-released documents from the Nazi archives revealed that Ford Werke A.G. was one of fifty-one German companies to use Nazi victims from Auschwitz as slave laborers. The documents, discovered in Russia by historians with the Auschwitz Museum in Poland, show that the Ford operation in Cologne was among the enterprises in Germany that exploited the vast pool of slave labor that the Nazis made available to German private industry during the war.

In response, Ford again contended that the American parent did not control Ford Werke A.G.’s operations in Nazi-occupied Europe.

837. See Marilyn Henry, Ford Slave-Labor Case May Stall Reparations, JERUSALEM POST, Aug. 8, 1999, at 3, available in 1999 WL 9006809; David Voreacos, Ford Fights Lawsuit by Holocaust Survivors, RECORD (N.J.), Aug. 6, 1999, at A1, available in 1999 WL 7109695. Christopher was brought in to argue that the claims of the former slave laborers at Ford should be dismissed because payment to them would amount to war reparations, which can be negotiated only between governments. See Voreacos, supra, at A1. “‘Reparations have been, and must be, handled by the political branches of government,’ Christopher told Judge Joseph A. Greenaway Jr. in arguing that the lawsuit should be dismissed.” Id. (quoting Warren Christopher).


839. This new accusation against Ford, discovered through historical research and connecting Ford to Auschwitz, is akin to the earlier historical discoveries made against Deutsche Bank, alleging that it financed the construction of Auschwitz, see discussion and notes infra Part VI.C., and Allianz Insurance, that it insured Auschwitz, see discussion and notes infra Part IV. As explained in a recent article:

While Auschwitz was the site of the deaths of over a million inmates, the camp complex, of three separate sites, was also a thriving industrial and business complex that proved highly profitable for the barons of Germany’s war industry as well as the Nazi leadership itself. Auschwitz, like many camps, had a subcamp—Auschwitz-III, also known as Monowitz, where I.G. Farben manufactured synthetic oil and rubber. According to a list compiled by the London-based Holocaust Education Trust (HET), a total of 51 companies used slave labour at Auschwitz.

LeBor, supra note 788, at 8.

840. See id.; Davis, supra note 787.

841. See Davis, supra note 787; LeBor, supra note 788, at 8.

842. See Davis, supra note 787.
2. Other Slave Labor Actions

While the slave labor actions were not the first Holocaust-era lawsuits to be filed in the United States, clearly, they constitute the largest category of Holocaust-era cases proceeding in American courts today. Following the Iwanowa lawsuit, more than three-dozen additional lawsuits were filed against more than twenty different German and Austrian firms843 for their use of slave labor during World War II.844 The lawsuits were filed in California,845 Illinois, Indiana, New Jersey, New York, and Wisconsin.846

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843. As of January 2000, the German and Austrian firms sued for their use of slave laborers during World War II are: Agfa-Gevaert, Alcatel SEL, Albert Ackermann, Aktiengesellschaft, Audi, BASF, Beiersdorf, BMW, Bosch, Continental (Tire), Daimler-Benz, Diehl Stiftung & Co., Dunlop, Durkopp Adler, Franz Haniel & Cie, Dyckerhoff Heinkel, Heidelberger Zement, Hochtief, Hoechst, Phillip Holzman, Hugo Boss, Leica Camera, Leonhard-Moll Krupp, Luftansa, MAN, Mannesmann, Messerchmitt-Boelkow-Blohm, Miele & Co., Pfaff Aktiengesellschaft, Rheinmetall, Rodenstock, Siemens, Steyr-Daimler-Puch, Thyssen, VARTA, Voest, Volkswagen, Wurttembergische Metallwarenfabrik, and Zeppelin. See infra Appendix A. Additionally, the American automotive giants Ford and General Motors and their German subsidiaries, Ford Werke A.G. and Opel, respectively, were also sued for profiting from slave labor. See discussion and notes supra Part VI.C.

The German firm Degussa was sued for supplying Zyklon B gas used in the gas chambers and for use of the gold taken from victims of the Nazi regime. See discussion and notes infra Part VI.D.2.

German pharmaceutical giants Bayer, Hoechst, and Schering were sued for being involved in cruel medical experiments performed upon Holocaust victims. See discussion and notes infra Part VII.B.

The German banks sued were Commerzbank, Deutsche Bank, Dresdner Bank, Hypo Bank, and VIAG. Austrian banks sued were Bank Austria, Creditanstalt (currently owned by Bank Austria), and RZB. See discussion and notes infra Part VIL.A.1.

844. This number does not include additional suits filed against: German pharmaceutical firms for their alleged involvement in cruel medical experiments during the war; German insurance companies for failing to pay on Holocaust-era insurance policies; German banks for stealing the accounts and other assets of its Jewish depositors; and other German companies' alleged war-time acts including neglecting infants who were taken away from slave laborers, and producing gas used in the gas chambers. From March 1998 to June 1999, German firms were hit with over 30 lawsuits in the United States for their nefarious activities during World War II. Almost all of these lawsuits were filed after the August 1998 settlement with the Swiss banks. See infra Appendix A for a listing of cases filed to date. The list is not exclusive. Truly, the floodgates of litigation have opened against German industry in the courts of the United States.

845. In 1999, California enacted California Civil Procedure Code section 354.6, specifically recognizing lawsuits in California courts for slave and forced labor, and extending the statute of limitations to 2010. See CAL. CIV. PROC. CODE § 354.6 (Deering 1999); see also infra Appendix B (providing California legislation). Since California is the only state with such a law, and is the state with the second-largest population of Holocaust survivors, it is likely that the next wave of World War II-era slave labor lawsuits will appear in California.

846. See infra Appendix A.
Like the Swiss banks, who faced similar Holocaust survivor litigants and heirs, the German companies countered the lawsuits with a variety of substantive and procedural defenses. For their substantive arguments, the German companies claimed that they were compelled by the Nazis to use slave labor.

The response to the suits by the German industrial concern Siemens is typical and echoed by the other companies using slave labor during World War II. "According to Siemens, 'During the course of World War II, German industry had no choice but to participate in the Nazi regime's "wartime economic production program."' The absence of sufficient labor meant that "companies were compelled to turn to laborers provided by the government. Operating in a totalitarian wartime economy, Siemens was also mandated to accept these conditions.'

As procedural defenses, the German defendants listed the usual reasons cited by foreign defendants when they are sued in American courts. In fact, every procedural argument made by the German companies in their motions to dismiss was one made by the Swiss banks' earlier dismissal motions.

The German companies argued that the lawsuits against them cannot be maintained in the United States because of: (1) existence of alternative resolution mechanisms for resolving the suits; (2)

847. See discussion and notes supra Part III.A.2.
848. See supra note 792 and accompanying text.
849. Gerald M. Steinberg, The Holocaust Did Not 'Just Happen', JERUSALEM POST, Oct. 23, 1998, at 9, available in 1998 WL 6536807 (quoting a company statement about participation in slave labor). The phrase "wartime economic production program" is the euphemism used by German companies when referring to their use of slave labor. See id.
850. Id. (quoting a company statement about participation in slave labor).
851. See discussion and notes supra Part III.B.
nonjusticiability;\textsuperscript{852} (3) lack of jurisdiction, both personal and subject matter; (4) forum non conveniens; and (5) statute of limitations.\textsuperscript{853}

D. The Dismissal of the Iwanowa and Degussa/Siemens Lawsuits

September 13, 1999 was not a good day for Holocaust-era litigation. Two federal judges, both sitting in New Jersey, issued separate opinions dismissing five slave labor lawsuits filed in the United States on that day.

Judge Joseph Greenaway, Jr. dismissed the lawsuit against Ford and its German subsidiary Ford Werke A.G.\textsuperscript{854} Judge Dickinson R. Debevoise dismissed four separate lawsuits filed against German companies Degussa and Siemens.\textsuperscript{855}

1. The Dismissal of the Iwanowa Action

As already discussed, in response to the lawsuit against it, Ford filed motions to dismiss. Ford's motions, like the earlier Swiss banks' motions, set out numerous reasons why the lawsuits against Ford, the American company, and Ford Werke A.G., its German subsidiary, could not proceed.\textsuperscript{856}

Judge Greenaway issued a 120-page opinion, in which he methodically dealt with each of Ford's arguments.\textsuperscript{857}

\textsuperscript{852} See discussion and notes infra Part VI.D.1.d. (discussing nonjusticiability). The German companies referred to various treaties entered into between defeated Germany and the victorious allies that they claim do not allow litigation against them in the United States for their wartime wrongs. See id. Similarly, the Swiss banks referred to the postwar agreements entered into between Switzerland and the allies for disgorging Nazi-stolen gold and other loot that entered Switzerland during the war. See discussion and notes supra Part III.A.2.b. (discussing the Swiss banks' substantive grounds for dismissal). Switzerland claimed that such agreements settled all Swiss obligations for their dealings with the Nazis. See id.

\textsuperscript{853} These arguments were never tested in the Swiss bank cases, since the cases settled before the federal district court ruled on the Swiss banks' dismissal motions. See discussion and notes supra Part III.A.2. (discussing Swiss banks' defenses used during litigation).


The opinion examined Ford's arguments as they applied to Iwanowa's claims under: (1) customary international law;\(^8\) (2) U.S. law;\(^8\) and (3) German law.\(^6\) In the last section, the opinion examined the claims in toto, to determine whether they were justiciable.\(^6\)

a. Iwanowa's Claims under International Law

Ford asserted that Iwanowa's claims under customary international law\(^6\) should be dismissed for: (1) lack of subject matter jurisdiction; (2) failure to state a claim; and (3) expiration of the statute of limitations.\(^8\) Judge Greenaway rejected Ford's jurisdictional challenge, but dismissed the claims on the other two grounds.\(^6\)

i. Subject Matter Jurisdiction under the Alien Tort Claims Act ("ATCA")

Because Iwanowa is a Belgian citizen and therefore is an alien, she meets the initial prerequisite to assert subject matter jurisdiction over her international law claims under the ATCA.\(^6\) Examining the other requirements of the ATCA, the court found that Iwanowa could fit her claims of slave labor against Ford under the subject matter jurisdiction mandate of the ATCA.\(^6\)

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858. Judge Greenaway labeled Iwanowa's customary international law claims as claims under "the law of nations," but recognized that the two terms are "interchangeable." Id. at 438 n.14. According to the opinion, Iwanowa is not asserting claims under any treaty or express international law. See id. at 439.
859. See id. at 469-76.
860. See id. at 476-82.
861. See id. at 482-91.
862. Iwanowa alleges that Ford breached international law "[b]y knowingly utilizing unpaid, forced labor under inhuman conditions." Iwanowa, 67 F. Supp. 2d at 439 (citations omitted). As evidenced by Ford's motion to dismiss, Ford did not dispute this assertion. See id.
863. See id. at 434.
864. See id. at 491.
865. The Alien Tort Claims Act ("ATCA") was first raised in Holocaust litigation in the Swiss bank cases. For discussion of the ATCA, in general, and as it applies to those cases, see discussion and notes supra Part III.A.2.a.(iii). (discussing the lack of subject matter jurisdiction in the Swiss bank cases).
First, the court held that Ford's "use of unpaid, forced labor during World War II violated clearly established norms of customary international law." According to the court, Iwanowa's allegation that "she was literally purchased, along with 38 other children... by a representative of [Ford Werke A.G.]... [suffices] to support an allegation that [Ford and Ford Werke A.G.] participated in slave trading." The court held that Ford's slave trading during World War II unequivocally violated customary international law, or "the law of nations."

Second, the court found that the ATCA, in addition to establishing subject matter jurisdiction, also creates a private right of action for violations of customary international law torts.

Finally, the court found that customary international law, despite being sometimes labeled as "the law of nations," does apply to private actors such as Ford. While the court recognized that certain customary international law norms may arguably only be binding upon state actors, slave trading definitely "is included in that "handful of crimes" to which the law of nations attributes individual responsibility." The court also found that Ford cannot utilize the nonstate actor argument since, by acting with Nazi government officials to obtain slave laborers, it "acted as an agent of, or in concert with, the German Reich.

While the human rights bar, and especially attorneys litigating Holocaust claims against German entities, may be unhappy with the remainder of Judge Greenaway's opinion, they would have no quarrel with the court's analysis of the ATCA.

Judge Greenaway, in the strongest terms, reaffirmed the viability of the ATCA as providing both a grant of subject matter jurisdiction

867. Id. at 440.
868. Id.
869. See id. at 439-41.
870. See id. at 441-43 (following earlier authorities discussing the issue).
871. See id. at 443-45.
872. See id. at 444-45. The court appeared to reject those cases which denied responsibility to private actors for violations of customary international law norms, characterizing them as applying "international law as it stood over fifteen years ago," and not today. Id. at 444.
873. Id. at 445 (citing National Coalition Gov't v. Unocal Corp., 176 F.R.D. 329, 348 (C.D. Cal. 1997)).
874. Id. at 446.
and a private cause of action, as well as its applicability to private, nonstate, actors.875

ii. Treaties with Postwar Germany and Private Rights of Action

In Part II.B. of the opinion, the court spends close to thirty pages analyzing various multilateral treaties enacted after the defeat of Germany.876 The analysis is done for two reasons: to determine if such treaties bar litigation against private actors, such as Ford and Ford Werke A.G. for international law wrongs; and to determine the proper statute of limitations for such international law claims.877

Contrary to popular belief, Germany and the Allied nations did not settle their postwar claims—or even enter into a peace treaty—upon Germany’s unconditional surrender in May 1945, or soon thereafter. Rather, the process took forty-five years, ending in 1990. Postwar Germany and the Allies entered into four different treaties dealing with postwar compensation.878

In January 1946, the United States and seventeen other nations met in Paris and enacted the so-called “Paris Reparations Treaty,” obligating Germany to pay reparations.879

The atonement contemplated by the Paris Reparations Treaty, however, was never fully executed. Rather, the Cold War led to the division of Germany into two states, the Federal Republic of Germany (the “F.R.G.” or “West Germany”), formed out of the portions of Germany controlled by the United States, the United Kingdom, and France; and the German Democratic Republic (the “G.D.R.” or “East Germany”), formed out of the portions of Germany controlled by the U.S.S.R.880

In the continuing conflict between West and East, both the Western powers and the Soviet Union halted the reparations

875. See id. at 437-46. This portion of the opinion, therefore, can serve as important precedent for the use of the ACTA in international human rights litigation.
876. See id. at 446-69.
877. See id.
878. See id. at 448-55.
program, preferring instead to rebuild those parts of Germany that they controlled.\textsuperscript{881}

In 1952, the F.R.G. entered into a treaty with the Western powers, the so-called "Transition Agreement,"\textsuperscript{882} that postponed West Germany's payment of reparations until a later date.\textsuperscript{883}

A year later, in 1953, the Western powers and seventeen other nations entered into another treaty with the F.R.G., the so-called "London Debt Agreement,"\textsuperscript{884} that deferred the collection of reparations set out in the Paris Reparations Treaty until the F.R.G. rebuilt its economy.\textsuperscript{885} As explained by the court, "[i]n effect, the London Debt Agreement established the equivalent of a bankruptcy workout plan designed to defer consideration of certain private liabilities until the bankrupt entity [the F.R.G.] regained its financial health."\textsuperscript{886}

In 1990, the F.R.G. and the G.D.R. on one side, and the U.S., the U.K., France and the U.S.S.R., on the other, entered into the so-called "Two-Plus-Four Treaty."\textsuperscript{887} The Two-Plus-Four Treaty: (1) reunified East and West Germany; (2) finally promulgated a peace treaty (envisioned by the Transition Agreement) between a unified Germany and its former adversaries; and (3) by implication, conclusively settled the problem of reparations by stating that the

\textsuperscript{881} See id. at 451-52; 468-69 (discussing West Germany's deferral of reparations to the Western allies and East Germany's extinguishment of reparations obligations to the Soviet Union).


\textsuperscript{883} See id. ch. 6, art. 1. "The problem of reparation shall be settled by the peace treaty between Germany and its former enemies or by earlier agreements concerning this matter. The Three Powers undertake that they will at no time assert any claim for reparation against the current production of the Federal Republic [of Germany]." Id.

Thus, the Western powers agreed to postpone reparations until a peace treaty was signed with a unified Germany sometime in the future and not to seek reparations from the F.R.G., the temporary state entity they created, until unification was achieved. See id.

\textsuperscript{884} Agreement on German External Debts, Feb. 27, 1953, 4 U.S.T. 443, 333 U.N.T.S. 3 [hereinafter Agreement on German External Debts].

\textsuperscript{885} See id.

\textsuperscript{886} Iwanowa, 67 F. Supp. 2d at 453.

\textsuperscript{887} Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1186.
Allied nations can no longer demand further reparations from a unified Germany.\textsuperscript{888}

While the court in its analysis discussed at length each of the four treaties, its decision essentially relies on article 5(2) of the London Debt Agreement.\textsuperscript{889}

Article 5(2) provides:

\begin{quote}
Consideration of claims arising out of the Second World War by countries which were at war with or were occupied by Germany during that war, and by nationals of such countries, against the Reich, or agencies of the Reich . . . shall be deferred until the final settlement of the problem of reparations.
\end{quote}

Since Iwanowa was a national of the U.S.S.R. during World War II, a country at war with and occupied by Nazi Germany, her claims, as the court acknowledged, are covered by article 5(2).\textsuperscript{891} Moreover, the court recognized that the Two-Plus-Four Treaty lifts the moratorium for filing claims by individuals, since it is the “final settlement of the problem of reparations” contemplated by article 5(2) of the London Debt Agreement.\textsuperscript{892} However, while the court recognized that (1) article 5(2) of the London Debt Agreement contemplates that individuals such as Iwanowa would be able to make claims arising out of World War II, and (2) the Two-Plus-Four Treaty now allows Iwanowa to make such a claim, it nevertheless found that such individual claims can only be pursued by way of government-to-government negotiations and not through private litigation.\textsuperscript{893}

\textsuperscript{888.} See id.
\textsuperscript{889.} Agreement on German External Debts, supra note 884, art. 5(2).
\textsuperscript{890.} Iwanowa, 67 F. Supp. 2d at 453 (quoting the London Debt Agreement). Private German corporations are not “the Reich or agencies of the Reich,” and, therefore, may appear not to be covered by the deferral provision of article 5(2). Id. at 454. However, in 1963, and again in 1973, the German Supreme Court held that private corporations utilizing unpaid slave labor were entitled to the same London Debt Agreement deferral defense as the German government. See id. at 452-54 (discussing the 1963 and 1973 decisions of the Bundesgerichtshof, which is the German Federal Supreme Court (“BGH”).)
\textsuperscript{891.} See id. at 453 n.36. Later in the opinion, the court contradicts itself by referring to article 5(3), which covers deferral of claims of neutral countries and its nationals. See id. at 459-61. This is obviously a mistake, since, as the court states, “[a]rticle 5(2) is the only provision pertinent to Iwanowa’s claims.” Id. at 453 n.36.
\textsuperscript{892.} Id. at 465.
\textsuperscript{893.} See id. at 460.
The court's conclusion is wrong. The plain language of article 5(2) contemplates the ability of individuals to make claims arising out of unlawful actions committed during World War II. The London Debt Agreement defers such claims to a later date. Nothing in the Agreement makes such claims available only through government-to-government diplomacy. The court's analysis, in effect, interprets article 5(2) as not only deferring such claims, but forever extinguishing them.

Moreover, the court's conclusion is contrary to the decisions reached by the German courts. Three German court decisions—in 1997, in 1998, and in 1999—have allowed private claims for slave labor to go forward in German courts.

In so doing, the German courts' decisions acknowledged that such private claims are now ripe for litigation, since the signing of the Two-Plus-Four Treaty lifted the forty-five-year moratorium on such claims. Unlike this court, the German courts interpreting the same treaties did not find that the private lawsuits were barred by the treaties.

Finally, the court confuses its analysis even more by incorrectly referring to and analyzing article 5(3) of the London Debt Agreement, dealing with claims of neutral nations and their nationals. Article 5(3) has no application to the case, since Iwanowa's claims,

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894. See Agreement on German External Debts, supra note 884, art. 5(2).
895. See id.
896. See Iwanowa, 67 F. Supp. 2d at 460.
897. See id. at 456 (citing Krakauer v. Federal Republic of Germany, LG [District Court] Bonn, 1 0 134/92 (1997)); see also Mary W. Walsh, German Judge Awards Back Pay to WWII Slave Laborer, L.A. TIMES, Nov. 6, 1997, at A1 (discussing the Krakauer I decision).
899. See Uta Harnischfeger, German Court to Hear Nazi Slave Labor Case, FIN. TIMES (London), Aug. 11, 1999, available in 1999 WL 21147091 (stating that a court in Hanover agreed to hear claims of three Holocaust survivors, now Israeli nationals, who were slave laborers for the German tire-maker Continental).
900. See Iwanowa, 67 F. Supp. 2d at 459-61. The court also incorrectly asserted that "Iwanowa may be entitled to compensation from [Russia, since in 1993 unified Germany agreed to contribute DM [Deutsche marks] 1 billion in funds to former Soviet states . . . to compensate victims of Nazi persecution." Id. at 460 n.42. However, Iwanowa, while born in Russia and abducted from there by the Nazis, is today a Belgian national. See id. at 463 n.51. Consequently, Iwanowa cannot make a claim for such funds, or even have the Russian government assert her claims against Germany. See id. Under international law, Belgium likewise cannot assert Iwanowa's claim, since the wrongs did not occur while she was a Belgian national. See id. Government-to-government diplomacy, the solution proposed by the court, therefore, is unavailable to her.
as the court itself acknowledged, fall exclusively under article 5(2).  

iii. Postwar Treaties and Statute of Limitations

Since "[t]he ATCA does not contain a statute of limitations," Judge Greenaway, following the authority of other courts, applied the statute of limitations of the closest analogous federal statute to the ATCA, the Torture Victim Protection Act of 1991 ("TVPA").

The TVPA contains a ten-year-limitations period. Since Iwanowa filed her suit more than fifty years after the events in question transpired, defendants asserted that her ATCA claims were time barred.

Plaintiff argued, however, that the statute of limitations was tolled. According to plaintiff, the various treaties discussed above and the doctrine of equitable tolling extend the statute of limitations to November 1997, making Iwanowa's claims timely. In its statute of limitations analysis, the court examined three possible tolling periods created by the treaties—extending from 1945 to 1997—to determine whether the treaties, in fact, tolled the statute of limitations.

The limitations period for Iwanowa's claims against Ford began to run in 1945, when she was freed from her slave labor. The court found that the Paris Reparations Treaty of 1946 initially tolled the limitations period until 1953. The Paris Reparations Treaty

901. See id. at 453-54 n.38.
902. Id. at 462.
903. See id. at 462-63.
905. See id.
907. See id. at 463.
909. Ford argued that the limitations period was only tolled until 1949, the year when the F.R.G. was established. See Iwanowa, 67 F. Supp. 2d at 465-66.
910. See id. at 463-66.
911. See id. at 463.
912. See id.
barred individuals from making reparation claims because it subsumed these claims into the governmental claims of the signatories to the Treaty.913

In 1953, the London Debt Agreement superceded the Paris Reparations Treaty.914 The Agreement both resurrected individual claims arising out of World War II, and at the same time deferred such claims until the final settlement of the issue of reparations.915 Therefore, Iwanowa's claims again were tolled.916 This second tolling period ended on March 15, 1991, when the Two-Plus-Four Treaty came into effect, terminating the London Debt Agreement's moratorium on claims.917 Consequently, since Iwanowa filed her lawsuit in March 1998, her ATCA claims, coming within the ten-year statute of limitations period, were timely.918 According to the court, "the statute of limitations on Iwanowa's claims under international law would expire on March 15, 2001."919

The court held, however, that the tolling provisions applied only to Ford Werke A.G., the German corporation, and not to Ford, its American parent.920 According to the court, since the London Debt Agreement covered only deferral of claims against German corporations for their Nazi-related activities,921 Iwanowa could have sued

913. See id.
914. See id. at 464.
915. See id. at 464-65.
916. See id. As explained by Judge Greenaway: "This court finds that the London Debt Agreement deferred all claims by non-German nationals, arising out of World War II, against German corporations acting under color of Nazi law, regardless of whether the claims asserted violations of international law or German law." Id. at 464 (citing to Agreement on German External Debts, supra note 884, art. 5(2)).
917. Plaintiff argued that the tolling period created by the London Debt Agreement extended until November 1997, when a German court announced for the first time that the Two-Plus-Four Treaty lifted the London Treaty's moratorium on individual claims. See id. at 465-66. The court rejected that argument. See id.
918. See id.
919. Id. at 466. If the court is correct in its analysis, then the statute of limitations for all suits against German corporations being sued in the United States under the ATCA expire on March 15, 2001. Attorneys who are contemplating filing suits on behalf of other claimants for slave labor and other World War II wrongs against German entities are now put on notice, through this decision, of the deadline for filing their suits.
920. See id.
921. See Agreement on German External Debts, supra note 884, art. 5(2) (deferring consideration of claims "against the Reich and agencies of the Reich"). As the court explains: "Although German courts have held that German corporations utilizing forced labor were acting as agents of the Reich, no court has ever held, and the complaint does not allege, that U.S. corporations (such as Ford) were agents of the German government." Iwanowa, 67 F. Supp. 2d at 466-67.

It appears that the court was unwilling to allow plaintiff to amend her complaint to
Ford under the ATCA in the last half-century. Having failed to do so, her claim against Ford, the court held, is time barred.

The court also refused to apply the doctrine of equitable tolling to the claims against Ford. As the court recognized, for the plaintiff to avoid dismissal, “a complaint asserting equitable tolling must contain particularized allegations that the defendant ‘actively misled’ plaintiff.” While the court recognized that plaintiff raised such allegations, they were not contained in the complaint, but in counsel’s brief and accompanying declarations. The court refused to recognize such allegations and declined to give plaintiff an opportunity to amend her complaint to add such allegations.

However, the court’s lengthy discussion of the limitations period for Iwanowa’s ATCA claims has no practical significance, since the court already held that the London Debt Agreement bars individuals from seeking damages through litigation for slave labor from private German companies. Therefore, Iwanowa’s timely claim against Ford Werke A.G. under the ATCA was dismissed anyway.

b. Iwanowa’s Claims under U.S. Law

Iwanowa’s claims against Ford are based upon common-law principles of unjust enrichment and quantum meruit. During wartime, Iwanowa performed services for Ford for which she was never compensated. Basic quasi-contract principles require Ford to pay Iwanowa the reasonable value of her services.

make such an allegation against Ford. See id. at 466. Pretrial discovery and further historical research could have revealed that Ford and Ford Werke A.G. had such sufficient financial links during wartime, and that if Ford Werke A.G. was an agent of the Reich, Ford likewise could be held to have had such an agency relationship.

923. See id. at 467-68.
924. See id.
925. Id. at 467 (citing 287 Corporate Ctr. Assocs. v. Township of Bridgewater, 101 F.3d 320, 325 (3d Cir. 1996)).
926. See id. at 468.
927. See id.
928. See id. at 460-61.
929. See id. at 466.
930. See id. at 470.
931. See id. at 469-70.
932. See id.
As the court recognized, the substantive law of all three possible jurisdictions—New Jersey (where the court sits), Michigan (where Ford has its headquarters), and Delaware (where Ford is incorporated)—recognize these basic equitable principles.\(^{933}\) The court, however, ruled that the quasi-contract claims were time-barred.\(^{934}\) Applying the statute of limitations of any of the three possible jurisdictions to such claims, the court found that “[t]he longest applicable limitations period for quantum meruit or restitution/unjust enrichment claims under New Jersey, Michigan, or Delaware law is six years.”\(^{935}\) Even if the London Debt Agreement tolled the statute of limitations until March 15, 1991, the effective date of the Two-Plus-Four Treaty, Iwanowa did not file the instant action until March 4, 1998, almost seven years later.\(^{936}\) Therefore, having filed her claims one year too late, “[Iwanowa's] claims under U.S. law are time-barred.”\(^{937}\)

c. Iwanowa's Claims under German Law

German law also recognizes the doctrines of restitution and quantum meruit, requiring defendants who are unjustly enriched to disgorge amounts wrongfully received or held by them.\(^{938}\) German courts, however, like courts in the United States, will dismiss a claim if it is not timely filed, regardless of its merits.\(^{939}\)

Judge Greenaway examined the various possible limitation periods which could apply to Iwanowa's claims under German law.\(^{940}\) The court held that a two-year statute of limitations applied

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\(^{933}\) See id. at 470 n.59.
\(^{934}\) See id. at 475.
\(^{935}\) Id. at 475-76.
\(^{936}\) See id. at 475.
\(^{937}\) Id. at 93. The Iwanowa action is the first slave labor lawsuit filed in the United States. See infra Appendix A.V. (listing pending and dismissed slave labor claims). If the court's statute of limitations analysis is correct, then all claims under U.S. law in the subsequently-filed slave labor lawsuits are also time-barred. The only possible exception would be slave labor lawsuits filed in California. See Cal. Civ. Proc. Code § 354.6 (Deering 1999) (extending statute of limitations for forced and slave labor claims until 2010).
\(^{938}\) See Iwanowa, 67 F. Supp. 2d at 478 n.77 (citing § 812 BGB [German Civil Code]).
\(^{939}\) See id. at 477-82. Under New Jersey's choice of law analysis, the German statute of limitations is applied to Iwanowa's claims under German law. See id. at 476-77.
\(^{940}\) See id. at 477-82. The term used in Germany, as in many other countries, for statute of limitations is "prescription." See id. at 477 n.71 (translating German Civil Code); see also Fed. R. Civ. P. 44(1) (discussing application and examination of foreign law in U.S. federal courts).
to Iwanowa's claim for lost wages\(^3\) and a three-year limitations period applied to Iwanowa's tort claims against Ford and Ford Werke A.G.\(^4\) The court rejected plaintiff's arguments, supported by an expert on German law,\(^5\) that other sections of the German Civil Code provide either a thirty-year limitations period,\(^6\) or no limitations period at all for her claims against Ford.\(^7\) In particular, the court relied on a 1967 decision of the German Supreme Court, Bartl v. Ernst Heinkel A.G.,\(^8\) that dismissed a German national's slave labor lawsuit, filed in 1959 (fourteen years after the end of the

941. See Iwanowa, 67 F. Supp. 2d at 477 n.71. Section 196 of the German Civil Code provides: “(1) The following claims prescribe in two years: * * * 9. Claims of workmenjourneymen, assistants, apprentices, factory workers—day laborers and manual laborers, for the wages and other allowances agreed upon in lieu of or as part of the wages, including disbursements . . . .” Id. (quoting § 196 BGB).

942. See id. at 477. Section 852(1) of the German Civil Code provides: “The claim for compensation for any damage arising from a delict [tort] is barred by prescription in three years from the time at which the injured party obtained knowledge of the injury and of the identity of the person liable to make compensation . . . .” Id. at 477 n.75. (quoting § 852(1) BGB).


944. See Iwanowa, 67 F. Supp. 2d at 477 n.72 (discussing German Civil Code § 195, which provides a thirty-year prescription for unjust enrichment claims).

945. See id. at 477. Plaintiff relied on §§ 819(1) and 852(3) of the German Civil Code. Section 819(1) provides:

If the recipient knows of the absence of a legal ground at the time of the receipt, or if he subsequently learns of it, he is bound to return from the time of receipt or of acquisition of the knowledge as if an action on the claim for return were pending at the time.

Id. at 477 n.73. (citing § 819(1) BGB). Plaintiff argued that pursuant to German Civil Code § 819(1), no limitations period exists for unjust enrichment claims arising out of particularly egregious behavior. See id. at 477.

Section 852(3) provides that if a “person liable has acquired anything by the delict at the expense of the injured party, he is, even after the running of the period of prescription, bound to return it under the provisions relating to unjust enrichment.” Id. at 477 n.75 (quoting § 852(3) BGB). Plaintiff argued that “because defendants have wrongfully obtained her property (her labor), and because she is requesting the return of that property, German law imposes no limitations period [on this action].” Id. at 477.

946. See Iwanowa, 67 F. Supp. 2d at 477 (citing Bartl v. Ernst Heinkel A.G., BGHZ [Supreme Court] 48, 125 (125) (1967) (F.R.G.)). Plaintiff Bartl, a German lawyer, was arrested by the Nazis and forced to work for an aircraft factory owned by the defendant German corporation Ernst Heinkel A.G. See id. In 1959, Bartl sued defendant for unpaid wages. See id. His suit in the German courts was not barred by the London Debt Agreement since he was a German national. See id. Nevertheless, the German Supreme Court dismissed his suit as untimely. See Bartl, BGHZ 48 (127). For a discussion of the opinion, see Iwanowa, 67 F. Supp. 2d at 477-81.
war), as time-barred.\textsuperscript{947} That decision held that, regardless of the gravity of the defendant's conduct, at most, a three-year statute of limitations applies.\textsuperscript{948} According to the court, "[s]ince Bartl is good law, and is factually similar to the instant case, this Court shall follow Bartl and its reasoning."\textsuperscript{949}

In this case, according to the court, Iwanowa could file her claims under German law after March 15, 1991, the effective date of the Two-Plus-Four Treaty. Since "[t]he statute of limitation on [her] claims under German law expired, at the latest, three years later," then "Iwanowa's claims under German law [are] time-barred."\textsuperscript{950}

At the end of this lengthy discussion on the German law of limitations, the court, in a footnote, added that it would have dismissed Iwanowa's German law claims even if they were timely filed.\textsuperscript{951} According to the court, two recent German court decisions have denied slave labor claimants the right to sue their private corporate captors in German courts.\textsuperscript{962} Based upon these decisions, according to the court, plaintiff has no right to sue Ford and Ford Werke A.G. under German law.\textsuperscript{953}

\textsuperscript{947} See Iwanowa, 67 F. Supp. 2d at 477-81.
\textsuperscript{948} See Bartl, BGHZ 48 (127). According to the court in Iwanowa, the German Supreme Court rejected his assertion that there is no limitations period for forced labor claims and held that "the circumstances under which the prohibited act was committed do not ordinarily counter the defense of the statute of limitations having run: Even the most horrible criminal is... not prevented under applicable law from countering the victim with the three-year statute of limitations." Iwanowa, 67 F. Supp. 2d at 481-82 (quoting Bartl, BGHZ 48 (133-34)).
\textsuperscript{949} Iwanowa, 67 F. Supp. 2d at 480 n.80. Plaintiff attempted to distinguish the Bartl decision by arguing that the plaintiff there was suing only for lost wages, and thereby triggered the shorter limitations period, while Iwanowa sought "not merely wages, but the equitable disgorgement of all unjust profits flowing to defendants from the enslavement of plaintiff, as well as compensation for the pain and suffering inflicted upon plaintiffs by defendants' brutal conduct." Iwanowa Declaration of Burt Neuborne, supra note 943, at 10. The court, however, rejected this distinction. See Iwanowa, 67 F. Supp. 2d at 479.
\textsuperscript{950} Iwanowa, 67 F. Supp. 2d at 482.
\textsuperscript{951} See id. at 482-83 n.83.
\textsuperscript{952} See id.
\textsuperscript{953} See id. However, Judge Greenaway failed to note that, in the last three years, other German court decisions in Bonn, Bremen, and Hanover recognized such suits. See discussion and notes supra Part VI.C.1. (discussing the claim against Ford Motor Co.).

It appears that the situation in Germany regarding slave labor litigation remains uncertain. Judge Deveboise, in the Burger-Fischer decision, examining the same cases referred to by Judge Greenaway, at least acknowledged this uncertainty: "It is evident that there are numerous unresolved issues of German law relating to claims of war time forced laborers both as against the German government and as against private German corporations." Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 280-81 (D.N.J. 1999). Judge Greenaway, therefore, in holding that the case law in Germany mandates dismissal of such suits, mischaracterized German law.
d. Nonjusticiability

In addition to the reasons discussed above, the court found an additional ground upon which to dismiss the lawsuit: nonjusticiability. The court used the term as synonymous for dismissal under the political question doctrine.

The political question doctrine holds that a federal court having jurisdiction over a dispute should still decline to adjudicate such a dispute if it would force the court to resolve issues that should be addressed by the political branches of the government (the Executive Branch and Congress).

As the court recognized, while cases concerning foreign relations are most likely to comprise political questions, "not every case involving foreign affairs or foreign relations raises a [non-justiciable] political question."

In Baker v. Carr, the Supreme Court set out a six-prong test for determining whether a case presents a nonjusticiable political question:

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without [the court first making] an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate

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954. See Iwanowa, 67 F. Supp. 2d at 483-89. In addition to nonjusticiability, the court also set out a final reason for dismissing the case: lack of international comity. See id. at 489-91. However, the court's rationale for the need for international comity is the same as that for existence of nonjusticiability. See id.

955. Part V.A. of the court's opinion is labeled "Political Question." See id. at 483-89. However, Part V contains no other subsections, and the court's only discussion of justiciability is of the political question doctrine. See id. The court, therefore, must equate justiciability with political question.

956. See id. at 483 (citing Baker v. Carr, 369 U.S. 186, 209 (1962)).

957. Id. at 485 (citing Baker, 369 U.S. at 211); see also W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990) (stating that "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them"); Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986) (stating that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance").

branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.959

Judge Greenaway found "at least four of the Baker factors are inextricable from Iwanowa's claims and, therefore, [the] forced labor claims raise nonjusticiable political questions."960

Judge Greenaway found the first Baker factor present: existence of a constitutional commitment that the issue of "war reparations fall within the domain of the political branches and are not subject to judicial review."961 However, the court was incorrect that this factor applied. First, plaintiff was seeking payment for unpaid services, compensation for brutal treatment, and restitution for unjust enrichment earned by a private company, Ford, not war reparations from Germany.962

Second, the mere fact that a suit seeks compensation for damages caused during wartime does not necessarily mean that adjudication of such a suit is impermissible because such wartime damages are nonjusticiable. For instance, in the Paquette Habana,963 the classic case found in every international law casebook, the Supreme Court awarded damages to Spanish owners whose vessels were seized by the United States in contravention of customary international law during the Spanish-American War.964 The political question doctrine was not even considered by the Court in deciding the case.965 Contrary to the district court's reasoning, the mere invocation of the term "war reparations" does not make the case nonjusticiable.

The court found the second factor of the Baker test present: lack of judicially discoverable and manageable standards.966 As support, the court relied on Kelberine v. Societe Internationale,967 a thirty-year-old decision of the U.S. Court of Appeals for the District of Columbia Circuit that dismissed World War II-era claims on the

959. Id. at 217.
961. Id. (citations omitted).
962. See id. at 432.
963. 175 U.S. 677 (1900).
964. See id. at 678-79, 714.
965. See id. at 683-84.
967. 363 F.2d 989 (D.C. Cir. 1966).
ground that deciding them posed "an insoluble problem if undertaken by the courts without legislative or executive guidance." 968

However, the current situation, in both the state of international human rights adjudication and in Holocaust-era litigation, is completely different than thirty years ago. While this court was complaining that it could not handle "[t]he specter of adjudicating thousands of claims arising out of a war that took place more than fifty years ago," two other federal courts in the Swiss banks and Austrian banks litigation were doing exactly that. 969

The court also found the fourth factor of the Baker test present: lack of respect to the coordinate branches of the government, specifically, the Executive Branch. 970 According to the court, "the executive branch, the department responsible for negotiating international agreements, considers claims arising out of World War II as falling within the ambit of government-to-government negotiations." 971

However, other than citing to some general pronouncements from the State Department and the President regarding compensation from Germany, no evidence exists that deciding this case would show any lack of respect to the Executive Branch. 972

Critical to this determination is that the Executive Branch is intimately aware of this litigation. Deputy Treasury Secretary Stuart Eizenstat, the number two official at the Treasury Department, is leading the negotiations with the German companies and the German government for a global "rough justice" fund for slave laborers 973 and yet the Executive Branch has not intervened. When the Executive Branch sees a threat to its interests by a court decision involving foreign affairs, it is not reluctant to make its

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968. Id. at 995.
969. Iwanowa, 67 F. Supp. 2d at 489. For a discussion of Swiss bank litigation, see discussion and notes supra Part III. For a discussion on Austrian bank litigation, see discussion and notes infra Part VII.A.1.
971. Id. at 486.
972. See id. at 486-87.
973. For recent congressional testimony by Deputy Treasury Secretary Eizenstat on the fate of the negotiations, see Statement of Deputy Treasury Secretary Stuart E. Eizenstat, supra note 814, at 1. For a profile of Eizenstat, see Bob Dart, From Atlanta to Washington Capitol Insider Is 'Still Stuart', ATLANTA J.-CONST., June 27, 1999, at G2, available in 1999 WL 3780967.
views known, either by filing an amicus brief or a suggestion of interest.\textsuperscript{974} Here it has done neither.

As pointedly put by the plaintiffs in the Swiss bank litigation, in response to the same alleged danger raised there by the Swiss defendants: "If the United States government wishes to inform the Court that maintenance of this action is detrimental to our national interest, it knows the Court's address."\textsuperscript{975}

At the least, if the district court was concerned about showing a lack of respect for the Executive Branch in deciding this case on its merits, it could have solicited the views of the Executive Branch on this issue. The district court chose not to do so.\textsuperscript{976}

Finally, the court found the sixth factor of the Baker test present: potential of embarrassment from multifarious pronouncements by various departments.\textsuperscript{977} According to the court, "the executive branch has rejected the notion that [Nazi-era slave labor] claims are justiciable."\textsuperscript{978} For this reason, "adjudication of Nazi era forced labor claims . . . would embarrass the executive branch in the eyes of the international community."\textsuperscript{979} It seems strange, however, that the Executive Branch, fearing such embarrassment in the eyes of the

\textsuperscript{974} See, e.g., W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 410-11, n.63 (1990) (submitting by the United States of an amicus brief in the Supreme Court and a letter from the State Department Legal Adviser in the district court, to make the United States' views known in this private litigation that involved international issues); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 704 (9th Cir. 1992) (filing by the United States of a Suggestion of Interest, asking the court to vacate default judgment against Argentina and to consider the issue of foreign sovereign immunity); Republic of the Philippines v. Marcos, 818 F.2d 1473 (9th Cir. 1987) (en banc) (reversing an earlier panel decision after the United States made its views known in a case involving suit against former Philippine President Ferdinand Marcos); Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir. 1985) (vacating its original decision involving an international business dispute after the United States made its views known); Jackson v. People's Republic of China, 596 F. Supp. 386 (1984) (vacating a judgment against PRC after receiving suggestion of interest from the United States explaining how that decision adversely impacted U.S. foreign relations).

\textsuperscript{975} Neuburne Memorandum at 71, supra note 138.

\textsuperscript{976} See, e.g., National Coalition Gov't v. Unocal Corp., 176 F.R.D. 329, 361 (C.D. Cal. 1997). The United States submitted a Statement of Interest in response to an invitation by the district court "to express its views concerning the ramifications this litigation may have on the foreign policy of the United States as established by Congress and the Executive." Id. at 361.


\textsuperscript{978} Id. at 488. Again, however, the court failed to point to any pronouncement by the Executive Branch stating this view. See id.

\textsuperscript{979} Id.
international community, would remain silent. The sixth factor of the *Baker* test is not present in this litigation.

2. The Dismissal of the *Degussa/Siemens* Actions

Judge Debevoise, in his opinion, dismissed four slave labor cases, two against Degussa and two against Siemens. Judge Debevoise's seventy-eight page opinion is less lengthy than Judge Greenaway's opinion. Moreover, the tone and methodology of the opinion are completely different.

Judge Debevoise, unlike Judge Greenaway, did not attempt to deal with every ground raised by defendants Degussa and Siemens in their motions to dismiss. Rather, the court ordered the parties to focus on only two questions: justiciability and statute of limitations. Ultimately, his decision for dismissal was based on

980. Like Judge Greenaway, Judge Debevoise used the terms “slave labor” and “forced labor” interchangeably. In his opinion, he states:

The shortage of manpower in Germany became acute and in order to fill the needs of German industry there was developed a system of involuntary forced laborers. These *slave* laborers were drawn from the conquered nations, Russian prisoners of war and the concentration camps. Organized by the Nazi government, the *slave labor program* enabled private industry to draw upon a huge pool of potential workers, who were not paid and who lived and worked in abominable conditions. Particularly appalling were the conditions to which the Jewish workers were subjected.


All four cases were brought by elderly Holocaust survivors who were forced to work as slave laborers for the defendant German companies. All four lawsuits were filed as class actions. See *Degussa/Siemens*, 65 F. Supp. 2d at 248.

Degussa, in addition to having used slave labor, was “charged with having refined the gold seized from inmates of the Nazi concentration camps with knowledge of its source . . . and with having manufactured [the] Zyklon B [gas] used in the notorious gas chambers of Auschwitz and other concentration camps.” *Id.* at 249.

Siemens “is alleged [to have] requisitioned for employment in its many plants nearly 100,000 foreign workers, prisoners of war and concentration camp inmates; exploiting them ruthlessly, subjecting them to abuses and ill treatment and profiting greatly from this source of unpaid labor.” *Id.* at 254.

982. See *Degussa/Siemens*, 65 F. Supp. 2d at 248.

983. See *id.* at 250.
only one ground: nonjusticiability. The limitations issue was not decided.

The scope and breadth of analysis, therefore, of the Degussa/Siemens opinion is much narrower than the Iwanowa decision. However, unlike the Iwanowa opinion, which takes no stand on these issues, the Degussa/Siemens opinion is rife with factual and legal findings in favor of the plaintiffs. According to the court:

Plaintiffs' factual allegations . . . are totally consistent with the history of the Nazi era and with the record developed during the post-war trials in Nuremberg. In brief[,] Degussa's and Siemens's executives were fully aware of the widespread use of slave labor and of the inhumane conditions in which the victims lived and worked. The two corporations were aware that this program was utilized not only to advance the German war effort, but also as part of the Nazi goal of exterminating the entire Jewish community in Germany, in the territories of its allies and in the conquered lands. Degussa was aware of the uses to which the Zyklon B it manufactured would be used in the concentration camps and was aware that the gold it refined was seized from the Jewish people at their places of residence, when they arrived at the concentration camps and from their bodies before and after they had been killed. Knowing this[,] Degussa and Siemens voluntarily participated and profited from the use of slave labor and[,] in the case of Degussa, in the manufacture and sale of Zyklon B and the refining of the stolen gold.

Furthermore, according to the court, "[t]here can be little doubt that the acts in which the defendant corporations are alleged to have engaged were and are proscribed by customary international

984. See id. at 272-81.
985. See id. at 255 n.2 ("For the purposes of this discussion it is assumed that plaintiffs' claims are not barred by any applicable statute of limitations.").
986. However, in other respects, the Degussa/Siemens opinion is broader than the Iwanowa opinion. Judge Debevoise devotes an entire section of his opinion to describing the history of World War II, its aftermath, and the Nazis' genocidal policies against the Jews. See id. at 262. No such historical mini-lesson is found in the Iwanowa opinion.
987. Id. at 255 (emphasis added). In the conclusion of the opinion, the court reaffirms these findings: "The plaintiffs' accounts of the wrongs they suffered at the hands of the Nazi government and the defendants are deemed to be completely accurate. The historical events recited herein are established either by undisputed submissions in the record or are of common knowledge." Id. at 285.
law... defendants' alleged conduct violated German civil law in effect at the time they engaged in that conduct.988

Like Judge Greenaway, Judge Debevoise devotes a substantial portion of his opinion reviewing the various postwar treaties entered into between defeated Germany and the allied powers.989

Following such review, the court focused on the justiciability of plaintiffs' claims.990 According to the court,

The critical issue, the resolution of which is dispositive of these cases, is whether in light of post World War II diplomatic history[,] the plaintiff victims, and representatives of victims of the Nazi regime[,] can bring an action in this Court against private German corporations which participated in and profited from the atrocities committed against plaintiffs and those they seek to represent.991

The Degussa/Siemens court answered this question in the negative. According to the court:

To state the ultimate conclusion, the questions whether the reparation agreements made adequate provision for the victims of Nazi oppression and whether Germany has adequately implemented the reparation agreements are political questions which a court must decline to determine. Accepting that the court has jurisdiction over the subject matter of this case and assuming that it has jurisdiction over the parties it must nevertheless refrain from adjudicating this dispute.992

While Judge Debevoise expressed his personal desire to help plaintiffs (and others like them),993 he found that "[t]o a greater or

988. Id. at 255. In response to the popular misconception that the German corporations were complying with German law (albeit enacted by the Nazis) at the time they used slave labor, plaintiffs' German law expert pointed out that "slavery and involuntary servitude have been prohibited in Germany since 1871 and that [section] 234 of the German Criminal Code prohibits slavery and involuntary servitude under penalty of imprisonment." Id. at 257.


990. See Degussa/Siemens, 65 F. Supp. 2d at 272 (discussing the justiciability of plaintiffs' claims). The heart of the decision is found in Part V.E. See id. at 281 (concluding the opinion). Therefore, while the opinion is 78 pages, only eight pages contain analysis, with the rest primarily being devoted to a recitation of the facts and the parties' arguments.

991. Id. at 254-55.

992. Id. at 282.

993. See id. at 285. The judge stated:

Every human instinct yearns to remediate in some way the immeasurable wrongs inflicted upon so many millions of people by Nazi Germany so many years ago, wrongs in which corporate Germany unquestionably participated. For the reasons
lesser extent all of the six political question factors enunciated in Baker v. Carr are present in the instant case. His analysis, however, did not discuss the factors in a coherent, orderly fashion. Rather, the opinion haphazardly referred to the various factors, sometimes expressly and sometimes implicitly.

First, like Judge Greenaway, Judge Debevoise laments that were the court to undertake to fashion appropriate reparations for the plaintiffs in the present case, it would lack any standards to apply. Judge Debevoise mischaracterized, however, the task required of him (and a jury at trial) to decide this litigation. The judge and jury are not being asked to undertake at trial the Herculean job of fashioning (or refashioning) damages for all European victims of World War II. Rather, his task (and that of the jury) is straightforward: to determine whether these private plaintiffs, and their class action counterparts are entitled to compensation from these

set forth above, however, this court does not have the power to engage in such remediation.

Id. See discussion and notes supra Part VI.D.1.d. (discussing the six factors of the political question doctrine).


996. Id. at 284. The court continued:

Wrongs were suffered not only by the classes of persons represented in these proceedings, however, but also by many other classes of persons in many lands. They, too, had claims against German assets. By what practical means could a single court acquire the information needed to fashion such a standard? This was a task which the nations involved sought to perform as they negotiated the Potsdam Agreement, the Paris Agreement, the Transition Agreement and the 2+4 Treaty. It would be presumptuous for this court to attempt to do a better job.

Id.

At another point in the opinion, the court states: “Determining adequacy in relation to the capacity of the Federal Republic [of Germany] to pay confronts the same lack of standards as establishment of a reparation program in the first instance.” Id.

However, these cases do not seek payment from Germany. Germany’s ability to pay is not at issue. Rather, the suits seek compensation from private corporate defendants. The issue of ability to pay—and extent of payment—in suits involving corporate defendants is confronted regularly, for instance, by bankruptcy courts and ordinary civil courts deciding the extent of punitive damages (based on net worth) to be assessed against a corporate wrongdoer.

While never specifically stated by the court, this discussion appears to refer to the second factor of the Baker test: “a lack of judicially discoverable and manageable standards for resolving the dispute.” Id. at 282 (citing Baker v. Carr, 369 U.S. 186, 217 (1962)). It may also be referring to the third factor of the Baker test: “the impossibility of deciding without [the court first making] an initial policy determination of a kind clearly for nonjudicial discretion.” Id. Or it may be referring to the fifth factor of the Baker test: “an unusual need for unquestioning adherence to a political decision already made.” Id.

two private defendants for specific wrongs committed during a twelve-year period (from 1933 to 1945).\textsuperscript{998}

Courts in the United States repeatedly undertake similar tasks, ranging from complex multidistrict litigation cases involving airline crashes or securities fraud, to wide-ranging products liability class action lawsuits involving tobacco, drugs, or other consumer products. As discussed above, two other federal courts—in the Swiss bank and Austrian bank litigation—are already determining a fair allocation of damages to Holocaust survivors and their heirs located throughout the world.\textsuperscript{999}

It appears that Judge Debevoise also relies on factors four, five, and six of the \textit{Baker v. Carr} test as grounds for dismissal:

> Major policy determinations are implicated in the determination of the size and in the allocation of reparations. They are not the subject of judicial discretion. For a court now, in the light of the diplomatic history of the last fifty-five years, to structure a reparations scheme would be to express the ultimate lack of respect\textsuperscript{1000} for the executive branch which conducted negotiations on behalf of the United States and for the Senate which ratified the various treaties which emanated from these negotiations.\textsuperscript{1001} These are decisions which were made in the face of serious foreign policy concerns. An attempt by a court to undo them would create the “embarrassment for multifarious pronouncements by various departments on one question.”\textsuperscript{1002} One need only consider the damage which would be created if foreign nations negotiating with the United States were confronted with a situation in which a solemn pact reached with the Executive Department and ratified by the Senate could be undone by a court.\textsuperscript{1003}

However, this “parade of horribles” recited by the court is nonexistent. By misconstruing this private litigation against two German corporate defendants into a lawsuit for reparations against

\textsuperscript{998} See id. at 282-83.
\textsuperscript{999} For a discussion of the Swiss and Austrian bank litigation, see discussion and notes supra Part III. and infra VII.A.1.
\textsuperscript{1000} This refers to the fourth factor of the \textit{Baker} test: “the impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of government.” \textit{Baker}, 369 U.S. at 217.
\textsuperscript{1001} This appears to refer to the fifth factor of the \textit{Baker} test: “an unusual need for unquestioning adherence to a political decision already made.” \textit{Id}.
\textsuperscript{1002} Here, the court quotes the sixth factor of the \textit{Baker} test.
\textsuperscript{1003} Degussa/Siemens, 65 F. Supp. 2d at 284-85 (citations omitted).
the nation of Germany, the court set out nonexistent concerns. As already pointed out, if these lawsuits against Degussa and Siemens had such significant consequences to American foreign policy, the Executive Branch, which is well-aware of this litigation, would have made its concern known to the court.

Judge Debevoise, it appears, committed the same error as Judge Greenaway. In the absence of specific danger to U.S. foreign policy, these cases, involving private litigation between nongovernmental parties, should not have been dismissed on political question grounds.

In *Kadic v. Karadzic*, the Second Circuit examined a suit filed under the ATCA against the Bosnian Serb leader Rodovan Karadzic. Even though the suit impacted U.S. foreign policy in resolving the crisis in the former Yugoslavia, the Second Circuit declined to dismiss the suit on political question grounds.

As the court explained:

> Not every case “touching foreign relations” is nonjusticiable, and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights. We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where

1004. The court found significance in Germany and Poland filing *amici* briefs in the case. The opinion states:

> Suggestive of the forbidden nature of the territory where plaintiffs ask this court to tread is the fact that even at this early stage of the litigation the Federal Republic of Germany and the Minister of Foreign Affairs of the Republic of Poland have intervened as *amicus curiae* to urge their respective views.

*Id.* at 284. However, the filing of an amicus brief by a foreign government, even to oppose the litigation, should play little significance in a court deciding the case. American courts routinely reject the views of foreign governments which, predictably, oppose litigation in the United States against their private corporations. *See, e.g.*, *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979); Diplomatic Note from the Canadian Secretary of State for External Affairs to U.S. Ambassador, *reprinted in* 17 *CAN. Y.B. INT’L L.* 334, 336 (1979) (opposing private antitrust litigation by Canada against private Canadian uranium producers). For a general discussion of foreign governments opposing litigation against their private corporations in the United States, and the use of amici briefs, diplomatic notes, and blocking statutes by foreign governments to thwart such litigation, see BORN, supra note 12, at 852-60.

1005. *See* discussion and notes *supra* Part VI.C. (discussing the slave labor cases that have been filed to date).

1006. 70 F.3d 232 (2d Cir. 1995).

1007. *See id.* at 235-36.

1008. Karadzic was served with the lawsuit when he flew to New York to attend a United Nations meeting on the crisis in Bosnia. *See id.* at 237.

1009. *See id.* at 238.
appropriate in light of the express legislative mandate of the Congress in section 1350, without compromising the primacy of the political branches in foreign affairs.\textsuperscript{1010}

As the Second Circuit noted, "[a]lthough these cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions."\textsuperscript{1011} The same reasoning applies to the slave labor litigation against German private industry.

3. Effect of the Dismissal of the Actions

As the above analysis of the two decisions has shown, the courts' dismissal of these slave labor lawsuits was in error, and should be overturned on appeal.

Contrary to published reports, the \textit{Iwanowa} and \textit{Degussa/Siemens} opinions were not the first cases to decide whether Holocaust lawsuits could proceed in the United States.\textsuperscript{1012} As already discussed, both before the onset of the modern era of Holocaust litigation and thereafter, courts have issued decisions denying and granting dismissal of such suits.\textsuperscript{1013}

Nevertheless, the dismissals of the five lawsuits appeared to significantly shift the offensive posture of Holocaust claimants and their lawyers, who one year earlier achieved an important milestone with the $1.25 billion settlement with the Swiss banks.\textsuperscript{1014} Suddenly, the plaintiffs' bar was faced with the prospect that other courts might follow the precedent of the two New Jersey judges, and likewise dismiss other pending Holocaust lawsuits.

Also significant, even if the two decisions are overturned on appeal, is that aging Holocaust survivors suing these companies

\textsuperscript{1010.} \textit{Id.} at 249 (quoting \textit{Baker v. Carr}, 369 U.S. 186, 211 (1962) and \textit{Lamont v. Woods}, 948 F.2d 825, 831-32 (2d Cir. 1991)).

\textsuperscript{1011.} \textit{Id.}

\textsuperscript{1012.} \textit{See}, \textit{e.g.}, David Voreacos, \textit{Court Rejects Holocaust Survivors' Suit Against Manufacturers}, KNIGHT-RIDDER TRIB. BUS. NEWS, Sept. 14, 1999, at 19, available in 1999 WL 22015287 (stating that the \textit{Iwanowa} and \textit{Degussa/Siemens} cases constituted the "first time judges have decided whether such lawsuits can proceed in American courts").

\textsuperscript{1013.} For decisions denying motions to dismiss, see discussion and notes supra Part IV.A.2.b.(i). For decisions granting motions to dismiss, see discussion and notes supra Part IV.A.2.a.(iii).

\textsuperscript{1014.} \textit{See} discussion and notes supra Part III.
might not be alive when the dismissals are reversed and the lawsuits are allowed to go forward. Ford, Degussa, Siemens, and, by association, the other companies being sued, therefore, achieved a significant strategic victory with these dismissals.

The effect of Judge Greenaway's dismissal of the lawsuit against Ford and Ford Werke A.G. is especially pernicious. Even though (1) during the height of the war, slaves comprised fifty percent of the laborers at Ford Werke A.G., allowing Ford to run its German factory without having to pay half its work force;\(^\text{1015}\) (2) Ford received benefits from Ford Werke A.G. during the war;\(^\text{1016}\) (3) the Ford Werke A.G. German plant was returned to Ford after the war;\(^\text{1017}\) and (4) Ford was allowed, for the next half-century, to reinvest the profits it made during wartime from its use of slave labor,\(^\text{1018}\) neither Ford nor Ford Werke has paid a single penny to those persons who were forced to work [as slaves] at [its] Cologne plant.\(^\text{1019}\) In fact, Ford's position was that it had no obligation to pay Iwanowa or any of its other slave laborers:

Germany and many nations of the world, including Russia and Belgium—plaintiff's former and current homeland—have reached agreements to compensate victims of Nazi persecution. Thus, any compensation to be paid to plaintiff in this matter must be provided by the governments of Germany, Russia or Belgium as part of the negotiated resolution of claims involving the victims of Hitler's Germany.\(^\text{1020}\)

\(^\text{1015.}\) See Mulligan, \textit{supra} note 833, at D1.
\(^\text{1016.}\) See Plaintiff's Memoranda of Law in Opposition to Defendants' Motions to Dismiss at 13, Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) (Civil Action No. 98-959). According to plaintiff, "as late as 1943, dividends of at least 5% were paid annually by Ford Werke A.G. to Ford Motor Company." \textit{Id.} But see Iwanowa Declaration of Burt Neuborne, \textit{supra} note 943, Exhibit B (providing 1994 statement of John Banning, Executive Director of Overseas Business Planning, Ford Motor Co. that noted "Ford Motor Co. had no participation in the operation or financial results of Ford of Germany while the United States was engaged in World War II").


\(^\text{1018.}\) See Agreement on German External Debts, \textit{supra} note 884. The London Debt Agreement, until March 1991, insulated defendants from any outside claims to these profits. \textit{See id.}

\(^\text{1019.}\) Letter from Allyn Z. Lite, Plaintiff's Attorney, to The Honorable G. Donald Haneke 2 (June 12, 1998) (on file with author).
\(^\text{1020.}\) Letter from Clyde A. Szuch, Defendant's Attorney, to The Honorable Joseph A. Greenaway, Jr. 5 (June 9, 1998) (on file with author).
Unlike other German companies, neither Ford Werke A.G. nor Ford has joined the German companies seeking to establish a "rough justice" fund to compensate former slave laborers working for German private industry during World War II.\textsuperscript{1021}

If the dismissal of the suit is upheld, Ford and Ford Werke A.G. walk away scot-free. Degussa and Siemens, on the other hand, have at least pledged to participate in the German slave labor fund.\textsuperscript{1022}

Of course, international law mandates a different result. Since international law, even before Nuremberg, recognized individual responsibility for war crimes,\textsuperscript{1023} and since corporations, under both U.S. and German law, carry a juridical personality, there is no reason why corporations should escape liability for their war crimes while individuals are held responsible. However, that is the result of the two decisions.

On the other hand, the importance of the two dismissals should not be overstated. Even if the dismissals turned the tide for these types of lawsuits (a question yet to be determined), the mere filing of such suits already has resulted in significant achievements. First, until the lawsuits in the United States were filed, German industry denied the slave laborers' claims for over half a century. Only after the German industrialists began to feel the pressure of American litigation did they agree to pay their still-uncompensated slave laborers. Second, the filing of the lawsuits led directly to exposing the widespread complicity of German, Austrian, and possibly American, industry with the Nazi war machine. As a result of the accusations against these corporate defendants in the lawsuits filed in the United States, facts about participation of these industrialists with the Nazis—solely for the sake of profit—either came to light for

\textsuperscript{1021} At oral argument, Judge Greenaway asked former Secretary of State Warren Christopher, who represented Ford, why his client had not joined other companies in negotiating a broad settlement fund for the survivors. Christopher responded: "Ford had not been asked to join the discussions. If they are asked to become involved, I can assure you that Ford will give every consideration to that." David Voreacos, Ford Fights Lawsuit by Holocaust Survivors, Record (N.J.), Aug. 6, 1999, at A1, available in 1999 WL 7109695.

\textsuperscript{1022} See Voreacos, supra note 1021, at A1.

\textsuperscript{1023} Regarding war crime responsibility, one source states:

Although Nuremberg laid the foundations for prosecuting war criminals, war-crimes trials in one form or another date back at least as far as the Middle Ages.... One of [Nuremberg's] most important contributions was its affirming the principle of individual responsibility, that individuals—not only government—are obliged to comply with international law.

the first time or were resurrected from the long-forgotten Nuremberg trials of half a century ago.

Even after the dismissals of the actions against Ford, Degussa, and Siemens, the expectation is that the remaining slave labor suits will not reach the trial stage, but will be resolved through the global settlement fund that the German government and industry is proposing to establish. In the aftermath of the two dismissals, Stuart Eizenstat, the U.S. government's representative to the German slave labor talks, announced that the German companies desired to continue negotiating with plaintiffs' lawyers and Jewish representatives over the establishment of the fund.

Two considerations should lead the Germans, even if they now may be less fearful of American litigation, to want a "rough justice" global settlement akin to the settlement achieved by the Swiss. First, like the Swiss, the German companies are still under a threat of sanctions being imposed by state and local governments. In July 1999, Alan Hevesi, Comptroller of New York City and the architect of the sanctions that forced the Swiss banks to settle, threatened to impose sanctions upon Germany if a settlement of the slave labor claims is not achieved. Second, the German multinationals, who do significant business in the United States, want to avoid the negative publicity that fresh allegations, unearthed from new historical research, might bring to them. Sensitive about their image, the German companies badly desire to put their Nazi past behind them.

It appears that a global settlement of the slave labor litigation will be achieved, and that the final payout--$5.2 billion as of March 2000.

1025. See id.
1027. See Holman W. Jenkins, Jr., Once More into the Dock with 'Nazi' Companies, WALL ST. J., Mar. 24, 1999, at A27. That article states: German companies are racing to follow the Swiss banks in paying up because they want their brand names to be acceptable globally. Deutsche Bank is in the process of buying Bankers Trust [of New York--a deal recently completed]; Volkswagen has launched a new Beetle; Daimler Chrysler doesn't want Jeeps and Lebarons to become "Nazi" cars in the eyes of the public.

Id.
will be significantly larger than the $1.7 billion that the Germans originally offered. The dismissals of the litigation against Degussa, Siemens, and Ford, however, did depress the final figure that German industry and German government will eventually have to pay to finally put to rest claims against them arising out of World War II.

1028. See discussion and notes supra Part VI.B. For a recent discussion comparing and contrasting the anticipated German settlement to the Swiss bank settlement, written by an attorney for the plaintiffs involved in both settlements, see Barry A. Fisher, Holocaust Haggle, L.A. DAILY J., Feb. 10, 2000, at 6.
VII. MISCELLANEOUS CASES

This section will discuss various Holocaust-era lawsuits filed in the United States that were not covered in the previous sections.

A. Claims against Non-Swiss Banks

Swiss banks were not the only banks to deal with the Nazis. During World War II, German, Austrian, French, and, it appears, even European branches of U.S. banks participated in the looting of assets held in their branches by Jews. Banks in other neutral countries, like the Swiss banks, helped the Nazis to launder assets stolen by them in occupied Europe.\textsuperscript{1029}

On the heels of the Swiss bank litigation, suits were filed in U.S. courts against other, non-Swiss banks for their dealings during the war. As in the slave labor cases, all of the entities sued have extensive business dealings in the United States.

1. Claims against the German and Austrian Banks

German and Austrian banks maintained close business relationships with the Nazi war machine, and appear to have profited handsomely from such dealings.

In February 1999, Deutsche Bank, Germany's largest bank, issued an explosive announcement: An independent historical commission reviewing the bank's wartime activities discovered that Deutsche Bank financed the building of Auschwitz.\textsuperscript{1030} Earlier, in July 1998, the historical commission confirmed that Deutsche Bank profited from gold plundered from Holocaust victims.\textsuperscript{1031}

\textsuperscript{1029} See discussion and notes supra Part III A.1.b.
\textsuperscript{1030} See Deutsche Bank Admits Auschwitz Role, IRISH TIMES, Feb. 5, 1999, at 51 ("The documents . . . also show that the Gestapo secret police and IG Farben, an industrial conglomerate involved in implementing the Holocaust, had accounts at Deutsche Bank."); Brian Milner, Auschwitz Role May Derail Bank Deal—German Institution's Revelation of Activities during War Adds Firepower to Holocaust Suits, GLOBE & MAIL, Feb. 6, 1999, at A16 ("Deutsche Bank disclosed that officials discovered documents showing a branch of the bank in Nazi-occupied Katowice, Poland, had provided loans to construction companies with contracts for facilities at Auschwitz, as well as an adjacent IG Farben chemicals plant.").
\textsuperscript{1031} The findings issued by the historical commission were widely reported in the press. Some of the most explosive portions reported were as follows: [Deutsche Bank] had bought more than 4.4 tons of gold from the Reichsbank, the onetime central bank. "This gold business was normal business during the war,"
An historical report of the Dresdner Bank, the second-largest bank in Germany, found that in Nazi-occupied lands, "the saying went, 'Right after the first German tank comes Dr. Rasche from the Dresdner Bank.'"\textsuperscript{1032}

The first class action filed against the German banks for their wartime activities was filed in June 1998 in federal court in Manhattan.\textsuperscript{1033} Plaintiffs, three elderly Holocaust survivors and all U.S. citizens,\textsuperscript{1034} sued on behalf of themselves and on behalf of 10,000 Holocaust survivors and victims' relatives.\textsuperscript{1035} Deutsche Bank and Dresdner Bank AG, both headquartered in Frankfurt, were named as defendants.\textsuperscript{1036} The lawsuit charged the two banks with profiting from the looting of gold and other personal property

\begin{quote}

\textsuperscript{[stated Ronald Weichert, a Deutsche Bank spokesman]. At wartime values and exchange rates, the gold was worth some $5 million, about one ninth of its estimated worth today. . . .}

Deutsche Bank channeled gold transactions with the Reichsbank through branches in occupied Austria and Turkey, then a self-avowed neutral power. Of purchases totaling 4,446 kilograms of gold, the [historical] report concluded, 744 kilograms [1,637 pounds] were dental gold taken from Jews' teeth, wedding bands and personal jewelry amassed in Berlin by an SS officer named Bruno Melmer.


"Gold played a deciding roll [sic] in financing the import of strategic goods essential to the Nazi war efforts . . . . The vast majority of the gold that Germany sold was stolen: from central banks of vanquished countries, but also from individuals, especially the victims of the Nazis' racist persecution--above all Jews."

\textit{Stolen Gold Tied to Top German Bank, Report Delves into Holocaust Plunder, CHI. TRIB.}, Aug. 1, 1998, at 10 (quoting the Deutsche Bank historical report). Even though the report found no "hard evidence" that Deutsche Bank officials were aware that they were dealing in victims' gold, the report found that the officials "could have known that the gold originally belonged--and . . . still belongs--to victims of Nazi Germany." Id. (emphasis added). Moreover, "[t]rading most of the gold through its only overseas subsidiary, in Istanbul, the bank made a profit from 1941-43 of $378,000, or $3.4 million today. The historians said the profit represented 0.15 percent of the bank's total profits during that period." Id.

The German bank said in a statement that it "fully acknowledges its moral and ethical responsibility for the darkest chapter of its history." Cowell, supra, at A2 (quoting a July 31, 1998 statement of Deutsche Bank).
\end{quote}
of Jews.\(^{1037}\) The complaint sought a total of $18 billion in compensatory damages\(^{1038}\) and unspecified exemplary damages.\(^{1039}\)

In October 1998, the lawsuit was amended to add two Austrian banks, Creditanstalt and its parent bank, Bank Austria, as defendants.\(^{1040}\) Creditanstalt was accused of both profiting from the proceeds of slave labor during the war, and of participating and profiting from the looting, or “Aryanization,” of Jewish-owned assets in Austria.\(^{1041}\)

The Austrian banks claimed that they should not be held legally responsible for participating in the theft of gold and other assets of Jewish victims because Creditanstalt was taken over by Deutsche Bank in 1938 as part of Germany’s annexation of Austria.\(^{1042}\)

Later that same month, the German banks were hit by a second class action lawsuit, this one filed in federal court in Brooklyn, New York, by another group of attorneys representing a different set of Holocaust survivors and heirs.\(^{1043}\) The lawsuit named Germany’s Deutsche Bank, Dresdner Bank, and Commerzbank as defendants.\(^{1044}\) The lawsuit accuses the banks of refusing to return assets of Jewish survivors, and of financing and profiting from Nazi slave labor.\(^{1046}\)

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1037. See id. ¶¶ 27-31.
1038. See id. ¶¶ 40, 45, 49, 52.
1039. See id. at Prayer for Judgment ¶ C.
1041. See Henry Weinstein, Austrian Bank Agrees to Pay $40 million in Settling Holocaust-related Lawsuit, L.A. TIMES, Mar. 9, 1999, at A21. Specifically, a document . . . [filed] last year in federal court in Brooklyn described how Creditanstalt officials, after the German annexation, set up a “Control Bank” to efficiently seize Jewish-owned assets in Austria that were deemed economically significant. The basic purpose of the Control Bank, according to the suit, was to acquire as trustee significant Jewish properties for later sale to appropriate “Aryan buyers.” The suit also noted that the buyers were required to pay a “dejewing fee” to the Control Bank to acquire the property. Id.
1043. See Complaint, Duveen v. Deutsche Bank, No. CV-98-06620 (E.D.N.Y. filed Oct. 28, 1998) [hereinafter Duveen Complaint]. The group of lawyers filing this suit is headed by attorneys Melvyn Weiss of New York and Michael Hausfeld of Washington, D.C., both of whom are also involved in the Swiss bank litigation and various other Holocaust-era lawsuits.
1044. See id.
1045. See id.
Subsequently, five other federal class action lawsuits were filed against the German and Austrian banks in either the Southern or Eastern Districts of New York.\footnote{1046}

Eventually, in March 1999, the seven cases were consolidated as \textit{In re Austrian and German Bank Holocaust Litigation},\footnote{1047} in the Southern District of New York before Judge Shirley Wohl Kram, when plaintiffs filed a consolidated class action complaint for all of the lawsuits.

Earlier, in December 1998, Judge Kram appointed former U.S. Senator Alfonse D’Amato\footnote{1048} to act as a “special master,” whose duties would include working with the parties to craft a global settlement of the various claims against the German and Austrian banks.\footnote{1049}

In March 1999, the two Austrian banks reached a separate settlement with plaintiffs’ attorneys.\footnote{1050} This became the third out-


1047. No. 98 Civ. 3938 (S.D.N.Y filed Mar. 17, 1999). Two of the class action plaintiffs also filed separate, individual actions against Deutsche Bank. See Complaint, Haas v. Deutsche Bank AG, No. 99 Civ. 1065 (S.D.N.Y. filed Feb. 11, 1999) (alleging that plaintiffs’ parents’ substantial assets were confiscated by Deutsche Bank between 1938 and 1945, filed by Gerhard Haas and Charlotte Haas Schueller, sole surviving heirs of their parents); Complaint, Hammerstein v. Deutsche Bank AG, No. 99 Civ. 1067 (S.D.N.Y. filed Feb. 11, 1999) (alleging the same cause of action, filed by plaintiffs Gabriele Hammerstein, relative of composer Oscar Hammerstein II, Helen Nightengale, and Alice Nightengale Luhan). The two separate actions are also being heard by Judge Kram.

1048. Senator D’Amato from New York was defeated in his bid for reelection in 1998. D’Amato, as head of the Senate Banking Committee, was instrumental in forcing the Swiss banks to settle the Holocaust claims against them, and earned the wrath of the Swiss for his efforts. See A Distinguished Public Servant, \textit{N.Y. Times}, Jan. 19, 1999, at A18. Former Israeli Prime Minister Benjamin Netanyahu was severely criticized by the Swiss for honoring D’Amato after the settlement with the Swiss banks. See id.

According to Gregg Rickman, D’Amato’s former legislative assistant, after his defeat, D’Amato received a letter from David Vogelsanger, a one-time member of the Swiss Embassy in the United States, stating: “I should like to congratulate you upon your miserably failed reelection. As a Swiss citizen, I am proud of the New Yorkers who have sent you where you belong, on the dung-heap of cheap and corrupted politics.” GREGG RICKMAN, SWISS BANKS AND JEWISH SOULS 284 (1999) (quoting letter from David Vogelsanger to Alfonse D’Amato). According to the \textit{New York Post}, Vogelsanger states that he was “banished” by the Swiss Ambassador for his comments and now lives in Sofia, Bulgaria. \textit{Alpine Hiss}, \textit{N.Y. Post}, May 24, 1999, at 8.


1050. See id.}
of-court settlement in the modern-era of Holocaust litigation.\textsuperscript{1051} The amount of the settlement, however, was small—$40 million—which amounts only to $4 million in pre-World War II values.\textsuperscript{1052} Moreover, $10 million, or one-fourth of the settlement, was allocated for attorneys' fees and administrative expenses, leaving only a negligible amount to be distributed to the actual victims or their heirs.\textsuperscript{1053}

Originally, the World Jewish Congress threatened to "launch an international print ad campaign targeting Bank of Austria/Creditanstalt," but later agreed not to oppose the settlement.\textsuperscript{1054}

In August 1999, Judge Kram appointed Simon Wiesenthal, the world's leading Nazi hunter, to head a committee that would decide how monies left over, after claimants with verifiable accounts with Bank of Austria or Creditanstalt are paid, would be distributed.\textsuperscript{1055} Wiesenthal's appointment, however, did not lead to an increase of

\textsuperscript{1051} The first was the $1.25 billion class action settlement of the Swiss bank case. See discussion and notes supra Part III.D. The second was the settlement of the case involving a Nazi-stolen Degas, in which plaintiffs obtained one-half ownership of the painting, valued at $1.1 million. See discussion and notes supra Part V.A. Both cases were settled in August 1998.

\textsuperscript{1052} See George John, Bank Offers $92M for Holocaust Role, AP ONLINE, Jan. 31, 1999, available in 1999 WL 9736890. Edward Fagan, one of plaintiffs' attorneys who negotiated the accord, justified the settlement on the grounds that Bank Austria, in exchange, "will provide us with documents that will open the way to the main vein of gold...pointing to Germany's Deutsche Bank and Dresdner Bank [which took over the Austrian banks upon Germany's annexation of Austria in 1938]." Id. (quoting Edward Fagan).

Unlike the Swiss banks settlement, the Austrian banks settlement is limited only to the two defendant banks, and does not insulate other Austrian companies for their misdeeds during World War II. It may well be, therefore, that the documents produced by the Austrian banks as part of the settlement will become useful in supporting claims against Austrian industry for its use of slave labor. See Donald G. McNeil, Jr., Chancellor Proposes to Compensate Austria's Wartime Slaves, N.Y. TIMES, Feb. 10, 2000, at A8.

\textsuperscript{1053} It remains unclear how many individuals will be eligible to receive payment from the Bank of Austria settlement. Potential claimants have been estimated to be between 50,000 to more than 10 million. See Wise, supra note 1049, at 1.

\textsuperscript{1054} Compare World Jewish Congress Threatens Campaign against Austrian Banks, AGENCE FR.-PRESSE, July 15, 1999, available in 1999 WL 2638409 (stating that the World Jewish Congress opposes the settlement), with Michel Moutot, Judge Approves Austrian Bank's Compensation to Holocaust Survivors, AGENCE FR.-PRESSE, Jan. 6, 2000, available in 2000 WL 2708173 (stating that the World Jewish Congress no longer opposes the settlement).

In later supporting the settlement, Elan Steinberg, of the World Jewish Congress stated: "We particularly welcome the apology issued by Bank of Austria, as the issue of moral restitution is just as important, if not more so, than financial restitution." Id.

the settlement sum: The Austrian banks' total payout still remained at $40 million.\footnote{In September 1999, notices began to be published in newspapers worldwide announcing the proposed class action settlement against the Austrian banks.\footnote{A fairness hearing was held on November 1, 1999 to determine whether the $40 million settlement should be given final approval, and the settlement was approved by Judge Kram on January 10, 2000.}}

In September 1999, notices began to be published in newspapers worldwide announcing the proposed class action settlement against the Austrian banks.\footnote{A fairness hearing was held on November 1, 1999 to determine whether the $40 million settlement should be given final approval, and the settlement was approved by Judge Kram on January 10, 2000.} A fairness hearing was held on November 1, 1999 to determine whether the $40 million settlement should be given final approval, and the settlement was approved by Judge Kram on January 10, 2000.\footnote{A fairness hearing was held on November 1, 1999 to determine whether the $40 million settlement should be given final approval, and the settlement was approved by Judge Kram on January 10, 2000.}

\footnote{See id. At the fairness hearing held before Judge Kram, Robert Swift, one of plaintiffs' attorneys, defended the settlement amount as follows:

I would like to make a response to the comments of the objectors. The principle response was to the adequacy of the amount, so let me address that first.

I think it would be an anomalous result were this Court to find that we could not settle with two Austrian banks who have been forthcoming, both as to their moral responsibility and their willingness to make a financial commitment to all class members, if we said we cannot do it until we have payment for all persons injured by the Third Reich.

Today we propose to make a settlement with two Austrian banks. There are many others in Germany and in Austria who have responsibility, moral and financial. We cannot deal with all of those at once, but there is an opportunity here, particularly for the aged class members, who, were we to pursue litigation, would probably not see any compensation in their lifetimes. . . .

. . . We submit to you that the delay, expense and risk incumbent upon rejection of this settlement is enormous and that we cannot, as counsel, recommend to this Court that this settlement be put aside so that the vast numbers of class members will receive nothing. A settlement, by its nature, is a compromise of claims.

. . .

In summary, your Honor, I believe that class counsel have acted responsibly, that this settlement is fair and adequate and reasonable and it warrants the Court's approval.

Transcript, Fairness Hearing before The Honorable Shirley Wohl Kram, In re Austrian and German Bank Litigation, No. 98 Civ. 3938 (S.D.N.Y. transcribed Nov. 1, 1999).

1057. See To Victims of Nazi Persecution and Their Heirs Who May Have Claims against Certain Austrian Banks Relating to the Holocaust, L.A. TIMES, Aug. 29, 1999, at A11. Since the notices were very similar to those published in the Swiss bank settlement, the Austrian bank advertisements, to avoid confusion, stated: "THIS SETTLEMENT IS DIFFERENT FROM THE SWISS BANK HOLOCAUST SETTLEMENT." Id. Like the Swiss bank settlement, the Austrian bank settlement posted information on a Web site, and provided a claim form for claimants to fill out. See Legal Notice by Order of the Court (visited Jan. 31, 2000) <http://www.austrianbankclaims.com/main.asp?lan=en&sec=67>.

1058. See Memorandum Opinion and Order at 1, In re Austrian and German Bank Holocaust Litigation, No. 98 Civ. 3938 (S.D.N.Y. filed Jan. 10, 2000).}
2. Claims against the French Banks

After Nazi Germany's conquest of France in 1940, French banks began to ferret out and confiscate the accounts of their Jewish account holders. Approximately 68,000 such Jewish accounts were identified and then so-called “Aryanized.”

The banks maintain that they had no choice but to comply with laws forced upon them by the Nazis or the collaborationist French regime. Critics argue that the banks passively complied with these anti-Jewish laws, and earned substantial profits as a result.

1060. See Memorandum of Law in Support of Credit Commercial de France's Motion to Dismiss the Amended Complaint ¶ 83, Bodner v. Banque Paribas, No. CV-97-7433 (E.D.N.Y. filed Dec. 17, 1997).
1061. See Complaint ¶ 83, Benisti v. Banque Paribas, No. CV-98-7851 (E.D.N.Y. filed Dec. 23, 1998) [hereinafter Benisti Complaint] (“[D]efendants and the Vichy authorities actively cooperated and collaborated with the Nazis, in the systematic plunder of the Looted Assets. The Defendants blocked bank accounts and seized countless of millions of dollars of Looted Assets.”); id. ¶ 86 (“The Defendants were so eager to ingratiate themselves with Nazi and Vichy officials that they began seizing and freezing the bank accounts of their Jewish depositors even before the relevant laws and regulations requiring them to do so were promulgated.”).
In December 1997, the first suit was filed against the French banks. It was followed, one year later, by a second suit.

Both suits were filed in federal court in New York. In March 1999, in yet another replay of the Swiss banks litigation, a third lawsuit was filed in California state court against the defendant banks.

The two federal lawsuits are class actions. The California state suit is a quasi-class action, filed both individually and on behalf of


The plaintiffs, or plaintiffs' heirs, are either former French nationals, or had escaped to France from other countries after the earlier Nazi occupations of their homeland. See id. Significantly, plaintiffs are all Jewish, and are suing on behalf of "the Jewish victims and survivors of the Nazi Holocaust in France, their heirs and beneficiaries." Id. ¶ 77. Therefore, unlike in the Swiss bank litigation, if the case is successfully resolved, non-Jewish victims of the Nazis in France will not be able to participate in the resolution.

The defendants are six large French banks: Banque Paribas, Credit Lyonnais, Societe Generale, Credit Commercial de France, Credit Anicole Indosuez, and Natexis. See id. ¶¶ 79-85. Originally, U.K.'s Barclays Bank was included as a defendant, because it held a branch in Nazi-occupied France that allegedly participated in the looting of the accounts of its Jewish depositors. Barclays settled the case, however, and is not included in the later proceedings. See infra notes 1079-81 and accompanying text (discussing the Barclays settlement).

1063. See Benisti Complaint, supra note 1061. This lawsuit was brought by an additional eighteen Holocaust survivors, or heirs of victims. See id. ¶¶ 1-58. In contrast to Bodner, all plaintiffs are aliens. See id. Like in Bodner, the named plaintiffs seek to represent only Jewish victims who suffered in France during World War II. See id. ¶ 60 ("The Class of Plaintiffs includes those aliens named herein and all other non-U.S. citizens similarly situated who themselves or whose family members were the Jewish victims and survivors of the Nazi Holocaust in France, their heirs and beneficiaries . . . .").

The defendants include the same six French banks named in the Bodner action. See id. ¶¶ 63-68. This lawsuit, however, added one additional French bank—Banque Nationale de Paris—as well as two U.S. financial institutions: Chase Manhattan Bank and J.P. Morgan & Co. ("J.P. Morgan"). See id. ¶¶ 69-71. The American banks had branches in France, and are alleged also to have participated in the confiscation of the assets of their Jewish depositors. See id. ¶¶ 70-71.

1064. See Benisti Complaint, supra note 1061; Bodner Complaint, supra note 1062. The two cases have not been formally consolidated, but are being heard by the same judge, the Honorable Sterling Johnson, Jr.

1065. See Complaint, Mayer v. Banque Paribas, No. BC 302226 (Cal. Super. Ct. filed Mar. 24, 1999) [hereinafter Mayer Complaint]. The lawsuit was filed by one plaintiff, Lily Mayer, an elderly Holocaust survivor residing in Southern California. See id. ¶¶ 8-12. Strangely, the lawsuit was brought in Northern California, in the California Superior Court in San Francisco. See id. ¶ 7.

With the exception of Credit Commercial de France, the defendants are the same French and American banks named in the Benisti action. See id. ¶¶ 15-22.
the general public, under the California Unfair Competition Act ("UCA").

The two federal cases were consolidated, and the defendant banks filed motions to dismiss.

In the California state court lawsuit, defendants also filed motions to dismiss, which are set to be heard in May 2000.

The French government came to the aid of the banks in the federal cases by filing an amicus brief supporting dismissal. According to France, "these proceedings infringe upon [France's] sovereign duty to take responsibility for, and interferes with its current efforts to address, the wrongs committed against residents of France within its borders."

The "current efforts" referred to are the creation by the French government in 1997 of the "Prime Minister's Office Study Mission Into the Looting of Jewish Assets in France," more popularly known as the "Matteoli Commission" after its chairperson, former cabinet minister and Resistance fighter Jean Matteoli.

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1066. CAL. BUS. & PROF. CODE §§ 17200-17206 (West 1997). As with all the other Holocaust-era lawsuits filed in California, see text and notes supra Part III.B.1. (discussing Markovicova lawsuit against the Swiss banks), and Part IV.A.2.b. (discussing litigation against European insurance companies), the complaint contains only one cause of action: violation of the UCA. See Mayer Complaint, supra note 1065, ¶¶ 42-46.

1067. The motions by the French banks, filed by some of the most well-known law firms in the United States, essentially restated the same legal arguments first made by the Swiss banks in the litigation against them, and, thereafter, repeated by other foreign defendants in the subsequently-filed Holocaust-era suits. Compare Memorandum of Law in Support of Motion to Dismiss of Defendants Banque Paribas, Credit Lyonnais, Societe Generale, Credit Commercial de France, Credit Agricole Indosuez, and Natexis, Bodner v. Banque Paribas, No. 97-CV-7433 (E.D.N.Y. filed May 4, 1998) (arguing lack of standing, need for abstention, lack of subject matter jurisdiction, failure to state a claim, forum non conveniens, statute of limitations, and failure to join indispensable parties), with text and notes supra Part III.A.2. (discussing Swiss banks' defenses).

1068. The arguments made by the banks in the California litigation essentially track their motions to dismiss in the federal action. See Memorandum of Points and Authorities of French Banks in Support of Demurrer and Motion to Dismiss or Stay on Grounds of International Comity, Act of State Doctrine, Failure to Join Indispensable Parties, and In Light of Proceedings In France, Mayer v. Banque Paribas, No. BC 302226 (Cal. Super. Ct. filed July 23, 1999). The banks also argue that California's UCA is not applicable since the California statute: (1) cannot regulate out-of-state, including foreign, conduct; and (2) cannot be applied retroactively to conduct that occurred before its enactment. See id. at 3-9.


1070. Id. at 2.

1071. See THE PRIME MINISTER'S OFFICE, EXTRACTS FROM THE SECOND REPORT OF THE STUDY MISSION INTO THE LOOTING OF JEWISH ASSETS IN FRANCE § 1 (1999). However, while the nine-member commission is supposed to determine what was taken, it cannot issue compensation.
Also weighing-in against litigation in the United States, and concomitant pressure by American-based Jewish organizations against the banks, is the organized Jewish community in France, the third largest in the world after Israel and the United States.\textsuperscript{1072}

To counter French government intervention in the litigation, Alan Hevesi, the New York City Comptroller, filed his own amicus brief, urging rejection of the dismissal motions.\textsuperscript{1073}

Hevesi addressed France's sovereignty argument directly:

At first, [France's] argument has some superficial appeal. However, France's real sovereign interest in taking responsibility for and addressing the events of the Holocaust is in exploring its own responsibility for the persecution of French Jews and other minorities

\textsuperscript{1072} \textit{See} Jean Matteoli, \textit{UPDATE FROM THE MATTEOLI COMM'N} (The Study Mission into the Looting of Jewish Assets in France), Feb. 1999, at 1. Apparently, another panel will need to be created to issue compensation based upon the Commission's findings.

According to Mr. Matteoli: “[W]e proposed the creation of a body that would examine individual claims from victims of anti-Semitic legislation passed during the Occupation . . . . This body . . . is due to be set up very shortly . . . . We have committed ourselves to submitting a final report before the end of the century.” \textit{Id.}


On September 10, 1999, French Prime Minister Lionel Jospin announced the creation of a post-Matteoli commission to oversee compensation payments to individual victims. \textit{See French Panel to Pay Jews Persecuted during War}, \textit{CHI. TRIB.}, Sept. 12, 1999, at 10, \textit{available in 1999 WL 2911250} (“To my knowledge, this marks the first time a state, other than Germany, recognizes the principle of individual reparation. It's something we have been waiting for years.” (quoting Henri Hadjenberg, president of the Representative Council of French Jewish Organizations, known by its French acronym CRJF)).

\textit{1073} \textit{See} Craig Whitney, \textit{A Survivor Helps Track French Debt of Wartime}, \textit{N.Y. TIMES}, Sept. 12, 1999, at A4. That article states:

While organizations representing Holocaust survivors have pressed Swiss banks for over $2 billion in compensation for Switzerland's wartime handling of gold that the Nazis seized from the Jews, Jewish groups in France have been less vocal, preferring to put their trust in the integrity of the Matteoli Commission rather than use moral persuasion on French financial and insurance institutions to make them contribute to international funds for the victims.

\textit{Id.}

\textit{1073} \textit{See} New York City's Comptroller's Proposed Brief Amicus Curiae in Opposition to Defendants' Motions to Dismiss, Bodner v. Banque Paribas, No. CV-97-7433 (S.D.N.Y. filed Apr. 26, 1999) [hereinafter Hevesi Brief]. New York City Comptroller Alan Hevesi heads the Executive Monitoring Committee, “an association of public finance officers and regulators that monitors and reports on Holocaust restitution issues to approximately 900 public finance officers, public pension fund administrators, and state and local regulators and legislators nationally.” \textit{Id.} at 1-2. For discussion of the critical role being played by the Executive Monitoring Committee in Holocaust restitution, see text and notes \textit{supra} Part III.C.3. (discussing the effect of proposed sanctions on the Swiss bank settlement).
and *its own* provision of restitution for the acts of the French government and/or its citizens. Its purported interest in *these* cases, which are private claims against private parties, amounts to a demand to be the sole arbiter of all claims asserted by any French Holocaust victim against any private defendant, and does not rise to a level demanding deference from this Court.\footnote{1074}

As to the U.S. interest in this litigation, Hevesi explained:

Indeed, this country, this State and this City\footnote{1075} all have an enormous countervailing interest in providing a forum in which U.S. citizens and Holocaust survivors living elsewhere can reclaim property misappropriated by French banks doing business here, which overshadows whatever interest French government has in forcing the plaintiffs to forgo litigating their claims. None of the legal theories advanced by the French Republic—*forum non conveniens*, international comity, or the Act of State Doctrine—requires this Court to decline to exercise jurisdiction over these actions.\footnote{1076}

The U.S. Executive Branch, keenly aware of this litigation and the interjection of France and the New York City Comptroller into the proceedings, stayed out. However, in a not-too-subtle effort to force the banks to settle, the U.S. House of Representatives' Banking and

\footnote{1074. Hevesi Brief, *supra* note 1073, at 3. As Hevesi states elsewhere in the brief: "While it is true, as the French government points out, that the Vichy government abetted and approved of these actions, the claims of the survivors are not against the French government; they are against the private financial institutions that allegedly took their property and never gave it back." *Id.* at 10.

1075. The "constituency" of the Comptroller of the City of the New York includes "the world's largest remaining community of Holocaust survivors and their heirs outside Israel, many of whom are putative class members in these and similar litigations. . . . The Comptroller has an enormous interest in assuring that these people receive a forum in which to adjudicate their claims meaningfully and expeditiously." *Id.* at 1.

1076. *Id.* at 3 (footnote omitted). Later in the brief, Hevesi expounds on this theme:

There is no doubt about the cultural importance to the French people of coming to terms with their history, but the simple fact that these private lawsuits against private entities accrued in occupied France does not mean they violate French sovereignty. Whether the misappropriation occurred with the explicit or tacit approval of the French government, or whether Vichy government was itself legitimate, simply is irrelevant to the disposition of the U.S. litigation, which comprises straightforward commercial claims against the defendant banks. *Id.* at 10. Hevesi adds a suggestion: "If the French government determines that the plaintiffs are entitled to additional restitution from the public institutions that persecuted and participated in the theft of their property, it may freely provide for it notwithstanding any U.S. litigation against the private wrongdoers." *Id.* at 11.
Financial Services Committee held hearings on the claims against the French banks.\footnote{7}

The timing of the hearings was also seen as sending a message to the banks. The hearings were held in mid-September 1999, before the dismissal motions had been ruled on, and while two of the defendant banks were awaiting approval for a merger from bank regulators in the United States.\footnote{8}

As of January 2000, none of the motions to dismiss banks in the three actions had been acted upon.

Earlier, however, Britain's Barclays Bank ("Barclays"), one of the defendants in the Bodner action, decided to settle.\footnote{9} In July 1999, Barclays agreed to pay $3.6 million to the families of its Jewish customers in France who lost their assets during the Nazi occupation.\footnote{10}

The Barclays Settlement provides a good model for subsequent settlements of Holocaust lawsuits.\footnote{11} It also demonstrates, contrary

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\footnote{7}{See Anne Swardson, French Jews and Banks Fight Holocaust Lawsuits, WASH. POST, Sept. 14, 1999, at A26, available in 1999 WL 23303444. The Executive Monitoring Committee, headed by New York City Comptroller Alan Hevesi, added to its September 1999 meeting agenda the issue of the French banks. See id. This was also seen as "a way to pressure French banks to settle the lawsuits." Id.}

\footnote{8}{See John Authers & Samer Iskandar, French Bankers Seek Compromise Plan in Holocaust Battle with U.S. Campaigners, FIN. TIMES (London), Aug. 24, 1999. The $16.4 billion merger of Banque Paribas and Societe Generale would be the largest in the French bank sector. See id. Because the French banks do extensive business in the United States, domestic bank regulators have the power to delay the merger. See id.}

\footnote{9}{See Settlement Agreement, Bodner v. Banque Paribas, No. CV-97-7433 (E.D.N.Y. filed July 8, 1999) [hereinafter Barclays Settlement Agreement].}

\footnote{10}{The exact amount is $3,612,500, to be made in one lump sum payment. See id. ¶ 6.1. The provisions of the settlement appear straightforward and fair. For attorneys' fees, Barclays agreed to pay, upon approval of the settlement by the court, plaintiffs' attorneys' fees for "actual hours billed at usual and customary rates," in an amount not to exceed $500,000. Id. ¶¶ 12.1-2. Barclays will also pay class action notification and other expenses "up to an aggregate of $400,000." Id. ¶ 8.2. Barclays' total maximum payout, therefore, is approximately $4.5 million.}

\footnote{11}{Parties entitled to the settlement are "all individuals of, or deemed to have been of, Jewish lineage or heritage . . . that were subject to discriminatory laws in effect in France during the Occupation of France having or claiming to have Assets of any kind," held by Barclays Bank in France during the German occupation. Id. ¶ 4.2.

The Barclays Settlement Agreement makes a provision for any nondistributed funds to be "contributed to one or more non-profit, charitable institution(s) in France to be used for the purpose of advancing research and knowledge concerning the Holocaust including, inter alia, research to assist Holocaust survivors and their heirs." Id. ¶ 7.3.

In the event that the French government establishes a payment procedure within one year of the settlement by which any claimants to this settlement are paid, Barclays is entitled "to a refund . . . up to a maximum of $800,000." Id. ¶ 7.5.}
to some skeptics,\textsuperscript{1082} that manageable settlements of Holocaust-era claims can be achieved through the court process.\textsuperscript{1083}

B. \textit{Claims against Bayer and other German Pharmaceutical Firms}

In 1999, in a new series of allegations against German companies, German pharmaceutical firms were accused of engaging in cruel medical experiments during World War II. Three suits making these allegations were filed in 1999.

The lawsuit against Bayer AG makes an explosive allegation: Bayer AG, the giant German pharmaceutical company and maker of such drugs as Bayer Aspirin and Alka-Seltzer, participated in grotesque medical experiments conducted at Auschwitz by the infamous Nazi-doctor Joseph Mengele, the "Angel of Death."\textsuperscript{1084}

Dr. Mengele conducted his experiments at Auschwitz on 1500 sets of twins and "individuals with any other physical abnormalities."\textsuperscript{1085}

Finally, "if members of the Settlement Class with aggregate claims of more than $500,000" opt out of the settlement, Barclays has the option of not going forward with the settlement. \textit{Id.} \textsuperscript{13.2}. This provision allows Barclays to terminate the settlement if there is major opposition to its terms.

\textsuperscript{1082} \textit{See supra} notes 959-79 and accompanying text (discussing \textit{Iwanowa} decision) and \textit{supra} notes 993-1011 and accompanying text (discussing \textit{Degussa/Siemens} decision).

\textsuperscript{1083} According to a Barclays representative: "We are a bit different from the Swiss and French banks. . . . We have sought not to have a drawn out legal battle." James Bone, \textit{Barclays Settles with Nazi Victims}, \textit{TIMES} (London), Aug. 4, 1999, at 15, available in 1999 WL 8013442.


\textit{Kor} also alleges that an associate of Bayer, SS Major Dr. Helmut Vetter, conducted medical experiments at three different concentration camps. \textit{See} \textit{Kor Complaint}, \textit{supra}, \textit{¶} 28. According to the complaint, [\textit{p}ost-war publications report that Bayer participated in these experiments, giving orders to SS [M]ajor Dr. Helmut Vetter, who was associated with Bayer and who was stationed in several concentration camps. Vetter performed medical experiments using concentration camp inmates as human guinea pigs in Dachau, Auschwitz, and Mauthausen. Dr. Vetter was sentenced to death by an American military court in 1947 and he was executed in 1949. \textit{Id.} For an excellent discussion of the \textit{Kor} lawsuit and how it relates to the other Holocaust-era lawsuits, see John Allen Jr., \textit{Victims No More, Auschwitz Survivor's Suit Aims to Expand Human Rights Law by Hitting Companies Where it Hurts}, NAT'L CATH. REP., May 7, 1999, at 3.

\textsuperscript{1085} \textit{Kor Complaint}, \textit{supra} note 1084, \textsuperscript{¶} 25. According to the complaint, "[b]etween 1943 and 1944, he conducted 'genetic experiments' on nearly 1500 sets of twins with the goal of proving Hitler's racial theories." \textit{Id.}

For treatises discussing Dr. Mengele's deadly work see \textit{LUCETTE MATALON LAGNADO}
The experiments researched "the effect of numerous bacteria, chemicals and viruses on the human body." One twin, "the guinea pig twin," would be injected with the substance while the other twin, "the control twin," would not. Frequently, the twins were then killed to perform autopsies and compare the differences between them. Fewer than 200 sets of twins, including the Mozes sisters, survived the horrific experiments.

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& SHEILA COHN DEKEL, CHILDREN OF THE FLAMES: DR. MENGELE AND THE UNTOLD STORY OF THE TWINS OF AUSCHWITZ (1992); ROBERT JAY LIFTON, THE NAZI DOCTORS: MEDICAL KILLINGS AND THE PSYCHOLOGY OF GENOCIDE 337-38 (1986); GERALD L. POSNER & JOHN WARE, MENGELE: THE COMPLETE STORY (1986). At the end of the war, Mengele fled Auschwitz and was on the run from the Red Army until he was captured by American forces. See POSNER & WARE, supra, at 59-62. Even though Mengele was identified as a war criminal by the United Nations War Crimes Commission and the Central Registry of War Criminals and Security Suspects, "the inefficiency and lack of coordination among various arms of the U.S. occupying forces, the near impossibility of weeding war criminals out of millions of detainees, and above all, his own vanity about the [blood group] tattoo," enabled Mengele to be set free. Id. at 63. One of the ways American forces could identify SS members was through the blood group tattoo. See id. Mengele "managed to convince the SS that the tattoo was unnecessary and that any competent surgeon would make a cross-match of blood types and not rely solely on the tattoo before administering a transfusion." Id. Mengele hid in Germany, evading arrest until he escaped to Buenos Aires in 1949. See id. at 86-94. Ten years later, in 1959, Mengele moved to Paraguay, believing he would be safer, and to develop a family business. See id. at 121. Because Adolph Eichmann's capture by the Israelis instilled fear of his own capture, Mengele, in 1960, moved to Brazil. See id. at 158. Mengele hid in Brazil until 1979, when he apparently drowned in the Atlantic Ocean. See id. at 287-89. Since Mengele's family did not announce his death, he was still being hunted by the West Germans, Americans, and the Israelis. See id. at 292-325. Finally, in 1985, an exhumation of his bones provided proof of his death. See id. at 325. For a detailed account of Mengele's life as a fugitive and his escape to Argentina, see POSNER & WARE, supra; see also Christopher Walker, Fugitive Mengele 'Took Holidays in Switzerland', TIMES (London), Feb. 17, 1999, at A13, available in 1999 WL 7973731.

1086. Weinstein, supra note 1084, at A18.
1087. See id.
1088. See id.
1089. See Allen, supra note 1084, at 4-5. Eva and Miriam Mozes survived the brutal experiments until the Nazis abandoned Auschwitz in early January 1945. See id. at 5. The sisters stayed at Auschwitz until January 27, 1945 “when the Soviet tanks rolled in.” Id. Shortly thereafter, Eva and Miriam returned to Romania and then emigrated to Israel. See id. Eva married Mickey Kor, who was a survivor of Buchenwald. See id. He persuaded her to move to Terre Haute, Indiana. See id. Today, she still lives in Terre Haute, selling real estate and running her CANDLES museum and Holocaust education center. See id. at 3-4. CANDLES stands for “Children of Auschwitz—Nazi’s Deadly Lab Experiments Survivors.” Id. at 4. “[Eva] Kor founded the group in the 1980s to reunite the surviving Mengele twins. To date, she has located 125.” Id. “Through CANDLES, [Eva] Kor has published books, organized conferences and trips to Auschwitz and operates a Web site [www.candlesmuseum.com].” See id. at 4. Miriam married and lived with her husband in Israel until her death from cancer in 1993. See id. at 5.
In February 1999, Eva Mozes Kor filed a class action lawsuit against Bayer on behalf of all Holocaust survivors upon whom medical experiments were performed using Bayer products or for the benefit of Bayer.

In March 1944, Eva Kor, her identical twin sister, Miriam, two older sisters, and her parents were deported to Auschwitz. An SS guard identified Eva and Miriam as twin sisters and they were taken to a special barrack to be used by Dr. Mengele.

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1090. See Kor Complaint, supra note 1084, ¶ 1. “Bayer is an international conglomerate that manufactures chemicals, pharmaceuticals, and other pesticides.” Id. ¶ 3. The corporate headquarters of Bayer AG are in Leverkusen, Germany. See id. ¶ 10. Bayer AG is the parent company of Bayer Corporation, a U.S. company based in Pittsburgh, Pennsylvania. See Weinstein, supra note 1084, at A18. The instant lawsuit names only Bayer AG, the German parent, as defendant.

1091. See Kor Complaint, supra note 1084, ¶ 12. That portion of the complaint states:

The Plaintiff brings this action pursuant to F.R.Civ.P. 23 on behalf of a Plaintiff class composed of all Holocaust survivors upon whom medical experiments were performed using products manufactured or developed by Bayer (the “Bayer Products Experiments Class”), or for the benefit of Bayer’s research and development efforts (the “Bayer Research Experiments Class”).

Id. The two classes are defined as follows:

[1] The Bayer Products Experiments Class is composed of all Holocaust survivors upon whom medical experiments were performed in any concentration camp using chemicals or any other products or materials designed, developed, manufactured, marketed or supplied by Bayer.

[2] The Bayer Research Experiments Class is composed of all Holocaust survivors upon whom medical experiments were performed in any concentration camp which were monitored, supervised, or studied in any way by Bayer for the purposes of Bayer’s research and development efforts.

Id. While the number of putative class members is not known, Eva Kor estimates that hundreds of class members exist. See id. ¶ 13.

1092. See id. ¶ 8. “[Eva Kor’s] father and two older sisters were probably taken directly to the gas chamber since their names appear nowhere in camp records.” Allen, supra note 1084, at 4.

1093. See Kor Complaint, supra note 1084, ¶ 8. According to the complaint:

Kor remembers an SS guard walking up and down the line of new arrivals yelling zwillinge, German for twins. Her mother replied, “Is that good?” The guard nodded yes, and Eva and Miriam were yanked away. Kor remembers crying and turning to look at her mother—it would be the last time she ever saw her. She was 9 years old. On that first day, Eva’s camp ID number was tattooed into her arm: A-7063. Even then she was a fighter. It took two guards and two inmates to hold her down, and she bit one of the SS guards before the tattoo was finished.

Id. ¶ 8.

1094. See Allen, supra note 1084, at 4. According to the complaint:

[A]centration camp inmates selected for medical experiments were kept in separate barracks from the other prisoners, and sometimes were given preferential treatment, and subject to grotesque physical and psychological experiments, including experimental surgeries performed without anesthesia, transfusions of blood from one twin to another, isolation endurance, reaction to various stimuli, injections with chemicals and lethal germs, including injection of chemicals directly into the eyes to
Eva Kor was forced to participate in medical experiments where her arms were tied down and blood was taken until she fainted. She became ill and was taken to a laboratory where, according to the complaint, Dr. Mengele and Dr. Koenig, a Bayer affiliate, visited her. During the visits, more blood was taken until she fainted, while “chemicals were injected into her other arm, causing her to become more ill.” She was taken to the hospital barrack because the injections caused her legs and ankles to swell and turn red. While Dr. Mengele and Dr. Koenig visited her to take her temperature, she was deprived of food, water, and other medical care.

According to the complaint, “[d]uring one such visit, Dr. Mengele laughed and stated to Dr. Koenig that she would only survive for two more weeks.” Eva Kor alleges that Bayer supplied toxic chemicals to the Nazis, which Dr. Mengele and Dr. Vetter used to conduct their experiments. She also alleges that these chemicals contained diseases injected into concentration camp inmates to test the effectiveness of determine whether eye color could be changed, sex change operations, and the removal of organs and limbs. Mengele maintained a special pathology lab where he performed autopsies on twins who died from such experiments. 

Kor Complaint, supra note 1084, ¶ 26.

As far as special privileges were concerned, Eva Kor stated she and Miriam were allowed to keep their hair and their clothes. See Allen, supra note 1084, at 4. However, according to Eva Kor, their hair was “soon swimming with lice and had to be removed, it wasn't much of a privilege.” Id. (quoting Eva Kor).

1095. See Kor Complaint, supra note 1084, ¶ 8.
1096. See id. ¶ 9. According to the complaint, “Eva's twin sister, Miriam also was injected with chemicals by Dr. Mengele. After the war, Miriam experienced kidney difficulties, which ultimately led to her death. During her treatment for that kidney disease, Miriam learned that her kidneys never had grown to adult size due to her treatment at Auschwitz. Id. She died at age 58 from cancer related to kidney problems. See Allen, supra note 1084, at 5.

1097. See Kor Complaint, supra note 1084, ¶ 9.
1098. Id.
1099. See id.
1100. See id.
1101. Id. While Eva Kor was hospitalized, Miriam was under constant SS guard. See Allen, supra note 1084, at 5 (“The guards were poised to kill Miriam as soon as Eva Kor died . . . . By killing the other twin when one died, Kor says, doctors were able to perform comparative autopsies.”).

1102. See Kor Complaint, supra note 1084, ¶ 1. Eva Kor alleges that no statute of limitations has begun to run because during the war, she did not and could not know that Dr. Koenig was working with Dr. Mengele on behalf of Bayer. See id. ¶ 5. According to the complaint, Bayer has refused to disclose any information relating to the claim and “[s]uch information has only recently been made available to the Plaintiff and class members as archived records concerning the World War II actions of Bayer and others have been made available to the public.” Id. ¶ 24. Moreover, Eva Kor “only recently has been invested with the legal right to sue . . . . Bayer as a result of the expiration of certain international tolling agreements created by the victorious nations after World War II.” Id. ¶ 5.
other Bayer drugs. Finally, she alleges Bayer monitored and supervised the experiments through Dr. Koenig, who recorded and reported the results of the experiments to Bayer. According to the complaint, "Bayer monitored and supervised those experiments [and] used them as a form of research and development for its corporate benefit."

The complaint asserts that "Bayer has been unjustly enriched by its participation in involuntary medical experiments and by its obtaining information from those experiments for research and development." Moreover, Bayer utilized the information it gained from the experiments to manufacture, market, and sell products during and after World War II.

The complaint sets out six causes of action against Bayer: (1) violations of international law; (2) conspiracy to commit violations of international law; (3) civil assault and battery; (4) conspiracy to commit civil assault and battery; (5) unjust enrich-

1103. See id. ¶ 1.
1104. See id. ¶ 2.
1105. Id.
1106. Id. ¶ 20.
1107. See id. ¶ 3. Compare Moore v. Regents of Univ. of Cal., 51 Cal. 3d 120 (1990), with Kor Complaint, supra note 1084. In Moore, physicians, while treating John Moore for leukemia, used his cells for lucrative medical research without his knowledge or permission. See Moore, 51 Cal. 3d at 124-25. Moore alleged that his physicians failed to disclose their economic interests in his cells prior to the medical procedures that extracted the cells. See id. at 125. Further, Moore alleged that his excised cells constituted a conversion of his possessory and ownership interests in personal property. See id. at 134. The California Supreme Court held:
(1) a physician must disclose personal interests unrelated to the patient's health, whether research or economic, that may affect the physician's professional judgment; and (2) a physician's failure to disclose such interests may give rise to a cause of action for performing medical procedures without consent or breach of fiduciary duty. Id. at 129.

On the conversion cause of action, the court held that "the use of excised cells in medical research does not amount to a conversion." Id. at 143. First, the court weighed two important policy considerations, the patient's right to make autonomous decisions and the protection of third parties who are engaged in socially useful activities, and found that "liability based upon existing disclosure obligations, rather than an unprecedented extension of the conversion theory, protects patients' rights of privacy and autonomy without unnecessarily hindering research." Id. at 143-44. Second, the court believed that the legislature is better suited to decide such a policy question. See id. at 147. Finally, the court reasoned that "enforcement of physicians' disclosure obligations protects patients directly, without hindering the socially useful activities of innocent researchers." Id.

1108. See Kor Complaint, supra note 1084, ¶¶ 35-37.
1109. See id. ¶¶ 38-42.
1110. See id. ¶¶ 43-48.
1111. See id. ¶¶ 49-50.
Eva Kor demands compensatory damages, disgorgement of illicit profits, the value of the information obtained from the experiments, imposition of a constructive trust upon the profits generated, an accounting for the value of the information received from the experiments, punitive damages, attorney's fees, and costs of the action.\textsuperscript{1114} In June 1999, Bayer filed a motion to dismiss.\textsuperscript{1115} While acknowledging the terrible wrongs committed during World War II\textsuperscript{1116} and Bayer's possible involvement in such wrongs,\textsuperscript{1117} Bayer maintained that it simply cannot be sued in the United States by Kor for activities committed in Europe during World War II.\textsuperscript{1118} Taking the approach adopted by other European entities sued in U.S. courts for their World War II activities, Bayer maintained that "[t]hreshold principles of personal jurisdiction,"\textsuperscript{1119} forum non conveniens,\textsuperscript{1120} and

\begin{itemize}
\item \textsuperscript{1112} See id. ¶¶ 51-55.
\item \textsuperscript{1113} See id. ¶¶ 57-59.
\item \textsuperscript{1114} See id. at Prayer for Judgment ¶ A-I.
\item \textsuperscript{1115} See Memorandum in Support of Bayer AG's Motion to Dismiss, Kor v. Bayer AG, No. TH-99-036-C M/H (S.D. Ind. June 30, 1999) [hereinafter Memorandum in Support of Bayer AG's Motion to Dismiss].
\item \textsuperscript{1116} See id. at 1. The memorandum states:
\begin{quote}
As [World War II] ended, the world learned the full scope of Nazi crimes. These crimes were adjudicated and punished at the Nuremberg War Crimes Tribunals, and the judgment of world opinion has been as harsh as Nuremberg's. This motion does not—and could not—seek to diminish the judgment of history.
\end{quote}
\item \textsuperscript{1117} See id. at 24-26 (citing historical treatises discussing Bayer's culpable involvement with the Nazis). However, as discussed below, Bayer also distances itself from such wrongs by placing responsibility on I.G. Farben, its former parent. According to Bayer, the present corporation being sued, Bayer AG, is different from the guilty party, I.G. Farben, the infamous German chemical concern that owned Bayer A.G. until 1951. See id. at 4-6; see also id. at 12 ("Bayer AG neither takes solace in the acquittal of the I.G. Farben executives on the medical experimentation claims, nor suggests that the evidence considered by the Nuremberg tribunal (while clearly extensive) was absolutely exhaustive." (footnote omitted)).
\item \textsuperscript{1118} See id. at 1.
\item \textsuperscript{1119} As with every other Holocaust-era case going back to the Swiss bank litigation, Bayer maintained that Indiana has: (1) no specific jurisdiction over Bayer because the acts complained of occurred in Germany, not Indiana, and (2) no general jurisdiction over Bayer because it is not incorporated in Indiana; does not maintain an office in Indiana; is not qualified or licensed to do business in Indiana . . . does not own any real property in Indiana; has not and is not required to pay taxes in Indiana; does not have any Indiana phone number or mailing address; and is not engaged in continuous or systematic activity of any kind in Indiana.
\item \textsuperscript{1120} Id. at 33. When making these statements, defendant refers to Bayer AG, the German corporation, and not Bayer AG's wholly-owned U.S. subsidiary, Bayer Corporation, which is incorporated in Indiana (and headquartered in Pittsburgh, Pennsylvania). See id. at 34.
\end{itemize}
the political question doctrine would be violated by the very prosecution of this case. All mandate dismissal...

Bayer also maintained that plaintiffs' lawsuit is barred by the Indiana statute of limitations. Finally, Bayer argued, that, even if Bayer committed violations of international law in its alleged participation in Mengele's medical experiments, such international law, whether in treaty form or under international customary law, does not provide plaintiff with a private cause of action in the United States.

As of January 2000, no ruling on Bayer's motion to dismiss had been issued.

It may well be that, like in the Swiss bank litigation, the motion to dismiss will never be decided. If, and when, the $5.2 billion German slave labor settlement is finalized, the medical experiment claims against Bayer and other German pharmaceutical firms are included in that settlement, thereby necessitating dismissal of these lawsuits.

The subjects of these medical experiments will then be limited to the modest lump-sum payment of a maximum of 15,000 German


1120. See Memorandum in Support of Bayer AG's Motion to Dismiss, supra note 1115, at 37-50. Again, the arguments in the Bayer brief for dismissal under the doctrine of forum non conveniens are almost exactly the same as those made in every other motion to dismiss filed in the Holocaust-era cases. Compare id. at 37 ("Not only is this case being brought against a purely German business, it is difficult to conceive of a matter in which the sovereign interests of Germany are more palpable.... A myriad of facts illustrates the inherently German nature of this case..."), with Reply Memorandum of Law in Support of Defendants' Motion to Dismiss on Forum Non Conveniens Grounds, supra note 164, at 6 ("[A]llmost everything about these cases relates to Switzerland and very little relates to the Eastern District of New York or even the United States.").

1121. See Memorandum in Support of Bayer AG's Motion to Dismiss, supra note 1115, at 50-54.

1122. Id. at 27-28.

1123. See id.

1124. See id. at 54-63.

1125. For a discussion of the German slave labor global settlement, see notes and text supra Part V.

1126. See Statement of Deputy Treasury Secretary Stuart E. Eizenstat, supra note 814, at 3. "Payments [from the German Foundation Initiative] settlement shall include an inclusive category for personal injury cases, including, but not limited to, medical experimentation... as well as all other personal injury cases directly involving German companies." Id. (emphasis added); see also Statement by Otto Graf Lambsdorff, supra note 813, at 4 ("[T]he largest part of the 10 billion mark endowment is intended for direct payments to victims, especially to former slave and forced laborers... as well as for victims of... medical tests...") (second emphasis added).
marks, or approximately $7800, that is contemplated in the German settlement. 1127

C. Claims Against Volkswagen for Maintaining a "Nazi Nursery"

One of the German companies that made extensive use of slave labor during World War II was Volkswagen ("VW"). Founded in 1938 with a mission from Adolf Hitler to build a "people’s car"—the term Volkswagen in German—it had between 15,000 to 20,000 prisoners working as laborers. 1128

In August 1998, the first class action slave labor lawsuit was filed against VW in the United States. 1129 One month later, VW announced the creation of a $12 million fund to compensate its Nazi-era slave laborers. 1130 In February 1999, VW joined eleven other German companies in proposing the creation of a German industry-wide fund to compensate former wartime slave laborers. 1131

1127. See supra notes 813-18 and accompanying text.
1128. See Wages of Sin, U.S. NEWS & WORLD REP., July 20, 1998, at 36, available in 1998 WL 8127010 ("Volkswagen employed 15,000 slave laborers in the final years of World War II."); Carol J. Williams, VW Setting Up Fund to Pay Nazi-era Slave Laborers, L.A. TIMES, Sept. 12, 1998, at A6 ("As many as 20,000 prisoners were put to work at VW during the war years. . . . [I]ts factories churned out grenade launchers, land mines and V1 rockets during wartime.").
1130. See Williams, supra note 1128, at A6; see also Volkswagen AG Humanitarian Fund for Granting Aid to Former Forced Laborers, L.A. TIMES, Dec. 4, 1998, at A11 (displaying full-page ad placed by Volkswagen publicizing the fund). Strangely, the advertisement does not even provide an address or telephone number in the United States. Elderly Holocaust survivors are directed to contact the Frankfurt office of the international accounting firm KPMG. See id. According to the ad: "KPMG Deutsche Treuhand-Gesellschaft AG has been requested by Volkswagen AG and the Curatorium to disburse the financial aid, upon examination and review of the documents, in an unbureaucratic, expeditious and swift manner." Id.
1131. See supra Part VI.B.
In May 1999, VW was hit with a different kind of lawsuit. Anna Snopczyk, a seventy-eight-year-old Polish national, sued VW in Wisconsin federal court for infanticide.\footnote{1132}

According to the complaint, VW, in conjunction with its forced labor program, operated a kinderheim—children’s home, in German—where infants born to VW’s forced workers and to forced workers on surrounding farms were taken.\footnote{1133}

Plaintiff brought this action on behalf of herself, and on behalf of parents of approximately 350 to 400 Polish and Russian children who, between 1943 and 1945, were placed in VW’s kinderheim and died shortly thereafter.\footnote{1184} The complaint alleges, based upon both Nazi and Allied reports, that the babies were kept in deplorable conditions and that, towards the end of the war, the mortality rate of the babies reached 100%.\footnote{1185} Only one cause of action is alleged in the complaint: “Torts in Violation of International Law.”\footnote{1136}

\footnote{1132} See Complaint, Snopczyk v. Volkswagen AG, No. 99-C-0472 (E.D. Wis. filed May 5, 1999) [hereinafter Snopczyk Complaint]. According to the Associated Press, citing one of plaintiff’s attorneys, the lawsuit “was filed in Milwaukee partly because of the area’s large Polish population” and that “the lawyers hope the case would encourage others to come forward.” Jim Chilsen, \textit{Volkswagen Sued for 'Nazi Nursery'}, AP ONLINE, May 6, 1999, available in 1999 WL 17800828.

\footnote{1133} See Snopczyk Complaint, supra note 1132, ¶¶ 17-18, 20. According to the complaint, VW’s original kinderheim was in Wolfsburg, in close proximity to the forced workers’ camp. \textit{See id.} ¶ 25. This allowed the female workers to visit their children and breast-feed them. In June 1944, however, the kinderheim was moved “out of Wolfsburg to a former prison camp in Ruhen, which was an eight mile walk from the [VW] factory. . . . This made it nearly impossible for mothers to visit their children.” \textit{Id.}

\footnote{1134} See Snopczyk Complaint, supra note 1132, ¶ 1. According to the complaint, in 1941, the Germans forcibly deported plaintiff, then 19-years-old, and her mother to Wolfsburg, Germany. \textit{See id.} ¶¶ 3-6. Plaintiff worked at the VW factory, and then at a farm near the factory. \textit{See id.} There, she fell in love with a Polish man who worked on a neighboring farm. \textit{See id.} In February 1945, plaintiff gave birth to a child, who was sent to the kinderheim in Ruhen operated by VW. \textit{See id.} The child, a baby boy, died two months later. \textit{See id.} Plaintiff had to pay to have the child buried. \textit{See id.}

\footnote{1135} See \textit{id.} ¶ 20. The complaint states:

In March, 1943, Volkswagen established a maternity hospital and [k]inderheim for the Poles and Russians working in Wolfsburg. From 1943 to 1945, Volkswagen operated these facilities without regard for the health or well-being of the mothers and children, and through a course of genocide, killed 350 to 400 Polish and Russian children under the age of 16 months. By deliberately providing inadequate care and unsanitary conditions which caused the rampant spread of infection and disease, Volkswagen caused the mortality rate of the day nursery to escalate from 25 percent when the nursery was first opened, to nearly 100 percent in the final months of its operation.

\textit{Id.} (emphasis added).

\footnote{1136} \textit{id.} ¶ 53.
By knowingly and intentionally causing the death of Polish and Russian babies entrusted to its care, defendant Volkswagen violated customary international law and the law of nations, including the Hague Convention of 1907, the Geneva Convention, and the principles of customary international law recognized by the Nuremberg Tribunals, and committed torts under the laws of the United States, requiring defendant to pay plaintiff Anna Snopczyk and the Class members appropriate compensatory and punitive damages for the brutal deaths of their children.\(^ {1137} \) 

VW, in response to the lawsuit, referred to the allegations as "a tragic chapter from one of the darkest times of modern history.... The widespread practice of forcing infants and children to be taken from their mothers and placed in special children's homes throughout Germany was another manifestation of the inhumanity of the Third Reich in World War II."\(^ {1138} \) 

In 1999, it appeared that other companies may soon face similar suits. A September 1999 "Holocaust-Related Claims Update Letter" of the lead law firm filing the lawsuit against VW states: "Volkswagen was by no means the only employer who operated a \( [\text{kinderheim}] \). There were 316 \( [\text{kinderheim}] \) in Germany under the Third Reich. We are currently investigating \( [\text{kinderheim}] \) run by Ford, Krupp, and Anorgana, but would greatly appreciate any information you have on other such \( [\text{kinderheim}] \)."\(^ {1139} \)

However, the December 17, 1999 preliminary slave labor settlement with the German government and German industry also covers the \( [\text{kinderheim}] \) claims.\(^ {1140} \) Consequently, if the settlement is finalized, the ongoing lawsuits will need to be dropped, with the \( [\text{kinderheim}] \) victims receiving only a modest payment of 15,000 German marks, or $7800, as contemplated in the German settlement.\(^ {1141} \)

\( ^{1137} \) Id.
\( ^{1138} \) Chilsen, supra note 1132 (quoting Lyn Rahilly, attorney for VW).
\( ^{1140} \) See Statement of Deputy Treasury Secretary Stuart E. Eizenstat, supra note 814, at 3. "Payments [from the German Foundation Initiative] settlement shall include an inclusive category for personal injury cases, including, but not limited to, mothers of [kinderheim cases . . . ]". Id. (emphasis added); see also Statement by Otto Graf Lambsdorff, supra note 813, at 4 ("[T]he largest part of the 10 billion mark endowment is intended for direct payments to victims, especially to former slave and forced laborers . . . as well as for victims of . . . the kinderheim cases . . . "). (second emphasis added).
\( ^{1141} \) See discussion and notes supra Part VI.B.
D. Claims against American Companies

Accusations against American companies for their dealings with Nazi Germany are not new. After the war, some U.S. government reports named certain domestic corporations as profiting from the Holocaust. 1142

In 1983, Charles Higham, a former writer for the New York Times, published a book 1143 accusing various American blue-chip companies of dealing with the Nazis during World War II. In the book, Higham also accused certain U.S. government officials of assisting these companies in such dealings.

In November 1998, the Washington Post carried an extensive story 1144 detailing alleged dealings by Ford Motor Company 1145 and General Motors ("GM") 1146 with Hitler's Germany.

In early 1999, President Clinton created a commission to determine the scope of Nazi-stolen assets still present in the United

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1146. In response to the Washington Post story, General Motors stated:

“The stale allegations repeated in The Washington Post were reviewed and refuted by GM 25 years ago in hearings before Congress, when more individuals with firsthand knowledge of the facts were available. . . . Such allegations, purporting to portray GM as a supporter of the Nazi war effort, are slanderous and untrue and do a great disservice to the thousands of loyal GM employees and their families who worked for the U.S.-Allied cause in that war.”


Three weeks later, GM hired Dr. Henry Turner, a Yale University historian, to research its activities in Germany during World War II. See GM Probing Former Ties to Nazis, N.Y. POST, Dec. 23, 1998, at 34, available in 1998 WL 25332546 (“Dr. Turner’s work will help us achieve our goal of a complete accounting of GM’s and Opel’s activities during World War II and to assess our responsibilities.”) (quoting John F. Smith, chairman of GM). Opel refers to Adam Opel, GM's German subsidiary. See id.
States and also to investigate American companies’ wartime complicity with the Nazis. 1147

At present, it is unknown what findings the presidential commission will issue after it concludes its research. 1148 From the information available so far, it appears, however, that even American companies are not completely guilt-free for their wartime activities.


[with this legislation[,] we will create a commission that will seek to find the disposition of the following assets in this country: dormant bank accounts of Holocaust victims in U.S. banks; brokerage accounts, securities, & bonds; artwork & religious/cultural artifacts; German-looted gold shipped to the U.S. . . . and insurance policies.


While we have sought answers from Switzerland and other nations on the disposition of dormant bank accounts and Nazi gold, we have not pursued the issue here in the United States. Today, we begin this search. Now we are obliged to set history straight and correct any injustices in our own country. The United States has a moral responsibility to address the same issues to which we have sought answers from Switzerland and other nations in Europe. The spirit of American decency demands no less.


1148. In October 1999, the Presidential Commission issued its first report: a preliminary study of the plunder by American troops of a train loaded with gold, artworks, and other valuables stolen from the Hungarian Jews by the Nazis. See Progress Report on: The Mystery of the Hungarian ‘Gold Train’, (visited on Feb. 23, 2000) <http://www.pcha.gov/goldtrainfinal toconvert.html>. The train was captured by the Allies on May 16, 1945, eight days after V-E Day. See id. According to the report, in a notable exception to the generally good effort of American troops to restore property to its owners, both high-ranking Army officers and lower-level personnel may have helped themselves to these valuables, rather than returning them to the Hungarian Holocaust victims or the postwar Hungarian Jewish community. See id. For articles discussing the Hungarian “gold train” report and its immediate aftermath, see Michael Dobbs, Tarnished Gold, WASH. POST, Oct. 15, 1999, at A3; Tim Golden, G.I.’s Accused as Looters of Riches of Jews, N.Y. TIMES, Oct. 15, 1999, at A1.
As summarized succinctly by *Newsweek International*:

Most Holocaust researchers still believe that U.S. corporate collaboration with the Axis was marginal, especially compared with activities by European firms in "neutral countries" like Switzerland, Sweden, Portugal and Spain. But U.S. complicity may have been greater than generally believed.... And so the search for Holocaust assets, which began in the United States, may be coming full circle. Nearly three years after U.S. groups representing Holocaust survivors began a campaign against Swiss banks, a vast financial reckoning is underway.1149

As already discussed, the American automotive giants, Ford and GM, have been accused of benefitting from the Holocaust through the use of slave labor by their German subsidiaries during World War II.1150

Two major American financial institutions, Chase Manhattan Bank and J.P. Morgan & Company, have also been sued for the confiscation of the accounts of their Jewish account holders in Nazi-occupied France by their French-based offices.

The first Holocaust-related lawsuit to involve American banks was filed in December 1998 in New York.1151 The lawsuit, filed against Chase Manhattan Bank, J.P. Morgan & Co., and seven French banks, accused them of confiscation and retention of bank deposits and other assets of Jews in France after the Nazi occupation of France.1152 The suit was filed by seventeen Holocaust survivors and sought class action certification on behalf of all Jewish account holders whose accounts were "Aryanized" by the defendants.1153

In March 1999, in a repeat of the strategy used in the Swiss bank litigation,1154 the attorneys prosecuting the federal lawsuit in New York filed a similar lawsuit against the same defendant banks in California state court in San Francisco.1155 Like the earlier California state suit against the Swiss banks, this suit, filed by a Holocaust

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1150. *See supra* Part VI.C.
1152. *See id.* ¶¶ 77-94. For further discussion of this litigation, see *supra* Part VII.A.2.
1153. *See Benisti* Complaint, *supra* note 1061, ¶¶ 59-60.
1154. *See supra* Part III.B. (discussing California lawsuits and other state actions filed against the Swiss banks).
survivor in California, was also filed under the California Unfair Competition Act ("UCA").

To date, the litigation against both of these American financial institutions continues, despite an announcement in May 1999 by Chase Manhattan that it had reached an accord to compensate former wartime Jewish account holders and heirs whose accounts were confiscated by the French branches of Chase Manhattan.

American companies are not contemplating the establishment of a private fund for compensating Holocaust victims and their heirs. Moreover, they have not joined any international private fund for a global settlement, such as the German industry fund. Therefore, newly-released historical findings on the role of American corporations during World War II may lead to American corporations being the next set of defendants in Holocaust-era suits.

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1156. CAL. BUS. & PROF. CODE §§ 17200-17206 (West 1997) (allowing individuals to bring actions under California law, both individually and on behalf of the general public, for unfair competition). This novel use of the UCA for Holocaust-era claims was never tested in Markovitcova v. Swiss Bank Corp., No. BC 996160 (Cal. Super. Ct. filed June 30, 1998), because the lawsuit was dismissed shortly after its filing as part of the August 1998 global settlement with the Swiss banks. See supra Part III.D.2. To date, no court has decided whether the UCA may be used for such a purpose.


1158. Ford and GM, whose subsidiaries in Nazi Germany used slave laborers during the war, could join the German companies seeking to establish a fund for the former slave laborers. See supra Part VI.B. So far, neither company has taken this step.
VIII. CONCLUSION

An editorial in the Israeli newspaper *Ha'aretz* succinctly explained the impact of the various revelations being made today about the financial misdeeds stemming from the Holocaust:

The Holocaust proved that the murder of the Jews and the annihilation of whole communities was not only an outlet for monstrous anti-Semitism, it was also good business. But it is precisely the willingness of the world's nations today, some fifty-five years after the end of World War II, to make the material calculations and search for stolen property and return it, that raises questions which in the past were possible to ignore.*1159

The Holocaust did not occur in the United States, but in Europe. Most Holocaust survivors reside in Israel, not in the United States. It is the United States, however, that has taken on the burden of delivering long-overdue justice to aging Holocaust survivors, thereby tackling the difficult questions caused by the delay in dealing with this long-neglected problem.

A discussion of Holocaust-era litigation is not static, since most of the lawsuits discussed in this article are ongoing.

Undoubtedly, additional lawsuits will be filed in the future. As long as one Holocaust survivor is alive somewhere in the world, and an individual or a corporation doing business in the United States is discovered to have been involved in misdeeds during World War II, litigation of the Holocaust will continue in our courts.*1160*

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1160. Already, 1999 has seen a new category of lawsuits being filed stemming from World War II: suits against Japanese companies for their wartime wrongs. Undoubtedly, these suits were inspired by the litigation discussed herein. The first suits filed were by American POWs who were forced to work as slave laborers for private Japanese companies during the war. See Complaint, Levenberg v. Nippon Sharyo Ltd., No. C 99-1554 BZ (N.D. Cal. Mar. 31, 1999) (class action lawsuit by 79-year-old retired U.S. Army Sgt. Ralph Levenberg against six Japanese companies who profited from the forced labor of U.S. prisoners of war during WWII); Complaint, Tenney v. Mitsui & Co. Ltd., No. BC 215028 (Cal. Super. Ct. Aug. 11, 1999) (individual lawsuit by 79-year-old retired U.S. Army officer Lester Tenney against Mitsui for forced labor performed at Mitsui's Miike coal mines in Omuta, Japan).


For a Web site created by one of the plaintiffs' attorneys prosecuting these cases, see Japanese WWII Claims (visited on Feb. 29, 2000) http://www.japanesewwiiclaims.com>.
Appendix A

HOLOCAUST LITIGATION IN THE UNITED STATES *

I. CONSOLIDATED SWISS BANK CLAIMS (In re Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. consolidated April 1997)).
A. Settled Cases¹
B. Dismissed Cases

II. CONSOLIDATED GERMAN & AUSTRIAN BANK CLAIMS (In re Austrian & German Bank Holocaust Litigation, No. 98 Civ. 3938 (S.D.N.Y. consolidated Mar. 15, 1999)).
A. Class Action Complaints
   1. Pending Cases

¹ Prepared with the assistance of Daniela Saxa-Kaneko. This list does not include the lawsuits filed against the Japanese corporations for their activities during World War II. For an updated chronicle of such cases, see Japan, U.S. and World War II: The Search for Justice Lawsuit (visited Feb. 23, 2000) <http://www.law.whittier.edu/sypo/fmlallawsuit.htm>.
² These cases settled for $1.25 billion in August 1998, and a fairness hearing was held in November 1999.
³ This lawsuit was voluntarily dismissed as part of the Swiss bank settlement.

2. Settled Cases

B. Individual Action Complaints
1. Pending Cases

III. FRENCH BANK CLAIMS
A. Pending Cases

IV. INSURANCE CLAIMS
A. Class Action Complaints
1. Pending Cases

³ A separate settlement was reached at the fairness hearing held on November 1, 1999, by Bank Austria and Creditanstalt for $40 million.
⁴ See id.
⁵ A separate settlement was reached with Barclays Bank for $3.6 million in August 1999.
B. Individual Action Complaints

1. Pending Cases

2. Settled Cases

V. SLAVE LABOR AND RELATED CLAIMS

A. Pending Cases\(^{10}\)

2. Michelin v. Opel, Civil Action No. 99-2229 (D.N.J. filed June 7, 1999).\(^{11}\)
3. Opatowski v. Opel, Civil Action No. 99-2228 (D.N.J. filed May 17, 1999).\(^{12}\)

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6. This case was originally filed in the Superior Court of California and was removed to the U.S. District Court for the Central District of California. The case was dismissed on October 16, 1998 and is currently on appeal to the U.S. Court of Appeals for the Ninth Circuit.
7. This case settled in February 2000. The settlement terms are confidential.
8. See id.
9. This case settled in November 1999. The settlement terms are confidential.
10. A preliminary global settlement was reached in December 1999 for 10 billion German (Deutsche) marks (approximately $5.2 billion).
11. This case was consolidated with Opatowski v. Opel, Civil Action No. 99-2228 (D.N.J. filed May 17, 1999), on June 4, 1999.
12. This case was consolidated with Michelin v. Opel, Civil Action No. 99-2229 (D.N.J. filed June 7, 1999), on June 4, 1999.

13. This case was consolidated with Gross v. Volkswagen AG, Civil Action No. 98-4104 (D.N.J. filed Aug. 31, 1998).
14. This case was consolidated with Rosenfeld v. Volkswagen AG, Civil Action No. 98-4429 (D.N.J. filed Sept. 22, 1998).

B. Dismissed Cases
VI. MEDICAL EXPERIMENT CLAIMS

A. Pending Cases

B. Dismissed Cases

VII. PROPERTY RESTITUTION CLAIMS

A. Pending Cases

B. Dismissed Cases

VIII. ART CASES

A. Pending Cases
   1. Bondi v. A Painting by Egon Schiele known as "Bildnis Vally [or "Wally"], 99 Civ. 9986 (S.D.N.Y. filed Sept. 24, 1999).\(^{17}\)
   2. United States v. Portrait of Wally, 99 Civ. 9940 (S.D.N.Y. filed Sept. 21, 1999).\(^{18}\)

B. Settled Cases

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\(^{15}\) This case was voluntarily dismissed by plaintiffs without prejudice.

\(^{16}\) These cases are covered by the 10 billion German (Deutsche) marks (approximately $5.2 billion) settlement. See supra note 10.

\(^{17}\) This case involves the Schiele painting, Portrait of Wally.

\(^{18}\) See id.

\(^{19}\) This case involves the "Book of Hours" Manuscript.
1. Goodman v. Searle, No. 96-C-6459 (N.D. Ill. filed Sept. 24, 1996).\textsuperscript{20}

C. Dismissed Cases

IX. CLAIMS AGAINST THE VATICAN BANKS
A. Class Action Complaints
1. Pending Cases

\textsuperscript{20} This case was originally filed in the Southern District of New York in July 1996. It was subsequently transferred to the Northern District of Illinois. The case involved a Degas, Landscape with Smokestacks, which is located in the Chicago Art Museum.

\textsuperscript{21} A cross complaint by the Seattle Art Museum against Knoedler & Co. Art Gallery was dismissed, and the Seattle Art Museum is appealing. The painting in this case, Oriental Woman Seated on Floor, was sold by the Rosenbergs to Bellagio Hotel in Las Vegas after the settlement. The settlement occurred on June 14, 1999.

\textsuperscript{22} The case involved two paintings by Schiele, Dead City III and Portrait of Wally. In September 1999, the New York Court of Appeals upheld the dismissal of the actions by the trial court.
Appendix B

FEDERAL AND STATE LAWS REGARDING HOLOCAUST RESTITUTION

I. Federal

A. Enacted Legislation


2. Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 18 (1998) (providing the following guidelines: (1) the President shall direct the commissioner representing the U.S. on the Tripartite Commission for the Restitution of Monetary Gold to seek and vote for an agreement with the 15 nations that have a claim to the gold that those nations will contribute all, or a substantial portion, of the gold to Jewish charities that assist survivors of the Holocaust; (2) the appropriation of funds to be used for Holocaust remembrance and education as well as research and translation services to further the restitution of assets to victims of the Holocaust is authorized; and (3) consistent with the Hague Convention of 1907, all governments should make a good faith effort to return property, such as works of art, to their rightful owners where such works of art were stolen during the Nazi era).

thorough study on, and develop a historical record of, the collection and disposition of those assets).

B. Proposed Legislation

1. Justice for Holocaust Survivors Act, H.R. 271, 106th Cong. (1999) (adding an exception to the Foreign Sovereign Immunities Act for cases involving lawsuits for money damages against Germany, or areas controlled by Germany, for the personal injuries of a U.S. citizen that occurred during World War II, provided the cause of action is brought within 24 months of the enactment of the exception).


United States is due and authorizes additional funding).


9. Comprehensive Holocaust Accountability in Insurance Measure (CHAIM), H.R. 3143, 105th Cong. (1998) (prohibiting 17 named insurance companies from doing business in the United States unless they disclose the names of all Holocaust victims listed in Yad Vashem's Hall of Names with whom they did business and all Holocaust survivors listed by the U. S. Holocaust Memorial Museum with whom they did business).


II. State Laws

A. California

1. Enacted Legislation
   a. Slave Labor
      i. CAL. CIV. PROC. CODE § 354.6 (Deering 1999) (giving anyone forced into labor without pay by the Nazis, their
sympathizers, or allies, for any period of time between 1929 and 1945, the right to file suit to recover monetary compensation from the entity, or its successor in interest, for whom the labor was performed; allowing suits to be brought in superior court either directly against the entity or through a subsidiary or affiliate; and suspending any otherwise applicable statute of limitations if the action is commenced on or before December 31, 2010).

b. Insurance

i. Holocaust Victims Insurance Act, CAL. INS. CODE §§ 790-790.15 (Deering 1998) (allowing insurance commissioner to suspend the operating license of any insurer failing to pay any valid claim from Holocaust survivors until such claim is paid).

ii. CAL. CIV. PROC. CODE § 354.5 (Deering 1998) (providing that any Holocaust victim or heir residing in California may bring suit in superior court to recover claims arising out of insurance policies purchased or in effect in Europe before 1945 from a specified insurer and extending statute of limitations to December 31, 2010).

iii. Holocaust Victim Insurance Relief Act of 1999, CAL. INS.
c. Tax
   i. Holocaust Reparations Act, CAL.REV. & TAX. CODE § 17155 (Deering 1998) (creating a tax exemption for Holocaust victims or their heirs for income derived from the settlement of Holocaust claims against any entity or individual).

B. Florida
   3. Enacted Legislation
      a. Insurance
         i. Holocaust Victims Insurance Act, FLA. STAT. ch. 626.9543 (1999) (providing that any insurer doing business in Florida must make a diligent attempt to investigate,
resolve, or settle claims made by Holocaust victims, survivors, and their families, provided that the claim is made within 10 years of enactment, and requiring that insurers must make full disclosure to the insurance commissioner of all records and information regarding policies issued to Holocaust victims between January 1, 1929 and December 31, 1945).

C. Georgia
1. Proposed Legislation
   a. Tax
      i. H.B. 385, 145th sess. (1999) (exempting from state taxation income received or recovered from foreign banks by Holocaust victims or their heirs).

D. Illinois
1. Enacted Legislation
   a. Tax

E. Indiana
1. Enacted Legislation
   a. Tax
      i. IND. CODE § 6-3-1-3.5 (1999) (excluding reparations to Holocaust victims from state
taxation if they are taxed federally and from consideration for certain monetary aid programs).

F. Maryland
1. Enacted Legislation
   a. Tax
      i. **MD. CODE ANN., TAX-GEN. §§ 7-203(l), 10-207(t) (1999)** (excluding reparations paid to Holocaust victims or their heirs from state inheritance and income tax).

G. Massachusetts
1. Proposed Legislation
   a. Tax

H. Michigan
1. Enacted Legislation
   a. Tax
      i. **1999 Mich. Pub. Acts 181** (excluding from state income taxation income derived from Holocaust claims settlements or claims proceeds against any individual or entity for bank deposits, insurance proceeds, or artwork owned at any time during 1920-1945 that were not recovered or compensated until after 1993).

I. Minnesota
1. Proposed Legislation
   a. Tax
in settlement of Holocaust claims from state income taxation).

J. Missouri
1. Enacted Legislation
   a. Tax
      i. H.B. 1332, 90th Leg., 2d Reg. Sess. (Mo. 2000) (exempting from state income tax income received by Holocaust victims as reparation for Nazi persecution).
      ii. H.B. 1452, 90th Leg., 2d Reg. Sess. (Mo. 2000) (exempting from state income tax income received by Holocaust victims as reparation for Nazi persecution).

K. New Jersey
1. Enacted Legislation
   a. Tax
      i. N.J. STAT. ANN. § 54A:6-29 (West 1999) (excluding Holocaust restitution and reparations from state income tax).

2. Proposed Legislation
   a. Insurance
      i. Holocaust Victim Insurance Claim Registry and Relief Act, A.B. 422, 209th Leg., 2000 Reg. Sess. (N.J. 2000) ((1) establishing the Holocaust Victim Insurance Claim Registry that would house records and information regarding the insurance policies of Holocaust victims and survivors; (2) providing that any insurer doing business in New Jersey who is presented
with a claim from an individual the insurer knows, or should know, is a Holocaust victim must make a diligent attempt to investigate, resolve, or settle the claim; and (3) providing that insurers must make full disclosure to the insurance commissioner of all records and information regarding policies issued to Holocaust victims between January 1, 1920 and December 31, 1945).

L. New York
   1. Enacted Legislation
      a. Insurance
         i. Holocaust Victims Insurance Act of 1998, N.Y. INS. LAW § 2703 (Consol. 1999) (providing (1) assistance to individuals in the recovery of proceeds from insurance policies written to Holocaust victims; (2) that any insurer doing business in New York who is presented with a claim from an individual the insurer knows, or should know, is a Holocaust victim must make a diligent attempt to investigate, resolve or settle the claim provided that the claim is made within 10 years of the enactment of this act; and (3) that insurers must make full disclosure to the insurance commissioner of all records and information regarding policies issued to Holocaust victims between
January 1, 1929 and December 31, 1945).


2. Proposed Legislation
   a. Tax

M. Pennsylvania
   1. Enacted Legislation
      a. Tax

N. Washington
   1. Enacted Legislation
      a. Insurance
         i. Holocaust Victims Insurance Relief Act, WASH. REV. CODE § 48.104.060 (1999) (requiring any insurer who sold insurance policies in Europe between 1933 and 1945 to disclose all records and information regarding those policies to the insurance commissioner).
         ii. Holocaust Victims Insurance Act, WASH. REV. CODE §
48.104.040 (1999) (allowing insurance commissioner to establish Holocaust-survivor assistance office to assist victims in the recovery of proceeds from the insurance policies and/or other assets that were improperly denied or processed).

2. Proposed Legislation
   a. Insurance
      i. H.B. 2162, 56th Leg., 1999 Reg. Sess. (Wash. 1999) (requiring any insurer who sold insurance policies in Europe before 1945 to disclose all records and information regarding those policies to the insurance commissioner and extends any applicable statute of limitations to December 31, 2010).

O. Wisconsin
   1. Proposed Legislation
      a. Tax
         i. S.B. 9, 1999-2000 Leg., 1999 Reg. Sess. (Wis. 1999) (exempting from state taxation settlements for claims of assets or assets actually recovered from claims against Nazi Germany or any Axis regime).
ii. A.B. 70, 1999-2000 Leg., 1999 Reg. Sess. (Wis. 1999) (exempting settlements for claims of assets or assets actually recovered from claims against Nazi Germany or any Axis regime from state taxation).