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Holocaust-Era Insurance Claims: Background and Proposed Legislation

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Summary

In November 1998, U.S. insurance regulators, six European insurers, international Jewish organizations, and the State of Israel agreed to establish the International Commission on Holocaust Era Insurance Claims (ICHEIC). ICHEIC was tasked with identifying policyholders and administering payment of hundreds of thousands of Holocaust-era insurance policies alleged never to have been honored by European insurance companies. It ended its claims process in March 2007, having facilitated the payment of just over $300 million to 47,353 claimants. An additional $190 million was allocated to a "humanitarian fund" for Holocaust survivors and Holocaust education and remembrance.

Throughout its existence, ICHEIC was criticized, including by some Members of Congress, for delays in its claims process, for conducting its activities with a lack of transparency, and for allegedly honoring an inadequate number of claims. Although they acknowledge initial delays in the claims process, ICHEIC supporters—among them successive U.S. Administrations and European governments—argue that the process was fair and comprehensive, especially given the unprecedented legal and historical complexities of the task.

Members of Congress have shown a long-standing interest in seeking to obtain compensation for Holocaust survivors and their heirs for unpaid insurance policies. Hearings before the House Committee on Government Reform between 2001 and 2003 exposed broad criticism of ICHEIC, and legislation proposed in the 107th-111th Congresses sought to provide survivors alternative legal mechanisms to pursue claims. These proposals were never enacted and were opposed by U.S. Administrations, which considered ICHEIC the exclusive vehicle for resolving Holocaust-era insurance claims.

ICHEIC's closure, and growing concern about the well-being of aging survivors—now predominantly over 80 years old—have reignited congressional interest in Holocaust-era insurance and other compensation issues. In March 2011, Representative Ileana Ros-Lehtinen and Senator Bill Nelson introduced companion legislation in the House and the Senate (H.R. 890 and S. 466) that would affirm Holocaust survivors' and their heirs' right to pursue claims against European insurance companies in U.S. courts and would prohibit executive agreements reached by the federal government from preempting state laws that impose disclosure requirements on European insurers. Critics of the proposed legislation argue that by effectively reversing past commitments made by the U.S. government, the bills could damage future cooperation with European governments on other Holocaust compensation and restitution issues. Furthermore, they contend that the legislation would enable costly, but likely fruitless, litigation.

This report aims to inform consideration of H.R. 890 and S. 466 and possible alternatives by providing: background on Holocaust-era compensation and restitution issues; an overview of ICHEIC, including criticism and support of its claims process and Administration policy on ICHEIC; and an overview of litigation on Holocaust-era insurance claims and the proposed legislation.

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Introduction

General Background on Post-War Compensation

The 1952 Luxembourg Reparations Agreement between the Federal Republic of Germany (West Germany), Israel, and the Conference on Jewish Material Claims against Germany (Claims Conference) marked the first and most significant of a series of post-war West German initiatives which have resulted in total German government payments of an estimated $99 billion (about €68.8 billion) to Jewish and non-Jewish victims of Nazi crimes and their heirs.[1] While most agree that Germany will never be able to adequately compensate for Nazi atrocities, the compensation and restitution efforts of successive German governments have been widely commended.[2]

The governments of other Western European countries known to have collaborated with the Nazis also undertook compensation efforts in the years after the Second World War. However, with the possible exception of those in the Netherlands, these efforts are generally thought to have been less comprehensive than West Germany's. In the years following the war, these countries, whose economies had been devastated, tended to argue that Germany should assume responsibility to compensate for Nazi crimes. The communist governments of East Germany and Central and Eastern Europe offered minimal restitution and/or compensation, if any.[3]

The fall of the Berlin Wall (1989) and collapse of the Soviet Union (1991) led to renewed efforts by Jewish organizations, Holocaust survivors, and the U.S. and Israeli governments to obtain compensation for survivors who had lived or continued to live in Central and Eastern Europe.[4] Initial efforts focused largely on property restitution and compensating victims of forced and slave labor. Simultaneously, a series of class-action lawsuits against European companies were filed in U.S. courts on behalf of Jewish Holocaust survivors; these shed light on the fact that up to billions of dollars worth of assets seized by the Nazis from individual citizens and deposited in private and national banks throughout Western Europe had never been returned. In March 1997, the first class-action lawsuits focusing exclusively on the issue of unpaid Holocaust-era life insurance policies were filed in New York (the so-called "Cornell Class Action" against 16 European insurers).

The mid-to-late 1990s' class-action lawsuits against Swiss, German, Austrian, Italian, and French companies brought widespread international attention to the issue of looted Holocaust-era assets, unpaid insurance policies, and dormant bank accounts. Given the immense significance and sensitivity of the issues, and the unprecedented nature of the legal cases before U.S. judges, the U.S. government sought to facilitate settlement of the lawsuits through a series of complex

[1] This figure represents the present-day value of all payments through the year 2010, as reported by the German Finance Ministry. German Ministry of Finance, *Leistungen der öffentlichen Hand auf dem Gebeit der Wiedergutmachung*, December 31, 2010. Document provided by the German Embassy, Washington, D.C.

[2] For more information see CRS Report RL33808, *Germany's Relations with Israel: Background and Implications for German Middle East Policy*, by Paul Belkin.

[3] See Stuart Eizenstat (former U.S. Undersecretary of State and Deputy Treasury Secretary, and lead Clinton Administration negotiator on Holocaust compensation matters), "Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II." New York: Public Affairs. 2003.

[4] For additional background information on these efforts see Ibid.; John Authers and Richard Wolffe, "The Victim's Fortune: Inside the Epic Battle over the Debts of the Holocaust," New York: Harper Collins. 2002; Michael Bazyler, "Holocaust Justice: The Battle for Restitution in America's Courts." New York: NYU Press. 2003; for U.S. government documents and a report on the 1998 Washington Conference on Holocaust-era Assets see the electronic archive at http://www.state.gov/www/regions/eur/holocausthp.html.

agreements involving national and state governments, class-action lawyers, private industry, and a variety of Jewish and other victims' groups.

Most agree that U.S. Administration efforts to facilitate resolution of these claims by involving a range of interested parties, including national governments, victims, and private industry, played an important role both in securing support for, and impeding subsequent legal challenges to the government-negotiated settlements. The Clinton Administration took the lead in facilitating broad compensation agreements—each with insurance-related components—with German, Austrian, and French companies and their governments. The Clinton Administration was also involved in negotiating a settlement with Swiss banks, although some U.S. officials contended that a lack of Swiss government involvement weakened that agreement, and led to heightened international criticism of Switzerland. According to Stuart Eizenstat, the Clinton Administration's lead official in the negotiations, the damaging effects of a wave of international criticism of Switzerland arising from its perceived poor handling of the "Swiss bank affair" led the German, Austrian, and French governments to proactively seek to resolve pending lawsuits against companies in their countries and stem the possibility of future lawsuits.[5] Each of these governments established broad settlement funds to compensate victims of forced and slave labor, looted assets, and insurance policy theft, among other crimes; each also reportedly viewed U.S. government approval of their compensation programs as a top priority. Official U.S. endorsement, it was believed, could ensure that future lawsuits or challenges to the settlements would have difficulty standing up in U.S. courts.[6]

Background on Insurance Issues

Insurance markets in pre-World War II Europe were well developed with many policies going further than simply compensating for property damage or providing benefits to a family in the case of the policyholders' death. In addition to providing death benefits, these policies often acted as savings vehicles, similar in some ways to what are known as whole life insurance policies in the United States today. For example, life insurance policies were often purchased intending to provide for a son's education, or to provide for a dowry upon the marriage of a daughter. Such a policy might have run for 20 years, with the policyholder committing to make periodic payments and the insurance company committing to pay a certain sum, known generally as the "face value" of the policy, at the end of the 20 years, or in the case of the death of the policyholder. Such a policy generally would have cancellation provisions, that would allow a policyholder to obtain a "surrender value" prior to the policy's intended end, or, if a policyholder wished to keep the contract but not pay further premiums, it could be converted to "paid up" status which would result in a smaller face value at the end of the policy.

In the run-up to, and during the conduct of, World War II, the Nazi government made a concerted effort to confiscate assets belonging to Jews in Germany and in various occupied countries.[7] At

[5] With regard to the importance of national government involvement, Eizenstat says, "My bitter experience with the Swiss negotiations, in which the Swiss government refused to be a negotiating partner, taught me a lesson that I never forgot in joining the German, Austrian, and French talks. I would never again risk the prestige of the U.S. government in trying to settle class-action lawsuits against foreign companies, unless their governments were willing to become directly engaged ... Fortunately, Germany, Austria, and France ... recognized that the reputation of their private companies reflected on their nations' reputations." Eizenstat, op. cit., p. 341.

[6] Ibid.

[7] An historian at the University of California, Berkeley, Professor Gerald D. Feldman, conducted extensive research into the Nazi seizure of insurance assets. See, for one account, Chapter 6 of his work *Allianz and the German Insurance Business, 1933-1945*, (Cambridge, UK: Cambridge University Press, 2001).

first, these efforts were largely indirect, such as placing high taxes or fees on those emigrating, which necessitated the liquidation of many insurance policies. Later, the confiscation was more direct, with, for example, insurance companies being required to pay insurance proceeds from claims[8] or the cash values directly to the government.

Initial post-war efforts in Western Europe to honor unpaid insurance policies—primarily life insurance—belonging to Holocaust victims are widely considered to have been far less comprehensive than other compensation and restitution programs. Several of the countries home to companies known to have sold such policies, including Germany, Austria, Switzerland, and the Netherlands, passed laws in the 1950s and 1960s attempting at least partially to honor these policies. However, a variety of factors led these efforts to fall short. These included uncertainty regarding the present value of the policies; difficulties with verification of policy ownership; disagreement over how to compensate the many Jews who were forced to either cash in their policies, or simply surrender them to the Nazis; and an insurance industry in dire economic straits.

As has generally been the case with post-war settlement issues, German and Dutch companies are thought to have done more than others in addressing unpaid insurance policies after the war. In the late 1990s, German insurance giant Allianz went so far as to claim it had honored approximately 70% of its wartime policies sold in Germany—either before the war ended, or through its participation in other post-war compensation programs.[9] Critics dispute Allianz's claim, arguing that policyholders were often grossly undercompensated, both during the war and with a greatly devalued currency in the war's aftermath. Other countries home to companies known to have sold insurance policies throughout the Nazi Reich, such as France and Belgium, did not administer any insurance-related compensation programs until the 1990s; and to this day, the Italian government appears to have involved itself in the matter minimally, if at all.

Historians agree that of all Holocaust victims, Jews were most likely to have owned substantial life and other insurance policies. Efforts to honor unpaid insurance policies have focused almost exclusively on Jewish victims. The fact that many such Jews lived and purchased policies in Central and Eastern European countries—primarily Poland, Hungary and Czechoslovakia—which later became part of the Soviet Bloc, proved to be an additional and significant complicating factor in post-war efforts to have the policies honored. Many of the companies that sold insurance in these countries no longer exist; however, several Western European companies which accounted for a significant portion of the Central and Eastern European markets continue to operate today. Specifically, the Italian company Generali is known to have been active in Central and Eastern Europe. Generali and others have in the past argued that responsibility to honor these policies was transferred to state-run insurance entities by way of the state takeover and nationalization of the industry under communist rule.[10]

[8] This was the case, for example, with regard to property damage claims from the anti-Jewish riots on Krystallnacht, November 9, 1938 as well as with life insurance policies.

[9] Statement of Mr. Herbert Hansmeyer, member of the Board of Management of Allianz AG. Washington Conference on Holocaust-era Assets (1998), op. cit., p. 594.

[10] For a detailed account of Generali's stand on the nationalization issue, see "The Nationalization, Confiscation and Liquidation of Insurance Policies Issued by Generali's Former Offices in Eastern Europe," May 24, 1999. Available from Generali offices, Trieste, Italy.

The International Commission on Holocaust Era Insurance Claims (ICHEIC)

In 1997, in response to increasing claims against European insurance companies operating in the United States, the National Association of Insurance Commissioners (NAIC) formed a Working Group on Holocaust Insurance Claims to reach out to Holocaust victims and their heirs to better determine the scope of the problem, and to initiate a dialogue with European insurers about how to resolve the issue of unpaid claims. A series of often emotional and contentious meetings between Holocaust survivors and their heirs, insurance regulators, and insurance companies over the course of the next year resulted in a joint decision to form an independent international commission to resolve unpaid claims.

In August 1998, the NAIC, six European insurers (Allianz, AXA, Basler,[11] Generali, Winterhur, and Zurich), the Claims Conference, the World Jewish Restitution Organization (WJRO), and the State of Israel signed a Memorandum of Understanding (MOU) establishing an international commission tasked both with identifying Holocaust victims who had purchased insurance policies from 1920-1945, and administering the repayment of these policies. Members of the International Commission on Holocaust Era Insurance Claims (ICHEIC)—chaired by former U.S. Secretary of State Lawrence Eagleburger—agreed that ICHEIC's claims process would adhere to the following principles: claimants would not be charged to file a claim; ICHEIC would evaluate claims based on relaxed standards of proof—given that a significant number of potential claimants did not possess policy documentation, claimants would not be required to name a specific insurance company or provide documentation of an insurance policy; and ICHEIC and participating insurance companies would conduct archival research in order to establish a database of potential policyholders against which to match submitted claims.[12]

Although the U.S. government did not have a voting representative on ICHEIC's board, state insurance regulators were officially represented through the NAIC, and a State Department representative was granted observer status. In all, the board consisted of Chairman Eagleburger and 12 members: three NAIC representatives; two representatives of Jewish organizations (the Claims Conference and WJRO); a representative of the state of Israel; and six representatives of European insurers and insurance regulators.

ICHEIC's claims process opened in 2000 and closed in March 2007. In total, it facilitated the payment of just over $300 million to 47,353 of about 90,000 claimants. Of the almost 48,000 recipients of ICHEIC payments, close to 31,300 received one-time "humanitarian" payments of $1,000 (see **Table 1** for detailed breakdown). Observers and others involved in the process report that rejected claims were often determined to have been honored under previous compensation agreements, or were determined to fall short of the relaxed standards established by the Commission. Some critics contend that ICHEIC applied these standards inconsistently, rejecting what were often valid claims.[13]

[11] Basler subsequently withdrew from ICHEIC. According to German Insurance Association (GDV) representatives, claims against Basler were covered through the Association's participation in ICHEIC.

[12] For additional background information on ICHEIC, see the ICHEIC Final Report, "Finding Claimants and Paying Them," June 2007, available at http://www.icheic.org/.

[13] Such criticism was, for example, expressed by former New York Superintendent of Insurance and ICHEIC appeals arbitrator, Albert Lewis. See Stewart Ain, "Probe 'Phantom Rule,' Says Congressman," *The New York Jewish Week*, July 6, 2007.

In addition to the funds paid to individual claimants, ICHEIC allocated $190 million to a "humanitarian fund" overseen by the Claims Conference. Following Claims Conference guidelines, 80% of this fund was designated to be spent on assistance to Holocaust survivors, and 20% on Holocaust education and remembrance.[14]

Despite ICHEIC's closure, some European insurers, including members of the German Insurance Association (*Gesamtverband der Deutschen Versicherungswirtschaft*, or GDV) and the Italian company Generali, say they are continuing to accept and honor legitimate claims based on ICHEIC's relaxed standards of proof. According to the GDV, since ICHEIC's closure, the association has received inquiries regarding 49 insurance policies. Of these, 12 were determined to be eligible for compensation, while 37 were determined to have been previously paid or compensated for. In total, GDV companies say they have paid $119,731 for claims brought since March 20, 2007.[15]

Table 1. ICHEIC Claims Received and Amounts Paid

	Claims Received	Offers Made	Total Paid
Named company	14,351	5,448	$136.29 million
No named company, but company research matches name to company	16,243	7,747	$98.4 million
No named company, no match ("humanitarian claims")	60,111	34,158	$61.82 million (31,284 rewards of $1,000)
TOTAL	90,705	47,353	$300.1 million

Source: ICHEIC Final Report, "Finding Claimants and Paying Them;" interview of ICHEIC representatives, March 2008.

Note: The $300.1 million in total payments includes about $45 million in payments made directly by insurance companies to claimants using ICHEIC standards, but outside the ICHEIC process. The total also includes just over $3.5 million in payments made by ICHEIC partner entities.

Ultimately, ICHEIC received a total of about $550 million from participating insurers. Of this, $350 million was secured from German companies through a watershed 2000 executive agreement between the United States and Germany, in which German government and industry committed $5 billion to compensate former forced and slave laborers and other victims of Nazi crimes.[16] $100 million came from Italian insurer Generali, and the remaining $100 million from a U.S.-Austrian executive agreement, and bilateral agreements between ICHEIC and Swiss insurers, and the Dutch, and Belgian insurance associations. In addition to the five insurers on ICHEIC's board, ICHEIC secured the participation of 75 other companies through bilateral agreements with the German, Dutch, and Belgian insurance associations.

[14] Some survivor organizations in the United States were reportedly dismayed that the bulk of this humanitarian funding went to assist Holocaust survivors in the former Soviet Union.

[15] See GDV, Post-ICHEIC Statistics (AVHO), available on GDV website at https://secure.gdv.de/entschaedigung/pdfdownloads/avho_statistik_eng.pdf.

[16] See "U.S.-Germany Agreement on the German Foundation." Available at http://www.state.gov/www/regions/eur/holocausthp.html.

Table 2. Insurance Company Contributions to ICHEIC

German Insurance Association (about 70 companies)	**$350 million**
Generali	$100 million
Swiss Insurers	$25 million
Austrian General Settlement Fund	$25 million
Others	$50 million
Total	**$550 million**

Source: ICHEIC Final Report, "Finding Claimants and Paying Them."

Note: ICHEIC representatives report that Generali contributed an additional $30 million in claims payments outside the ICHEIC process.

Administration Policy on ICHEIC

U.S. Administrations have consistently endorsed ICHEIC as an important and unprecedented mechanism to provide support and compensation to individuals whose insurance claims were believed unlikely to have been satisfactorily resolved through existing legal channels. The Clinton Administration sought to secure funding for ICHEIC and its claims process as part of the broader compensation agreements it negotiated with the German, Austrian, and French governments in the late 1990's. In exchange for financial commitments made to ICHEIC by German and Austrian companies by way of these agreements, the Clinton Administration agreed to endorse ICHEIC as the exclusive mechanism for resolving unpaid Holocaust-era insurance claims.

The Administration also sought to grant participating German companies so-called legal peace from further action against them in U.S. courts. Although the U.S. federal government could not forbid U.S. citizens from pursuing legal action against the companies, it did commit to file a statement of interest encouraging dismissal of any future legal action against German companies in the United States.[17] This commitment appears to have effectively impeded subsequent legal challenges or the development of alternatives to ICHEIC. Most significantly, in 2003, the U.S. Supreme Court struck down legislation in California that would have imposed additional reporting requirements on European insurers. In *American Insurance Association v. Garamendi,*[18] the Court ruled that the California law ran counter to the U.S. commitment to ICHEIC as enshrined in the executive agreements with European governments (the legal implications of both the commitment to legal peace and the Supreme Court decision are discussed in more detail below in the section entitled "Litigation of Holocaust-Era Insurance Claims").

[17] President Clinton's National Security Advisor Samuel Berger summarized the U.S. commitment to give German companies "enduring and all-embracing legal peace ... " in a June 2000 letter to his German counterpart. See June 16, 2000 letter from U.S. National Security Advisor Samuel Berger to German Foreign Policy and Security Advisor Michael Steiner; and "U.S.-Germany Agreement on the German Foundation." Both available at http://www.state.gov/www/regions/eur/holocausthp.html.

[18] 539 U.S. 396 (2003).

Key Points of Contention

Despite receiving the support of U.S. Administrations, ICHEIC was broadly criticized, including by Members of Congress.[19] Critics put forward the following charges: that ICHEIC's administrative and claims processes suffered from a lack of transparency and oversight; that ICHEIC often failed to live up to its commitment to apply relaxed standards of proof in assessing claims; and that ICHEIC and participating insurance companies failed to make comprehensive policyholder lists available to the public.[20] Since ICHEIC's closure, critics have emphasized that the roughly $300 million paid out to Holocaust survivors and their heirs falls far short of their estimates of the total value of unpaid Holocaust-era insurance policies, which range from $17 to $200 billion.[21] ICHEIC proponents respond that ICHEIC administered a claims-based process, giving all claims fair consideration. They argue, for example, that the fact that the total amount paid by ICHEIC falls short of some estimates of the value of unpaid policies suggests a lack of claimants rather than a flawed claims process.

The ICHEIC Claims Process: Management and Oversight Issues

Critics contend that ICHEIC's claims process suffered from unnecessary and prolonged delays, and that thousands of eligible claimants were ultimately excluded from the process due to poor management and a lack of transparency and legitimate oversight. Contention over ICHEIC management and oversight centers largely on European insurance companies' obligations under ICHEIC, and the extent to which they were held accountable to meeting these obligations. Under the terms of the ICHEIC MOU, ultimate responsibility for verifying, accepting, or rejecting submitted claims rested with the insurance companies. As outlined in **Figure 1**, ICHEIC staff submitted claims it deemed legitimate to insurance companies, which would, in turn, consult their records to verify whether a policy existed, and whether it had been previously paid. Although participating insurers were required to commission and publicize independent audits of this process, ICHEIC critics contend that these were often delayed, and that lack of an independent review process allowed room for unfair insurer influence.

ICHEIC proponents argue that publicly available audits and ICHEIC's final results demonstrate that the companies did indeed follow the agreed upon principles in honoring tens of thousands of unpaid Holocaust-era insurance policies. Clinton and Bush Administration officials and others involved in the process also argue that the ICHEIC claims process, with its relaxed standards of proof and historical research, gave potential claimants a far better opportunity to resolve claims than they would have received in a U.S. court of law. In addressing criticism of insurers' lack of accountability, they emphasize that insurers would not have participated in ICHEIC or any other restitution process without retaining full control over claims decisions. Furthermore, the fact that

[19] Between 2001 and 2003, the House Committee on Government Reform held three hearings on ICHEIC and Holocaust insurance issues. For information on the hearings held and related legislative proposals see http://oversight.house.gov/investigations.asp?id=237.

[20] Eizenstat captures much of the criticism surrounding ICHEIC in his characterization of ICHEIC Chairman Eagleburger's own complaints about the ICHEIC process as follows: "there was incessant internal bickering over every issue—how to value policies from prewar days, which lists of policyholders should be opened, the costs to be borne in processing claims, the ICHEIC claims process itself. Eagleburger had difficulty getting the companies, particularly Allianz, to fulfill the terms of the MOU ... And ICHEIC's administrative failings led to few claims paid and large costs." Eizenstat, op. cit., p. 267.

[21] See, for example, Sidney Zabludoff, "The International Commission of Holocaust-Era Insurance Claims: Excellent Concept but Inept Implementation," *Jewish Political Studies Review*, Spring 2005.

ICHEIC was incorporated in Switzerland and headquartered in London, England, insulated the organization's decisions from scrutiny under U.S. law.

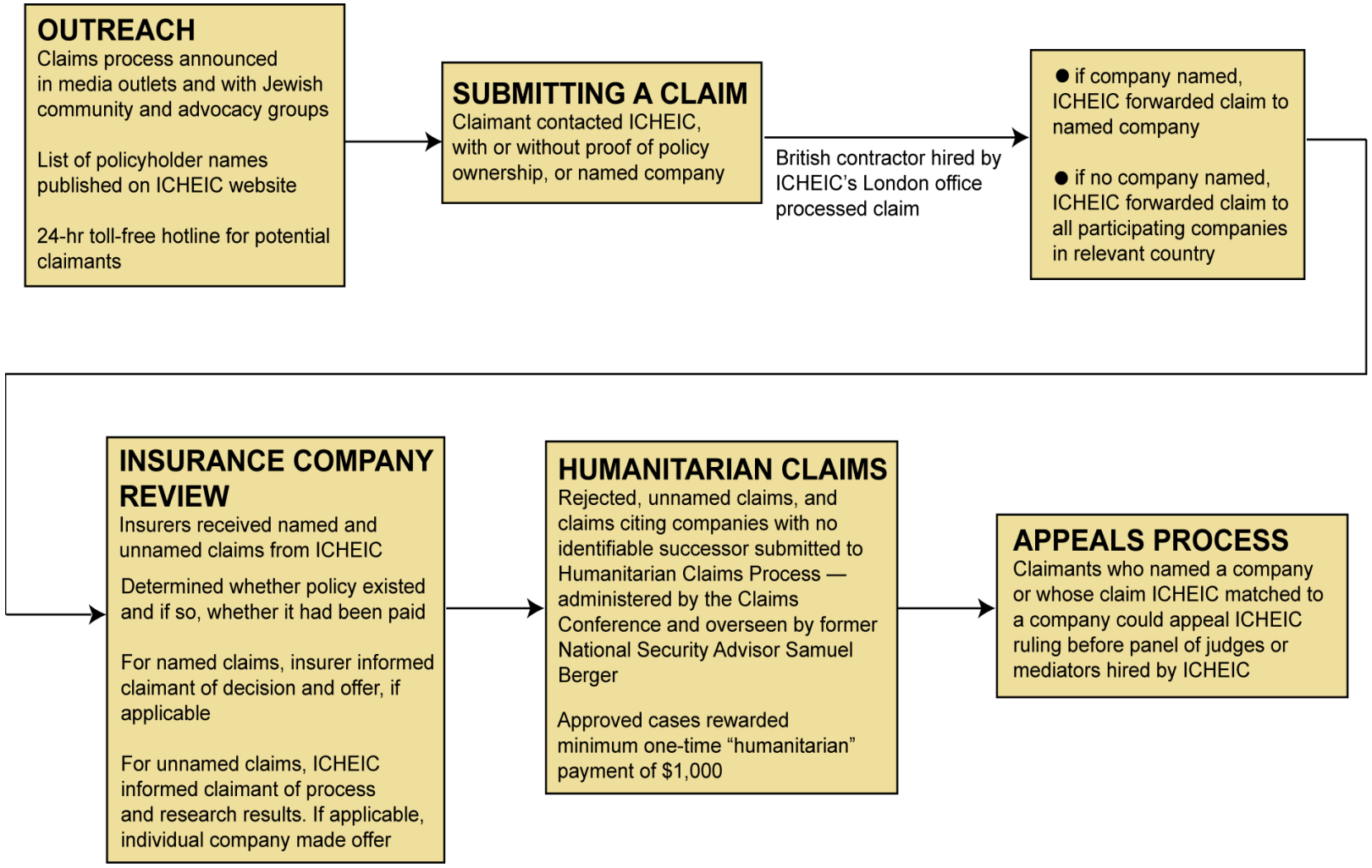
Initial congressional concerns regarding problems with ICHEIC administration, oversight, and its claims process were brought to light during a November 2001 hearing before the House Committee on Government Reform. During the hearing, critics expressed dismay that ICHEIC had not launched its claims process until early 2000—one and one-half years after the MOU was signed—and that a year-long "pilot" claims process resulted in what some considered remarkably high rejection rates.[22] ICHEIC was also confronted with complaints of high administrative costs and board secrecy. ICHEIC supporters generally acknowledge that the claims process got off to a slow and problematic start, but argue that initial missteps were addressed and that the claims process was ultimately fair and comprehensive.

In the year following the 2001 congressional hearing, an "Executive Monitoring Group" appointed by Chairman Eagleburger to investigate claims handling found widespread mismanagement in insurance company handling of documented claims. As a result, ICHEIC implemented a verification system to "verify" company claims decisions, and compelled participating insurance companies to undergo audits of their claims decisions after 2002.[23]

[22] "The Status of Insurance Restitution for Holocaust Victims and their Heirs," Hearing before the Committee on Government Reform, November 8, 2001.

[23] In June 2007, ICHEIC reported having "verified" 30,000 total claims. ICHEIC Final Report, op. cit.

Figure 1. The ICHEIC Claims Process at a Glance



Source: Information taken from ICHEIC Final Report, "Finding Claimants and Paying Them."

ICHEIC Research and Publication of Names

One of ICHEIC's most contentious and challenging tasks was to determine and disclose lists of Jewish Holocaust victims who had purchased insurance policies from 1920-1945. Although estimates vary, some studies indicate that between 800,000 to 900,000 polices were sold to eventual Jewish victims of the Holocaust.[24] By 2003, ICHEIC's published policyholder lists comprised a total of approximately 520,000 Jewish individuals who purchased insurance policies in Nazi occupied Europe.[25] The German insurance industry provided 363,232 policyholder names, over half of the total names published. As well as including records from non-German companies, ICHEIC reports that it carried out extensive archival research in 15 countries that resulted in the discovery of 55,079 Jewish policyholder names representing about 78,000 policies.

The German Insurance Association (GDV) and the German government express confidence that the GDV's published list of just over 360,000 Jewish policyholders is comprehensive, representing all life insurance policies owned by Jewish residents of Germany from 1933-1945.[26] To generate the list, the GDV crossed a list of all insurance policyholders in Germany from 1920-1945 (about 8.5 million policies), with a list of Jews residing in Germany between 1933 and 1945 (an estimated 550,000 - 600,000 people). According to the GDV, the list of total policies represented records of 70 insurance companies active in Germany during the time period. The list of Jewish residents was the result of unprecedented archival research in cooperation with The Holocaust Martyrs' and Heroes' Remembrance Authority, Yad Vashem, in Israel, and over 100 German archives and sources.

While most observers praise the German industry's disclosure of policyholder names, some contend that Generali and other European insurers avoided disclosing their records, often citing privacy concerns. For its part, Generali argues that its contribution of about 45,000 names to the ICHEIC list was the product of comprehensive research involving a match between records of all potentially unpaid policies sold during the Nazi era and Jewish victims of the Holocaust available at Yad Vashem.

European insurers uniformly oppose calls for companies to publicly disclose lists of all policies in force during the era of the Nazi Reich. In addition to citing privacy concerns, they argue that compiling and publishing such lists would be costly and would provide little clarity regarding potential Jewish policyholders. Company policy lists contain no information as to a person's religion, and numerous variations in spellings could cause greater confusion and may unnecessarily raise expectations, they contend.

Policy Valuation

Another central critique of the ICHEIC process is that it paid out a relatively low proportion of the value of the insurance assets in question. Legislation proposed in the 112th Congress does not include reference to specific values, however, past House legislation on the issue (H.R. 1746, 110th Congress) included a finding that:

[24] See Association of Jewish Refugees website http://www.ajr.org.uk/insurance, and Zabludoff, op. cit.

[25] ICHEIC's list of potential policyholders is no longer available on the ICHEIC website, but can be accessed through Yad Vashem's website at http://www1.yadvashem.org/pheip/.

[26] Interviews of German government and GDV officials, November 2007 - January 2008.

> "(12) Experts estimate that the value in 2006 of unpaid life, annuity, endowment, and dowry insurance theft from European Jewry from the Holocaust and its aftermath ranges between $17,000,000,000 and $200,000,000,000."

The estimates referenced, $17 billion to $200 billion, generally came from critics of the ICHEIC process and advocates for Jewish survivors and their heirs.[27] The insurance companies involved have produced estimates that are significantly less, in the range of $2 billion to $3 billion. ICHEIC itself commissioned a task force led by Glenn Pomeroy (then Insurance Commissioner of North Dakota) and Philippe Ferras (then Executive Vice-President of AXA Insurance) to assess the value of Holocaust-era insurance markets.[28] The Pomeroy-Ferras Report as it is usually known, lays out in great detail various facts and assumptions around the issue of valuation including ranges of estimates for each country in the home currency. It does not itself give a current day number for the value of all unpaid claims although it would be possible to calculate such a value using the ICHEIC valuation calculations applied to individual claims (these guidelines are discussed below).

Despite the seemingly wide range of estimates, between $2 billion and $200 billion, the basic method for the competing calculations is largely the same—estimate the total amount of insurance held by Jews in the relevant parts of Europe prior to World War II, subtract the amounts that have been previously paid on these policies, and adjust this amount for the intervening 70-odd years. While the figures for total insurance amounts and the approximate Jewish population are generally accepted, the figures used in most other steps of the calculation are often disputed. These include the specific propensity for the Jewish population to purchase insurance, and the method used to value assets denominated in historical foreign currencies from the 1930s in current U.S. dollars. Unfortunately, there is often little objective evidence upon which to base the choice of what figure to use.

Perhaps the single factor that can have the widest impact on the range of estimates is the method used to translate the values of insurance policies from the 1930s denominated in European currencies to current day U.S. dollars. The first part of this question is, what index does one use to adjust for the intervening seven or eight decades? The answer to this can change the final value dramatically. Using the U.S. Consumer Price Index, $1 in 1938 would be worth approximately $16.03 in 2011; if that $1 from 1938 had been invested in 10-year U.S. Government bonds, it would be worth approximately $53.05 in 2011; if it had been invested in the S&P 500, $1 in 1938 would be worth approximately $2,319. The corresponding figures for Germany, for example, would be much lower, largely due to the post-war currency reform. One unit of German currency adjusted from 1938-2011 using German inflation would be multiplied by approximately 7.5; adjusted using German bond returns, the figure would be 9.3; and, using German stock returns, it would be 184.6.[29] In general, the ICHEIC process used multipliers based on long-term bond rates, although there were times when the multipliers were apparently arrived at through negotiation between the parties involved.

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[27] The $17 billion figures appears to come from the previously cited work of Mr. Sydney Zabludoff. The $200 billion appears to come from the work of Professor Joseph Belth in *The Insurance Forum*, "Life Insurance and the Holocaust," Vol. 25, No 9, p. 81, September 1998.

[28] "Report to Lawrence Eagleburger, Chairman, by the Task Force Co-Chaired by Glenn Pomeroy and Philippe Ferras On The Estimation of Unpaid Holocaust Era Insurance Claims in Germany, Western and Eastern Europe," available at http://www.icheic.org/pdf/Pomeroy-Ferras%20Report.pdf.

[29] The stock and bond yield calculations assume reinvestment of interest and dividends and do not include the effect of taxes. Data series used were "United States of America BLS Consumer Price Index," "Germany Consumer Price Index," "USA 10-year Government Bond Total Return Index ," "Germany 10-year Government Bond Return Index," "S&P 500® Total Return Index," and "Germany CDAX Total Return Index" from http://www.globalfinancialdata.com.

The second part of the question is, when one chooses to exchange the policy value from the original currency into U.S. dollars? This is particularly important for German policies since, following World War II, West Germany reformed its currency from Reichsmarks (RM) to Deutsche Marks (DM). This was done at a rate of 10 RM to 1 DM for most currency and 5 RM to 1 DM for long-term financial assets. Thus, if one chooses to change a RM policy into dollars prior to the currency reform, the current day dollar value of that policy would be five or ten times larger than if one chooses to change that policy into dollars after the currency reform. In general, for Germany and Western Europe, values were kept in original currencies until the current day. For Eastern Europe, currencies were converted to dollars in the past.

ICHEIC's method of determining the present day value of individual policies differed according to the country of origin and whether or not the policy specified a particular currency. German policies were paid according to a formula in a general German post-war restitution law that was then adjusted using German long-term bond rates. Offers were made in euros or converted to dollars in the current day. Other Western European policies were generally left in the original currencies, brought forward in time using long-term bond rates in the country of origin. Offers were made in the original currencies. Eastern European policies were first converted into dollars, using 1938 exchange rates that were discounted 30%, and then multiplied by 11.286 to bring the value to the year 2000.[30] After 2000, the values were brought forward to the current day using a rate based on long-term bond rates. Policies that specified a currency, such as British pounds or Swiss francs, were generally left in those currencies and then brought to the current day using long-term bond rates. ICHEIC also used minimum valuation thresholds for each individual policy claimant. If the ICHEIC valuation standards resulted in a present-day value that was below a certain minimum value, the actual offer given to the claimant was raised. The minimum values ranged from $500 to $4,000 depending on the country involved, and whether the policy was held by someone who survived the Holocaust or not.[31]

Litigation of Holocaust-Era Insurance Claims

At or about the same time that international efforts to deal with reparations and claims issues—i.e., beginning in the 1990's—litigation involving Holocaust-era-issued insurance began in earnest in the United States. The claims, brought by either survivors of the Holocaust, or the relatives or estates of non-survivors, challenged the nonpayment or alleged erroneous payment of the proceeds of that insurance.[32]

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[30] The 30% discount on the exchange rates and the multiplier value of 11.286 were the result of negotiations by the ICHEIC participants and apparently included because of the post-war nationalization of Eastern European insurance companies.

[31] See "Guide to Valuation Procedures: Edition Dated 22-10-02," available at http://www.icheic.org/pdf/ICHEIC_VG.pdf.

[32] At least 20 actions (both individual and class actions) were filed, primarily in California and Florida state courts and in New York, and subsequently transferred to the United States District Court for the Southern District of New York. A footnote in the federal case that ultimately dismissed them all in light of the Supreme Court's opinion in American Insurance Association v. Garamendi, 539 U.S. 396 (2003) (*discussed, infra* at pp. 15-17) lists them:

> Of the twenty actions, two were filed initially in this court: Cornell v. Assicurazioni Generali S.p.A. (class action); and Schenker v. Assicurazioni Generali S.p.A. (formerly Winters v. Assicurazioni Generali) (class action). Sixteen were transferred to this court by the Panel on Multidistrict Litigation ("MDL Panel") under Docket No. 1374: Brauns v. Assicurazioni Generali S.p.A.; Smetana v. Assicurazioni Generali S.p.A. (class action); Mandil v. Assicurazioni Generali S.p.A.; Weiss v. Assicurazioni Generali S.p.A.; David v. Assicurazioni Generali S.p.A.,; Szekeres v. Assicurazioni Generali S.p.A.; Lightner v. Assicurazioni Generali S.p.A.; Sladek v. Assicurazioni

As has been discussed, there was a great deal of dissatisfaction both with the intention to substitute an ICHEIC claims process for the rights of individuals to bring their own actions in court, and with the operation of ICHEIC itself. Initially, the plaintiffs in those cases fared well. For example, when the defendant insurers sought to have the cases that had been transferred to and consolidated in the United States District Court for Southern New York dismissed from that forum in favor of adjudication before ICHEIC, the district court refused. "ICHEIC is not an adequate alternative forum for the litigation of plaintiffs' claims," the court explained, pointing out that despite ICHEIC's inclusion of the State of Israel and "certain U.S. state insurance regulators," the Commission remained, at bottom, a "privately funded, non-profit entity ... created ... among six European insurance companies ... with certain nongovernmental Jewish organizations.... "[33]

The court was persuaded neither by the fact that ICHEIC was assumed to be a recognized agent for purposes of carrying out the obligations assumed in the German Foundation Agreement,[34] nor by the presumption of both the German government and the various German insurance companies against whom there were Holocaust-era-related claims pending in U.S. courts that the conclusion of the Foundation Agreement would bring "legal closure" to those claims. Nor, seemingly, was the court convinced that the arrangement amounted to a valid U.S. foreign policy concern—despite the obligation of the Department of Justice to:

> file a "Statement of Interest" in all cases involving Holocaust-era claims against German companies, expressing the view that the German Foundation is the exclusive forum for those claims and that dismissal is required in keeping with the foreign policy interests of the United States.[35]

Along with the lawsuits filed by Holocaust survivors and their heirs, states enacted statutes intended to aid survivors in recovering the proceeds of insurance policies written during the war. Among the statutory provisions most prominently litigated in the lower federal courts were those from Florida and California creating disclosure obligations for insurance companies wishing to do business in those states. The litigation produced diametrically opposite results.[36] The U.S. Court

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> Generali S.p.A.; Haberfeld v. Assicurazioni Generali S.p.A. (class action); Lantos v. Assicurazioni Generali S.p.A.; More v. Assicurazioni Generali S.p.A.; Pioro v. Assicurazioni Generali S.p.A.; Sorter v. Assicurazioni Generali S.p.A.; Ungar v. Assicurazioni Generali S.p.A.; Weiss/Friedman v. Assicurazioni Generali S.p.A.; and Zada v. Assicurazioni Generali S.p.A. Anderman v. Federal Republic of Austria(class action), was transferred by the MDL Panel to this court under Docket No. 1337. Tabaksman v. Assicurazioni Generali S.p.A. was removed to this court from New York State Supreme Court.

In re Assicurazioni Generali S.p.a. Holocaust Ins. Litigation, 340 F.Supp.2d 494, 497 n. 1 (S.D.N.Y. 2004) (case docket numbers omitted). The dismissal was appealed to the United States Court of Appeals for the 2d Circuit. The 2d Circuit affirmed the dismissal in early 2010. In re Assicurazioni Generali S.p.a. Holocaust Ins. Litigation, 592 F.3d 113 (2d Cir. 2010). The defendant insurance companies have been engaged in settlement negotiations with the plaintiffs, and although the settlement was approved (2007 WL 601864 (2007)), the approval was appealed to the United States Court of Appeals for the Second Circuit by certain dissatisfied plaintiffs. The settlement order was remanded by that court to the district court with instructions to remedy what it considered "inadequate" notice to class members. On January 7, 2008, the district court determined that the proper notice had been accomplished, and again approved the settlement as "fair, reasonable and accurate" (2008 U.S. Dist. LEXIS 744, *5). That approval was again appealed, and on June 6, 2008, the Second Circuit, "[h]aving considered all of plaintiffs-appellants' arguments ... and found them to be without merit," affirmed the judgment of the district court (2008 WL 2329321, *2).

[33] In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation, 228 F.Supp.2d 348, 353, 354 (S.D.N.Y. 2002).

[34] *See, supra*, p. 7.

[35] 228 F.Supp.2d at 354.

[36] 539 U.S. 396 (2003).

of Appeals for the Eleventh Circuit struck down Florida's *Holocaust Victims' Insurance Act*[37] on the grounds that it violated the Due Process rights of insurers because it effectively regulated transactions that had insufficient connection to Florida to provide the requisite jurisdictional foundation.[38] On the other hand, the U.S. Court of Appeals for the Ninth Circuit upheld California's *Holocaust Victim Insurance Relief Act* (*HVIRA*),[39] disagreeing with the district court's reasoning that the statute impermissibly interfered with the national conduct of foreign affairs, but initially continuing the trial court's injunction against enforcement of the provision.[40]

The Supreme Court resolved the conflict between the Circuits in *American Insurance Association v. Garamendi*.[41] In that case, the Court struck down the California statute at issue in the Ninth Circuit case. As noted above, HVIRA was enacted to impose disclosure requirements on insurance companies related to certain policies the companies may have written in Europe during WWII. The Court found the statute impermissibly impinged on the President's conduct of foreign affairs.[42] The issue before the Court was "whether HVIRA interferes with the National Government's conduct of foreign relations."[43] A five-Justice majority concluded that the statute did so interfere, given the "'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place."[44] The California law was, therefore, held to be preempted by the Executive's negotiated agreements with foreign governments, and the ruling of the Ninth Circuit was, accordingly, reversed.[45] The dissenters would have relied instead on the fact that the German

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[37] Fla. Stat. Ann. § 626.9543 (West Cum. Supp. 2004); an amended statute is now set out in the 2007 Cum. Supp., with a note citing a 2004 session law that provides: "Nothing in this act shall be construed to create or be the basis of a civil action."

[38] Gerling Global Reinsurance Corp. v. Gallagher, 267 F.3d 1228 (11th Cir. 2001), *aff'g*, Gerling Global Reinsurance Corp. v. Nelson, 123 F.Supp.2d 1298 (N.D. Fla. 2000).

[39] Cal. Civ. Proc. §§ 354.5 (West 2004); the statute has since been invalidated by the California state courts; *see* note 44, *infra*.

[40] The history of this case, before it reached the Supreme Court as *Garamendi*, is as follows: Gerling Global Reinsurance Corp. of America v. Quackenbush, 2000 WL 777978 (E.D. Cal. 2000), preliminary injunction *aff'd sub nom.* Gerling Global Reinsurance Corp. v. Low (who was California's insurance commissioner by 2001), 240 F.3d 749 (9th Cir. 2001), but *remanded* for further proceedings; *on remand*, 186 F.Supp. 2d 1099 (E.D. Cal. 2001), *rev'd and remanded by* 296 F.3d 832 (9th Cir. 2002).

[41] 539 U.S. 396 (2003).

[42] California is but one of several states to have enacted statutes dealing with Holocaust-era insurance issues. Provisions have included those in which states have created disclosure obligations for insurance companies wishing to do business in them, extended the deadline for the filing of claims by "Holocaust insurance victims," or provided favorable tax treatment for the proceeds of successful Holocaust-era insurance claims. See CRS Report RL32448, *Holocaust-era Insurance Claims: Federal Court Decisions and State Statutes and Federal Legislative Proposals*, by Douglas Reid Weimer and Janice E. Rubin, for citations to the various state statutes and some commentary on their likely continued viability.

[43] 539 U.S. at 401.

[44] *Id.* at 413, *quoting from* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427, n. 25 (1964).

[45] In Steinberg v. International Commission on Holocaust-era Insurance Claims, the California Court of Appeals for the 2d District applied *Garamendi*, saying:

> ... the Garamendi opinion not only sets forth the relevant test, but applies it. A state may not enforce a statute which interferes with a specific interest of the Federal Government. To have preemptive effect, the specific interest need not be expressly set forth in an official agreement. An interest reflected in official agreements and statements by Executive Branch officials is sufficient. Moreover, the federal government's "policy of repose for companies that pay through the ICHEIC," is sufficient to preempt a California statute imposing additional duties on European insurers. Garamendi held that California insurance disclosure laws which require greater disclosure than that required by the ICHEIC are preempted by this foreign policy. Similarly, we must

Foundation Agreement "makes clear ... that 'the United States does not suggest that its *policy interests* concerning the Foundation *in themselves* provide an independent legal basis for dismissal."[46]

As a result of *Garamendi*, the same court that refused to dismiss the cases before it in favor of adjudication before ICHEIC, believed it had no choice but to grant the insurers' motion to dismiss all of the claims before it.[47] A settlement for many of the claims was eventually reached during the appeal of the dismissal.[48] On January 15, 2010, the Second Circuit upheld the dismissal of the remaining non-class action claims.[49] The Supreme Court denied certiorari in the case, effectively ending the litigation.[50] Litigation regarding the settlement of the consolidated class action against Generali also appears to have ended. The Second Circuit affirmed the dismissal of the remaining complaints against Generali in 2010.[51] Following the Second Circuit decision, the plaintiffs appealed to the Supreme Court, but the Supreme Court declined to hear the case.[52] The plaintiffs' opportunities to appeal have therefore been exhausted.

Congressional Concerns and Proposed Legislation

Since the late 1990s, Members of Congress have taken a variety of steps seeking to ensure that Holocaust survivors and their heirs receive fair compensation for unpaid insurance policies. A series of hearings before the House Committee on Government Reform between 2001 and 2003 focused specifically on ICHEIC and on proposed legislation intended to create alternative and more effective means for Holocaust survivors and their heirs to resolve unpaid insurance claims. As highlighted above, the House Committee's initial exposure of perceived problems with ICHEIC appears to have played a significant role in spurring subsequent reforms to ICHEIC's

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> conclude that section 354.5, which provides for private actions arising out of Holocaust era insurance policies, is preempted by the same policy.

133 Cal.App.4th 689, 699 (Cal.App. 2 Dist. 2005).

[46] 539 U.S. at 436 (emphasis added). The majority opinion, delivered by Justice Souter, was joined by Justices Rehnquist, O'Connor, Kennedy, and Breyer. The dissenting opinion was filed by Justice Ginsburg, joined by Justices Stevens, Scalia and Thomas. For a more detailed presentation of *Garamendi*, including the cases at the district and court of appeals levels, see CRS Report RL32448, *Holocaust-era Insurance Claims: Federal Court Decisions and State Statutes and Federal Legislative Proposals*, by Douglas Reid Weimer and Janice E. Rubin.

[47] "I denied Generali's motion by opinion and order dated September 25, 2002, finding, with respect to the application to dismiss the actions in favor of ICHEIC, that that body is an inadequate alternative forum for litigation of plaintiffs' claims. See In re Assicurazioni Generali S.p.A. Holocaust Insurance Litig., 228 F.Supp.2d [at] 355-58.... [Now, i]n light of the Supreme Court's decision in American Insurance Association v. Garamendi ... it appears that the laws supporting litigation of plaintiffs' benefits claims are preempted by a federal Executive Branch policy favoring voluntary resolution of Holocaust-era insurance claims through ICHEIC. Plaintiffs' ancillary claims, in turn, are not actionable because it appears that they do not allege any cognizable injury other than that caused by Generali's non-payment of benefits, redress for which is committed to ICHEIC. Accordingly, Generali's motion to dismiss is granted with respect to all actions." 340 F.Supp.2d at 497.

[48] See discussion *supra* note 32.

[49] In re Assicurazioni Generali S.p.a. Holocaust Ins. Litigation, 592 F.3d 113 (2d Cir. 2010). The court did allow one plaintiff to amend his complaint to state a claim that falls outside of the scope of the ICHEIC, but all other claims were dismissed. *Id*. at 121.

[50] Wiss v. Assicurazioni Generali, S.p.A., 2010 U.S. LEXIS 7770 (U.S., Oct. 4, 2010).

[51] Weiss v. Assicurazioni Generali, S.p.A. (In re Assicurazioni Generali, S.p.A.), 592 F.3d 113 (2d Cir. 2010). One of the plaintiffs whose pleadings were dismissed was allowed by the court to replead his case if the plaintiff could demonstrate that his case would fall outside of the "Holocause era" as defined by ICHEIC; however, CRS did not find evidence that a new lawsuit had been filed by that plaintiff.

[52] Weiss v. Assicurazioni Generali, S.p.A. (In re Assicurazioni Generali, S.p.A.), 131 S. Ct. 287 (2010) (cert. denied).

claims process. However, the Supreme Court's 2003 *Garamendi* ruling effectively halted initiatives in several U.S. states that were also supported by some Members of Congress. These initiatives would have required European insurers to disclose policyholder records, and provided Holocaust survivors and their heirs a cause of action to pursue claims substantiated by these records.

In *Garamendi*, the Supreme Court cited an absence of congressional action to counter or amend Administration support of ICHEIC. Specifically, the failure of numerous legislative proposals aimed at amending Administration policy was considered evidence that "Congress has done nothing to express disapproval of the President's policy ... " and that furthermore, "Given the President's independent authority 'in the areas of foreign policy and national security, ... congressional silence is not to be equated with congressional disapproval.'"[53]

Bills introduced in the 108th – 111th Congresses would have altered U.S. policy by requiring European insurers to disclose policyholder lists from the Holocaust era and by strengthening survivors' ability to bring cases against European insurers in U.S. courts.[54] None of these bills was enacted, and each was opposed by the Administration, which continued to consider ICHEIC the exclusive vehicle for resolving Holocaust-era insurance claims.

ICHEIC's closure, and growing concern about the well-being of survivors of an average age of over 80 years old, have reignited congressional interest in resolving outstanding Holocaust-era insurance claims. Many observers agree, however, that Congress may be limited in its ability to ensure increased compensation for outstanding claims. Many of those involved in past efforts to resolve claims—including representatives of the U.S. Administration, the NAIC, European governments, the Claims Conference, and the State of Israel—appear to agree that ICHEIC, in spite of its faults, offered individuals a better vehicle than any previously available mechanisms. Given that European insurers' participation in ICHEIC was based on the condition that ICHEIC would be an exclusive mechanism to resolve claims, many argue that it could be difficult to obtain additional financial commitments from these companies. Furthermore, some argue that significant obstacles could prevent successful litigation against European insurers. These include difficulties in establishing both the existence and present-day value of policies.

As outlined below, legislation introduced in the 112th Congress by Representative Ileana Ros-Lehtinen and Senator Bill Nelson would provide a congressionally sanctioned vehicle for the pursuit of claims by individuals who would otherwise have been prevented from doing so by virtue of the Supreme Court's 2003 *Garamendi* decision.

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[53] In its decision, the Supreme Court highlighted the failure of the following proposed legislation to achieve enactment: H.R. 1210, 108th Cong., 1st Sess. (2003); S. 972, 108th Cong., 1st Sess. (2003); H.R. 2693, 107th Cong., 1st Sess. (2001); H.R. 126, 106th Cong., 1st Sess. (1999). 539 U.S. at 429, *citing*, Haig v. Agee, 543 U.S. 280, 291 (1981).

[54] See, for example: H.R. 1210, the Holocaust Victims Insurance Relief Act of 2003, introduced by Rep. Henry Waxman on March 11, 2003; H.R. 1905, the Comprehensive Holocaust Accountability in Insurance Measure, introduced by Rep. Mark Foley on May 1, 2003; S. 972, the Comprehensive Holocaust Accountability in Insurance Act, introduced by Sen. Norm Coleman on May 1, 2003; H.R. 3129, the Holocaust Victims Insurance Act, introduced by Rep. Adam Schiff on September 17, 2003; H.R. 1746, the Holocaust Insurance Accountability Act of 2008, introduced by Rep. Ileana Ros-Lehtinen on March 28, 2007; H.R. 4596, the Holocaust Insurance Accountability Act of 2010, introduced by Rep. Ileana Ros-Lehtinen on February 4, 2010; and S. 4033, the Restoration of Legal Rights for Claimants under Holocaust-Era Insurance Policies Act of 2010, introduced by Sen. Arlen Specter on December 15, 2010.

Legislation Proposed in the 112th Congress: The Holocaust Insurance Accountability Act of 2011 (H.R. 890) and the Restoration of Legal Rights for Claimants under Holocaust-Era Insurance Policies Act of 2011 (S. 466)

On March 2, 2011, Representative Ros-Lehtinen introduced H.R. 890, the Holocaust Insurance Accountability Act of 2011. The bill would allow persons who are beneficiaries of insurance policies purchased during the time period surrounding World War II in Nazi Germany, or areas controlled by that government, as well as their heirs or successors in interest, to bring suit in federal court to "recover proceeds due under the covered policy or otherwise enforce any rights under the covered policy." Section 3 of the bill would also essentially reverse *Garamendi*. It states explicitly that the state laws that create a cause of action related to covered policies against insurance companies (i.e., the laws at issue in the class action lawsuits, described above) and the state laws imposing disclosure requirements on insurance companies relating to covered policies (i.e., the California statute at issue in *Garamendi*) shall not be preempted by Executive Agreements or Executive foreign policy.[55] The bill would apply to all suits brought for recovery related to covered policies, including the lawsuits that have been dismissed as a result of *Garamendi*. This retroactive application would allow plaintiffs in those lawsuits to sue again. The bill would further prohibit the use of federal funds to file the statements of interest that the Department of Justice has filed in the civil suits against insurance companies that have stated that it is the policy of the United States to resolve all claims through ICHEIC.

On March 7, 2012, the House Committee on Foreign Affairs ordered H.R. 890 to be reported by unanimous consent. The bill has also been referred to the House Judiciary Committee.

Companion legislation was introduced in the Senate, by Senator Bill Nelson, on the same day as H.R. 890. S. 466, entitled the Restorations of Legal Rights for Claimants under Holocaust-Era Insurance Policies Act of 2011, would also grant beneficiaries of covered policies, defined similarly as above, the right to sue in a civil action against insurers and their successors in interest to enforce any rights under the policy. Unlike H.R. 890, S. 466 would provide for treble damages if a court finds that an insurer acted in bad faith. The bill would apply to all covered policies, including lawsuits that have been dismissed as a result of *Garamendi*. This retroactive application would allow plaintiffs in those lawsuits to sue again. Similar to H.R. 890, S. 466 would reverse *Garamendi* by explicitly stating that the state laws that create a cause of action related to covered policies against insurance companies (i.e., the laws at issue in the class action lawsuits, described above) and the state laws imposing disclosure requirements on insurance companies relating to covered policies (i.e., the California statute at issue in *Garamendi*) shall not be preempted by Executive Agreements or Executive foreign policy.[56] The Senate bill, again like the House bill, would further prohibit the use of federal funds to file the statements of interest that the Department of Justice has filed in the civil suits against insurance companies that have stated that it is the policy of the United States to resolve all claims through ICHEIC.

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[55] Assuming that this bill becomes law, this could create a situation in which an act of Congress directly conflicts with Executive foreign policy. The question of which would take precedence was not at issue in *Garmendi*, and the Court did not consider it. Whether the act of Congress or the Executive policy would control following the passage of H.R. 890 is a question that is beyond the scope of this report at this time.

[56] Similar to H.R. 890, assuming that S. 466 becomes law, this could create a situation in which an act of Congress directly conflicts with Executive foreign policy. The question of which would take precedence was not at issue in *Garmendi*, and the Court did not consider it. Whether the act of Congress or the Executive policy would control following the passage of H.R. 890 is a question that is beyond the scope of this report at this time.

In general, those supportive of the proposed legislation argue that both the ICHEIC process and previous agreements between the United States and European governments failed to compensate a significant number of Holocaust survivors and/or their heirs and beneficiaries. Some of those critical of ICHEIC and supportive of the proposed legislation acknowledge that the standards of proof placed on a claimant in a U.S. court of law would likely be far more stringent than those exercised by ICHEIC. However, they argue that in light of ICHEIC's closure, the courts represent one of the few, if not the only, remaining avenues by which to pursue claims. Furthermore, a strong sense of distrust regarding ICHEIC's application of its relaxed standards of proof, and of insurers' thoroughness in searching their records, appears to have increased hope that public disclosure of Holocaust-era records could lead to substantive claims.

Opponents of the proposed legislation often argue that by effectively reversing past commitments made by the U.S. government—specifically, the granting of legal peace to German companies—the bills could damage future cooperation with European governments on other Holocaust compensation and restitution issues. In addition, some U.S. and German government representatives suggest that the credibility of future U.S. and German commitments to European companies in these areas could be called into question. Specifically, German government officials have indicated that new lawsuits against German companies would likely limit their ability to gain future financial commitments from these and other German companies in Holocaust compensation and restitution cases.[57] Critics also argue that given the legal and historical complexities of substantiating the existence and value of Holocaust-era insurance policies, it is unlikely that claims would be satisfactorily settled in U.S. courts. They argue that it was precisely this fact that drove U.S. insurance regulators, the Claims Conference, and others to back ICHEIC. In addition, given the likelihood of legal challenges from European insurers, some question whether claims could ever be resolved within a reasonable period of time.

[57] Interviews of German foreign ministry officials, Berlin, November 2007.

Appendix. ICHEIC Timeline

Aug. 1998[58]	ICHEIC MOU signed: —6 European Insurers (1 drops out) —NAIC —Claims Conference —World Jewish Restitution Organization —Israel
Oct. 1999	California institutes Holocaust Victims Insurance Act (HVIA)
Feb. 2000	ICHEIC launches claims process with initial "pilot" of "fast-track" claims previously gathered by U.S. insurance commissioners. Expects to end claims process by Feb. 2002. *Claims deadline ultimately extended to March 2004, with decisions complete by June 2006.*
Apr. 2000	1st policy-holder list published (18,833 names from archives and ICHEIC research).
June 2000	$5 billion German Foundation Agreement includes $350 million German Insurance Industry commitment to ICHEIC.
Nov. 2000	Generali commits $100 million to ICHEIC.
Feb. 2001	Austrian General Settlement Fund (GSF) includes $25 million commitment to ICHEIC.
Mar.-Apr. 2001	About 24,000 additional policyholder names published (none from company lists).
May 2001	Press reports 80% of fast-track claims remain unprocessed; 95% of those processed rejected.
Nov. 2001	Members criticize ICHEIC during House Committee on Government Reform hearing. Eagleburger testifies and agrees to "policing commission" to oversee company claims handling.
Early 2002	Eagleburger appoints "Executive Monitoring Group" (EMG) to investigate ICHEIC claims handling.
May 2002	EMG allegedly finds widespread mismanagement in rejection of documented claims. Eagleburger/ICHEIC hire Chief Operating Officer and set-up process to "verify" company claims decisions. *In June 2007, ICHEIC reports having verified about 30,000 claims in total.*
Sept. 2002	House Government Reform Subcommittee on Government Efficiency conducts Hearing on proposed Holocaust Victims Insurance Relief Act (Waxman).
Oct. 2002	German Insurance Industry gives previously committed $350 million.
Nov. 2002	ICHEIC finalizes valuation guidelines.
Apr. 2003	Swiss Insurers agree to $17.5 million to ICHEIC.
Apr. 2003	ICHEIC publishes 363,232 policy-holder names from German Insurance Industry.
June 2003	Supreme Court rules against California's HVIA (Garamendi). Primary argument that state law interferes with foreign policy decisions of the Executive branch.
Sept. 2003	House Committee on Government Reform holds hearing on future of insurance-related bills in light of Garamendi decision. Eagelburger testifies.
Mar. 2004	Claims filing deadline.
June 2006	Claims decisions finalized.
Mar. 2007	ICHEIC closes.
June 2007	ICHEIC final report released.

[58] Information from following sources: "Finding Claimants and Paying Them," ICHEIC Final Report, June 2007, available on ICHEIC website; ICHEIC Timeline from ICHEIC website (no longer online); Michael J. Bazyler, "Holocaust Justice," New York: New York University Press, 2003.

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