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By Deborah Rosenthal

Resolution Dilemma -- Attorneys and experts discuss the advantages and disadvantages of the mechanisms applied to Holocaust-related litigation and claims, especially those concerning victims and their heirs.

In last week's issue, Verdicts & Settlements reviewed the major Holocaust-related litigation in the United States, from 1996 through the present.

An extra-judicial claims procedure established to handle the insurance claims has diverted some litigation. Some of the individual lawsuits settled in private mediation, and some of the class actions settled as a result of negotiations between counsel. A federal judge dismissed another set of cases on Nov. 14, 2000, in light of the adoption of an intergovernmental agreement by the United States, Germany and several Central and Eastern European nations, which provided that the fund established by the agreement would serve as the exclusive remedy against German entities for Holocaust-related misconduct.

Whether the remaining cases will proceed through the civil court system to trial or alternative dispute resolution will curb Holocaust-era claims may depend on the extent to which these alternative solutions now under way provide justice for Holocaust victims and their heirs.

In Part Two of this series, attorneys and experts discuss the pros and cons of the resolution mechanisms applied to Holocaust-related claims.

Administrative Claims Procedure

In October 1998, five major European insurers (Allianz of Germany, Generali of Italy, AXA of France, and Wintertour and Zurich of Switzerland) volunteered to participate in an international effort to investigate Holocaust-era insurance policies (i.e., policies issued between 1920 and 1945), identify whether benefits were owed to survivors or their heirs and establish a just process for expeditiously handling outstanding claims.

This organization, called the International Commission on Holocaust Era Insurance Claims and chaired by former U.S. Secretary of State Lawrence S. Eagleburger, was established in response to pressure from the National Association of Insurance Commissioners, European regulators and representatives of Israel and of Jewish and Holocaust survivor organizations.

During the commission's formative stages, its members engaged in extensive debate over how to value the policies, according to Los Angeles attorney Peter Simshauser, who represents Generali in numerous Holocaust-related lawsuits filed against it.

The insurance companies argued that most of the policies at issue were "almost completely valueless as a result largely of historical currency devaluation in the countries in which the policies were written," Simshauser says.

Advocates for the claimants, however, argued for substantial payments to these policies.

As a compromise, Eagleburger developed a formula whereby benefits due under a policy would have their 1938 value in the foreign currency in which they were written, translated into their 1938 value in U.S. dollars, and then brought to a rough estimation of present-day value by multiplying the 1938 value by a factor of 7.

Proponents of the commission offer several reasons why it provides the best method for resolving insurance claims arising out of policies issued in the Holocaust era.

First, Simshauser says, potential beneficiaries have no legally viable theory of recovery which they could pursue successfully through litigation.

"All of the judges who have addressed these claims have concluded that the plaintiffs are raising political issues or issues relating to the foreign affairs of the United States, and those are areas that are the exclusive domain of the executive branch. As a result, these litigations are doomed to fail," Simshauser says.

In addition, litigation delays the possibility of payment, and in these cases, where Holocaust survivors are dying at a rate of 10 percent per year, time is of the essence, Simshauser says.

Nor is litigation necessary because the commission gets the job done. Simshauser says that Generali already has paid more than 200 claims through the commission and will end up paying \$150 million in claims through the commission.

But others complain that the commission delegates the claim review process to the very insurance companies which withheld payment and made multiple misrepresentations to potential claimants over the past five decades. The commission enables these insurers to deny or undervalue claims and delay overdue payments, critics say.

Los Angeles attorney William Shernoff, who has filed 15 lawsuits against European insurers for their alleged misconduct related to Holocaust-era insurance policies, says that the commission typically offers claimants \$5,000-\$15,000 for policies "worth 10 and 20 times that amount."

Moreover, the commission does not allow claimants to seek damages for emotional distress or for an insurer's oppressive, fraudulent and/or malicious misconduct; nor can it disgorge all the ill-gained profits from an insurer. Under California law, plaintiffs may avail themselves of such remedies with adequate proof of certain kinds of misconduct, which Shernoff says his clients have.

Indeed, many attorneys argue that, because the commission rejects most of the claims it receives (as of May 2000, it had denied 75 percent of the claims submitted), the insurance cases must be litigated.

"ICHEIC is not paying out, [and] our clients are not protected by ICHEIC," says Los Angeles attorney Nancy Sher Cohen of Heller, Ehrman, White & McAuliffe, who serves as lead counsel in an insurance class action pending in San Francisco Superior Court against Generali.

"Until the companies feel they have some obligation to step forward and actually pay the plaintiffs what they are due, [litigation] is the only alternative we have," Cohen says.

Rule 23 and Mediated Settlements

The first Holocaust-related cases, filed in October 1996 against the Union Bank of Switzerland and Credit Suisse, ended in a settlement which took two years to negotiate and two additional years to be approved by a

federal court judge. In those cases, plaintiffs alleged that Swiss banks participated in and/or profited from Nazi looting and the use of slave and forced labor.

Initially, the parties reached a \$1.25 billion settlement in August 1998, to be distributed to plaintiffs whose assets were converted, hidden, laundered or retained improperly; those who provided slave labor to a Swiss company or a company which deposited revenues into Swiss banks; and those who were denied entry into Switzerland or "were deported, detained, abused or otherwise mistreated."

The settlement was amended to include an additional \$50 million, contributed by Swiss insurers, to cover half of the potential claims against Swiss insurance companies for unpaid insurance benefits.

Victims eligible for payment from the settlement include Jews, homosexuals, gypsies, disabled people and Jehovah's Witnesses. Central and Eastern Europeans who were enslaved or forced to work as laborers cannot obtain payment from this settlement.

U.S. District Judge Edward R. Korman approved the amended settlement as fair and reasonable in July 2000, thereby establishing the largest settlement of a human rights case in U.S. history.

Delay of distribution has resulted from the need for an allocation plan, which was finalized in November 2000, and from two sets of appeals, one of which already has been rejected. The 2nd Circuit probably will decide the second appeal by the end of this year.

People have criticized the length of this process as one of the disadvantages of class actions. Because 55 years have passed since the Holocaust and the few remaining survivors are rapidly dying, prompt payment is critical.

According to Witten, the defendants placed \$250 million in escrow in November 1998 and another \$333 million in November 1999, but disbursements could not begin until the court approved first the settlement and then the distribution plan, a process mandated by Federal Rule of Civil Procedure 23, which governs class actions.

Yet advocates of litigation as the best means of attaining justice believe that the protracted nature of the process is an unfortunate but unavoidable hurdle. Ratner says that the final agreement "is the product of a far more refined analysis than we were able to make in 1996" and affords a better and farther-reaching measure of justice than could have been achieved in less time.

"Some of the more recent amendments related to insurance and art issues could only have been made after reviewing the case for four years," he says.

Nor does the four-year process seem disproportionately lengthy in light of the magnitude of the settlement.

"We are talking about the worst financial crimes in history, perpetrated on some of the most unfortunate victims in history," says Lisa Stern, a Los Angeles attorney who has represented numerous individual plaintiffs in Holocaust-era insurance cases.

In Stern's view, litigation alone affords its participants the assurance that a neutral arbiter will review the settlement for fairness. Stern's clients are individuals who claim to be beneficiaries of insurance policies issued in Europe before and during World War II, the benefits of which have never been paid.

Several of her cases resolved in mediation with retired California Supreme Court Justice Edward A. Panelli of JAMS. This means of resolution provided her clients with independent legal expertise regarding the issues

involved and the fairness of the settlement. It also afforded her clients an opportunity to tell their stories to the retired judge.

That experience itself - one which administrative claims procedures or diplomatic negotiations do not provide - had extraordinary value to the survivors, Stern says.

Intergovernmental Agreement

In July 2000, the German Bundestag formally acknowledged the injustices perpetrated by the Nazis and accepted "political and moral responsibility for the victims of National Socialism."

To allow Germany to fulfill this responsibility, representatives of the governments of Germany, the United States, Israel and several Central and Eastern European nations; private industry in Germany; several international Jewish organizations; and classes of plaintiffs involved in lawsuits filed in American courts all signed an agreement to establish a foundation for "Remembrance, Responsibility and the Future."

The foundation will consist of 10 billion Deutsche marks (\$5 billion) contributed by the German government and German industry and distributed to former slave and forced laborers, people whose property was looted by the Nazis, victims of Nazi medical experimentation and the beneficiaries of unpaid Holocaust-era insurance policies.

The agreement exonerates all German entities from future lawsuits arising out of World War II-era conduct and conditions payment into the fund and payment from the fund on a finding by the German Bundestag that "legal security" has been achieved for Germany.

In order to facilitate such a finding, the United States government issued a Statement of Interest to hasten the dismissal of lawsuits which were pending against German entities.

Critics argue that, because a neutral arbiter will not review the agreement for fairness, there is no way to assure that the settlement has been valued fairly.

For example, attorney William Shernoff, who has represented more than a dozen individuals in civil actions against insurance companies, strongly objects to the notion that the 10 billion DM should cover insurance matters. According to Shernoff, the insurance claims arise from binding contracts unpaid for 50 years, establishing a continuing violation of the law worth 20 to 30 times what the claimants are likely to be paid through the German fund.

"To me, that's a [binding contract], and it should not be confused with political or past injustices," Shernoff says.

Shernoff views the German foundation as an attempt by private companies to "knock out the important and valuable claims."

"They want immunity for all of their past sins, and all they want to pay for that is a woefully inadequate amount of money. I think that's a farce and tragedy," he says.

Nevertheless, under the terms of the German Economy Foundation Initiative, and after several discussions with Stuart Eizenstat, Shernoff and his co-counsel, Lisa Stern, had no choice but to explain to their clients that they would receive a minimum of \$7,500 each from the fund, but if they refused to voluntarily dismiss

their cases, the German parties would not pay any of the \$5.2 billion to anyone.

"[Our clients] made the ultimate sacrifice, and they are the heroes," Stern says.

"It's their money that is funding this, and it's on their blood, sweat and brows that this settlement is funded, not in whole but in part," she says.

Nonetheless, proponents of the foundation claim that it achieves what litigation could not: the payment of billions of dollars by thousands of companies and by the German government as soon as is reasonably possible.

Indeed, as of Dec. 11, 2000, more than 5,000 German companies had pledged to contribute more than 3.4 billion DM, including numerous companies which Washington, D.C., attorney Roger Witten, who served as lead counsel for the German industrial complex, says had no possible legal liability because they did not exist during World War II.

"The coverage is breathtakingly broad and could never have been achieved in a class-action settlement, even assuming that any of these cases could have succeeded, which is highly unlikely," Witten says.

While plaintiffs' attorneys wholeheartedly defend the legal merits of the cases they advanced, most agree that the intergovernmental agreement has yielded a satisfactory result.

"There is no question that the Germans to some degree are holding us hostage as a result of the condition that they created, which is that these people are elderly" and need a quick resolution to their claims, says Melvyn I. Weiss, one of the class counsel involved in the negotiations.

Nevertheless, Weiss says that "the most important thing is to get remedies to these people in their lifetimes," and the international resolution achieves this goal.

New York attorney and law professor Burt Neuborne, who served as principal plaintiffs' counsel in the slave labor cases and has been appointed to the sole attorney seat on the board of the German foundation, says that, although the German entities easily could afford to pay twice the amount they have pledged, the 10 billion DM "is way more than anybody dreamed."

AT A GLANCE

Forced Labor and Medical Experimentation

Cases against German Entities

Cases: Twenty-six cases filed in the District of New Jersey between August 1998 and August 1999; eight cases filed in the Eastern District of New York between August 1998 and May 1999; two cases filed in the Southern District of New York in November 1998; one case filed in the Eastern District of Wisconsin on May 5, 1999; one case filed in the Southern District of Indiana on Feb. 17, 1999; and two cases filed in California Superior Court in March 1999. All have been dismissed or are awaiting dismissal in light of the German Economy Foundation Initiative signed in July 2000.

Counsel:

Plaintiffs: Burt Neuborne, New York University Law School, New York; Morris A. Ratner, Lieff, Cabraser, Heimann & Bernstein, San Francisco; Melvyn I. Weiss and Deborah Sturman, Milberg, Weiss, Bershad, Hynes & Lerach, New York; Michael Hausfeld, Cohen, Milstein, Hausfeld & Toll, Washington, D.C.; Robert A. Swift, Kohn, Swift & Graf, Philadelphia; Steven Winston, New York; Edward Fagan, Fagan & D'Avino, New York

Defendants: Roger Witten, Wilmer, Cutler & Pickering, Washington, D.C., (representing the German Industrial Complex)

Diplomats: Otto Graf Lambsdorff, former head of Germany's Free Democratic Party (representing Germany); Stuart Eizenstat, U.S. deputy secretary of the treasury (representing the United States)

For a complete list of all Holocaust-related cases filed in the United States, see Bazylar, Michael J., Nuremberg in America: Litigating the Holocaust in United States Courts, 34 Univ. of Richmond L. Rev. 1, 265-71 App. A (March 2000).

Next week, the final part of this series will look at the impact of the Holocaust-related litigation on the future role of American lawyers and courts in resolving international civil disputes.