

Los Angeles Daily Journal
December 22, 2000
By Deborah Rosenthal

Right the Wrongs -- Documents, public awareness and the willingness of foreign governments to acknowledge injustices perpetrated during the Holocaust lay the groundwork for attorneys to pursue justice.

Attorneys in California and on the East Coast have spent the past several years seeking justice through the civil courts for Holocaust survivors and the heirs of Holocaust victims. Such a broad scale pursuit has been hindered in the past by evidentiary problems, procedural difficulties and constitutional impediments.

But several factors recently have made successful litigation possible. The increasing availability of documents, public awareness and the willingness of foreign governments to acknowledge the wrongs perpetrated during the Holocaust has laid the necessary groundwork. This allowed creative attorneys to address through the American justice system in the 1990s and 2000s the misdeeds that occurred in Europe in the 1930s and 1940s.

This month Verdicts & Settlements examines the Holocaust litigation in a three-part series, beginning with an account of the major Holocaust-related cases brought in state and federal courts in California and on the East Coast in the past four years.

Cases Against Swiss Banks

In Oct. 1996, American attorneys filed the first class actions against European entities that allegedly participated in Holocaust-related misconduct. The lawsuits alleged that the Swiss bank defendants deprived Holocaust survivors of postwar access to their prewar and wartime deposits, that they profited on transactions with the Nazis involving looted property and that they financed and profited from Nazi industrial operations, including companies which used slave labor.

Spearheading the actions were several lawyers from New York, Washington, D.C., Philadelphia, San Francisco and Indianapolis (see At a Glance, below).

Roger M. Witten, an attorney with Wilmer, Cutler & Pickering in Washington, D.C., served as lead defense counsel. The cases were brought in the Eastern District of New York before Judge Edward R. Korman, who consolidated the actions and ordered that the plaintiffs' attorneys form an executive committee and attempt to resolve the matters through negotiation.

Korman appointed Burt Neuborne, a civil rights attorney and New York University Law School professor, to form the committee, which consisted of nine plaintiffs' lawyers and Neuborne. Korman also invited the World Jewish Congress to participate in the talks as a nonparty.

In June 1998, the defendants offered \$600 million to settle the cases and asserted that they would not pay a penny more. According to Morris A. Ratner, a San Francisco attorney who served on the executive committee, "there was a consensus in the Jewish community that anything under \$1 billion would not represent what we called rough justice.' "

Despite this disparity, settlement discussions continued, prodded along by federal, state and local officials. According to New York attorney Melvyn I. Weiss, another member of the plaintiffs executive committee, former U.S. Sen. Alfonse D'Amato drew public attention to the cases and consulted with Korman with regard to the issue of whether the defendants should pay interest.

New York City Comptroller Alan Hevesi formed a committee of state officials, including California's former Treasurer Matt Fong, which held hearings and threatened to recommend a boycott against Swiss banks if no settlement was reached. Weiss says that he believes the threatened embargo had a powerful effect on the defendants.

In August 1998, Korman presented the attorneys with a series of settlement options, one of which was to have the two largest Swiss banks, Credit Suisse and Union Bank of Switzerland, pay \$1.25 billion in exchange for releasing the Swiss government, banks and business entities from liability for all alleged conduct related to World War II and the Holocaust.

"We accepted first thing in the morning, and [the defendants] accepted later that day," Neuborne says.

The settlement covers all Swiss insurance companies except those companies against which other lawsuits were pending (Zurich Life, Wintertour, Basler Leben and their subsidiaries). Fifty million dollars of the \$1.25 billion settlement was allocated to pay insurance claims, but the settlement was later amended to include an additional \$50 million, contributed by Swiss insurance companies, to help cover the insurance claims. Neuborne says that Swiss liability on insurance claims probably will be "much lower" than \$100 million, however.

In November 2000, Korman approved a distribution plan which allots \$900 million to bank deposit and looted asset claims and \$300 million to slave and forced laborers and refugees who were detained, mistreated or turned away. According to Ratner, one-fourth to one-third of the 500,000 claimants who will receive payment under the settlement are Americans.

Neuborne, who serves as lead settlement counsel, says the plaintiffs' lawyers undertook a systematic process to provide worldwide notice of the class settlement to potential claimants. This process unexpectedly yielded a valuable result: 600,000 detailed accounts of a wide range of individual experiences of the Holocaust. Neuborne will release this record of survivor histories to an appropriate Holocaust memorial organization once disbursement of the settlement fund has concluded.

Cases Against French Banks and Subsidiaries

Beginning in December 1997, plaintiffs' attorneys filed class actions in New York and San Francisco against seven French banks, a British bank and two American financial institutions, for "aryanization," or conversion of Holocaust victims' property and resources. Britain's Barclays Bank and American companies Chase Manhattan Bank and J.P. Morgan & Co. were named in the lawsuits because of the alleged misconduct of their Paris branches.

According to Lieff Cabraser attorney Ratner, who represents the plaintiffs in those cases, Barclays Bank settled in July 1999 for \$3.6 million, and J.P. Morgan & Co. settled earlier this year for a confidential sum. The cases against the remaining defendants are pending.

In September 2000, Judge Samuel Johnson in the Eastern District of New York denied the defendants' motion to dismiss, which Ratner says "should send a clear message to the companies that have not yet

settled their claims that they face a serious risk of continued litigation in United States courts if they don't do what Switzerland and Germany have done." Nevertheless, no settlement discussions have occurred.

Cases Against German Banks and Businesses

Beginning in March 1998, plaintiffs' lawyers filed 50 cases against German banks, companies and subsidiaries for alleged misconduct related to the Holocaust. The plaintiffs sought damages for aryation of their property and for involuntary labor.

The defendants included Deutsche Bank, Dresdner Bank, Ford Motor Co., General Motors, Volkswagen, DaimlerChrysler (formerly Daimler-Benz), BMW, petrochemical company BASF, pharmaceutical company Bayer, electronics manufacturer Siemens and Degussa Huels, which allegedly helped the Nazis by refining looted gold and manufacturing Zyklon B gas.

In defense, Washington, D.C., attorney Roger M. Witten argued that American courts had no jurisdiction and that the lawsuits violated all potentially applicable statutes of limitations.

According to Witten, the cases "are not cognizable by the court" because claims against Germany and its constituents arising out of wartime conduct "are political questions which the courts do not and cannot consider."

In September 1999, two federal judges in Newark, N.J., dismissed five of the class actions on the grounds that they involved political issues which the courts had no power to decide. The postwar treaties between Germany and the Allies extinguished the rights of private citizens to proceed with claims against German companies for Holocaust-era or World War II-era misconduct, the judges held. The judgments for dismissal have been appealed.

Meanwhile, the other parties continued with the settlement negotiations, which differed from the Swiss bank negotiations in that government officials actively participated in discussions with the attorneys and became parties to the negotiated agreement.

"We sat in these enormous meeting halls, and I would be negotiating with people speaking Russian, Czech, German, Hebrew and various other languages," Ratner, one of the plaintiffs' attorneys, recalls. "The discussions were slow."

The negotiations resulted in an agreement among the governments of the United States, Germany, Israel, Poland, the Russian Federation, Ukraine, the Republic of Belarus, the Czech Republic, American plaintiffs' attorneys, several international Jewish organizations and German industry.

Under the agreement, known as the German Economy Foundation Initiative, the German government and the German industrial complex will establish a fund of 10 billion deutsche mark (approximately \$5 billion) to pay former slave and forced laborers alive as of February 1999 and claims arising from insurance, banking, property and medical experiments.

According to Ratner, "the vast majority" of people who will receive payment from the fund are non-Jewish, Eastern Europeans; Americans will receive 10 percent to 15 percent of the settlement "at most."

Witten says that 700 million deutsche mark (\$3.5 million) of the settlement will be used to create the German Future Fund, "to fund projects to combat racial hatred and bigotry in the future."

The German Economy Foundation fund, which has been named "Remembrance, Responsibility and the Future," will be incorporated as a private law foundation in Germany and, by executive agreement, will provide the exclusive remedy against all German entities for any claim based on Nazi-era or World War II-era misconduct.

In the United States, the Department of Justice issued a Statement of Interest declaring that the foundation fund should be the exclusive remedy against German companies for any action "arising from the Nazi era and World War II" and urging "the filing of motions for voluntary dismissal of all pending Nazi-era litigation against German companies in United States courts."

After minimal dissent from the plaintiffs' bar, on Nov. 14, 2000, Judge William G. Bassler of the federal District Court in New Jersey dismissed 46 of the lawsuits brought against German companies. A handful of cases remain.

Cases Against Austrian Banks and Businesses

In 1998, lawyers filed class actions in the Southern District of New York against two Austrian banks, alleging that these institutions participated in the aryanization of property belonging to Holocaust victims.

These cases consolidated with pending cases against the German entities before Judge Shirley Wohl Kram, who appointed former U.S. Sen. Alfonse D'Amato to facilitate settlement negotiations.

In March 1999, defendants Bank Austria and Creditanstalt settled for \$40 million, and it is estimated that one-fourth to one-third of that amount will be paid to American claimants. Kram approved the settlement in January 2000, but due to the fact that one individual objected to the adequacy of the settlement, and his appeal is pending in the 2nd Circuit Court of Appeals, no money has been distributed yet.

Earlier this year, plaintiffs' attorneys filed two additional class actions in the Southern and Eastern District Courts of New York against Austria and 80 of Austria's leading businesses, alleging that these entities used slave and forced labor during the war.

"After Germany, Austria was the second greatest user of slave and forced labor during the Holocaust," Ratner says.

Settlement talks with the Austrian defendants followed a format similar to the discussions with the Germans, although negotiations were complicated by the fact that plaintiffs' attorneys believed that Austrian industry should pay more, because its relative lack of involvement in postwar restitution programs, while the size of its economy (about one-tenth the size of the German economy) mandated that it pay less.

As of November 2000, it appears that the Austrian labor claims will be dismissed in exchange for "an accord similar to the accord with Germany" which calls for the establishment of a fund by the Austrian government and/or its businesses of 96 billion schillings, or \$400 million, to pay former laborers, an estimated 10 percent to 15 percent of whom are American.

Insurance Cases

The late 1990s spawned another type of Holocaust-related litigation. Attorneys filed class actions in federal court in the Southern District of New York against more than one dozen European insurers, including an Italian insurer, Assicurazioni Generali. The lawsuits sought remuneration for Holocaust survivors and the heirs of those who died during the war for unpaid benefits allegedly owed under life, homeowners and dowry

policies issued before and during World War II.

On the West Coast, Los Angeles attorneys William M. Shernoff and Lisa Stern filed the first individual cases arising out of Holocaust-era insurance policies. These lawsuits, filed in 1998 in California state court against Generali and others, alleged breach of contract, bad faith and violation of California's Unfair Business Practices Act.

Plaintiffs contended that they made repeated attempts in the 50 years following the war to collect on the policies, but insurance agents repeatedly turned them away and made numerous misrepresentations about the policies, the availability of information and the rights of plaintiffs and others to collect.

According to one of Generali's attorneys, Peter Simshauser, the insurer's liability for policies issued in certain countries extinguished when the Communist Party seized those countries after World War II.

"In many cases, Generali was told by the governments in those countries that those governments were setting up state-run insurance companies that were going to have all responsibility for the policies," Simshauser says.

Generali further defended on the grounds that the plaintiffs' claims were barred by the Act of State Doctrine and the Due Process Clause of the 14th Amendment.

In January 1999, Los Angeles County Superior Court Judge Florence-Marie Cooper ruled that California had jurisdiction over Generali because the insurer maintained sufficient business contacts with the state and had availed itself of California's court system on other matters. The 2nd District Court of Appeal affirmed. Generali then appealed to the California Supreme Court, but the high court denied review.

In November 1999, the first case filed by Shernoff and Stern settled in mediation. In February 2000, four other individual actions against Generali settled, and two actions were dismissed voluntarily.

In August 2000, the Judicial Panel on Multi-District Litigation consolidated 48 cases, not including cases against the Italian insurer Generali, in the Southern District of New York to facilitate resolution of the cases pursuant to the German Economy Foundation Initiative.

Shernoff and Stern, who did not participate in any of the negotiations, initially felt disinclined to dismiss their clients' actions against German insurers. However, after several meetings with Eizenstat, they became convinced that dismissal would enable the claimants, including their clients, to receive payment from the fund as soon as possible. As a result, the individual insurance actions pending on the West Coast against German insurers were dismissed on Oct. 25, 2000.

Earlier this month, the Multi-District Litigation Panel entered an order consolidating the remaining insurance cases, including those pending against Generali, and transferring them to the Southern District of New York for pretrial coordination.

AT A GLANCE

Cases Against Swiss Banks

Cases: Consolidated as *In re Holocaust Victim Assets Litigation*, 96 Civ. 4849

Filed: October 1996 and January 1997. Consolidated in April 1997. Additional cases filed in January and

June 1998

Court: E.D.N.Y., Judge Edward R. Korman

Status: Settled August 1998 for \$1.25 billion; approved August 2000 with an additional \$50 million to help pay for insurance claims. Allocation plan approved November 2000. Appeal by Polish national and Polish-American constituents of their exclusion from the settlement denied by the 2nd Circuit Court of Appeals in November 2000. Appeal by individual American objector to the allocation plan is pending. Disbursement expected to begin in the first quarter of 2001.

Counsel:

Plaintiffs Burt Neuborne, New York University Law School, New York; Morris A. Ratner, Lieff, Cabraser, Heimann & Bernstein, San Francisco; Melvyn I. Weiss, 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; Stanley M. Chesley, Waite, Schneider, Bayless & Chesley Co., Cincinnati; Irwin B. Levin, Cohen & Malid, Indianapolis; Edward Fagan, Fagan & D'Avino, New York
Defendants: Roger Witten, Wilmer, Cutler & Pickering, Washington, D.C.

Special Master: Judah Gribetz, Richards & O'Neil, New York (developed distribution plan)

Cases Against German Banks

Cases: Consolidated as part of In re Austrian & German Bank Holocaust Litigation, 98 Civ. 3938

Filed: June 1998, October 1998 and January through March 1999. Consolidated in March 1999

Court: S.D.N.Y., Judge Shirley Wohl Kram

Status: Pending. Plaintiffs declined to voluntarily dismiss their claims, despite the German Economy Foundation Initiative; final determination on the viability of those cases will be rendered in late December 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, United States deputy secretary of the treasury (representing the United States)

Cases against French, British and American Banks and Financial Institutions

Cases: Bodner v. Banque Paribas, CV 97-7433; Benisti v. Banque Paribas, CV 98-7851; Mayer v. Banque

Paribas, BC 302226

Filed: Bodner Dec. 17, 1997; Benisti Dec. 23, 1998; Mayer Mar. 24, 1999.

Courts: Bodner & Benisti E.D.N.Y., Judge Samuel Johnson; Mayer S.F. Super. Ct., Judge Stuart Pollack

Status: Defendant Barclays Bank settled for \$3.6 million in July 1999 and defendant J.P. Morgan & Co. settled on confidential terms in 2000. Pending as to all other defendants.

Counsel:

Plaintiffs: Morris A. Ratner, Lieff, Cabraser, Heimann & Bernstein, San Francisco; Melvyn I. Weiss, Milberg, Weiss, Bershad, Hynes & Lerach, New York; Kenneth F. McCallion, Goodkind, Labaton, Rudoff & Sucharow, New York; Richard H. Weisberg, Benjamin N. Cardozo School of Law, New York; Harriet Tamen, New York

Defendants: Fred Davis, New York (representing French banks); Floyd Abrams, New York (representing Barclays Bank and J.P. Morgan Co.); Owen N. Powell, Bonifay, Florida (representing Chase)

Cases Against Austrian Banks

Cases: Consolidated as part of In re Austrian & German Bank Holocaust Litigation, 98 Civ. 3938

Filed: January 1999 and March 1999. Consolidated in March 1999.

Court: S.D.N.Y., Judge Shirley Wohl Kram

Status: Property claims settled March 1999 for \$40 million; approved January 2000. Appeal by an individual of the order approving settlement is pending before the 2nd Circuit. Labor cases pending but likely to be dismissed in light of an intergovernmental accord between the United States and Austria, establishing a \$400 million fund to be paid to former slave or forced laborers.

Counsel:

Plaintiffs: 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 E. Randol Schoenberg, Los Angeles; Charles G. Moerdler, Stroock & Stroock & Lavan (representing the Austrian Jewish Community)

For a complete list of all of 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, in Part Two of this series, an analysis of the resolution mechanisms applied to Holocaust-related claims.