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The Settlement of Nazi-era Litigation Through the Executive and Judicial Branches

By

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Efforts to recover stolen assets and to address Nazi-era human rights violations benefited from a confluence of events beginning in the mid 1990s. Researchers of the Holocaust Museum in Washington, D.C. located recently declassified documents in the United States National Archives detailing Swiss accounts that had been in the names of Jewish victims. This produced renewed interest in the recovery of these assets. Using this new evidence, a team of the most experienced and prominent class action plaintiffs' counsel in the country filed related cases in 1996 against Swiss banks, including Credit Suisse and Union Bank of Switzerland, and other Swiss entities to recover dormant bank accounts and to press human rights and other claims against the banks for their role in laundering gold and other assets taken from victims of Nazi persecution. Several of the cases also sought to force the banks to disgorge profits they obtained from the Nazi slave and forced labor program. The cases were filed in the United States District Court for the Southern District of New York, a jurisdiction which had over prior decades pioneered the use of Federal Rule of Civil Procedure 23 as a case management tool to permit the effective resolution of

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1. The original class action complaints were amended and re-filed in July 1997 as four separate actions, consolidated in the United States District Court for the Eastern District of New York under Master Docket No. 96-Civ-4849: Sonabend, v. Union Bank of Switzerland; Trilling-Grotch v. Union Bank of Switzerland; Weisshaus v. Union Bank of Switzerland; and World Council of Orthodox Jewish Communities, Inc., v. Union Bank of Switzerland. The consolidated case was captioned In re Holocaust Victim Assets Litigation, Master Docket No. 96-Civ-4849 (ERK) (MDG), and is referred to herein as the "Swiss banks" litigation.
mass claims. As discussed in more detail below, this litigation was followed by the filing of similar class cases against German, Austrian, French and other European entities, all seeking to recover for Nazi-era misconduct.

The credible threat of an involuntary judgment posed by the class action litigation combined with (1) intense media attention, (2) political pressure from well-situated victims' advocates, (3) the ongoing efforts of institutions such as the World Jewish Restitution Organization, and (4) mounting public support within Switzerland to face past wrongs, to produce immense pressure on the Swiss bank defendants to address their liability. These pressures, under the guidance of an engaged jurist, the Honorable Edward R. Korman, led to a $1.25 billion settlement of the Swiss Banks litigation, using Fed. R. Civ. P. 23 to create multinational plaintiff classes. The settlement was historic because it was the first resolution of mass tort claims arising from Nazi-era conduct during World War II.

The same factors that produced the Swiss Banks Settlement, to varying degrees, facilitated the relatively prompt resolution of class action cases against German, Austrian, French and other entities that had potential liability for Nazi-era misconduct. In the German class cases, which were filed a few years after the Swiss Banks litigation commenced, the defendants insisted on a resolution of the litigation using the Executive Branch to reach an agreement between the governments of the United States and the Federal Republic of Germany. Most of the Austrian and French claims were resolved on a similar basis, thereby preventing substantial judicial involvement in the settlement of those cases.
This article addresses some of the principal differences between these two approaches from the perspective of fairness to the victims. Section I describes the Swiss settlement and the role of the United States courts in overseeing and policing the fairness of the settlement negotiations, the approval and evaluation process, and settlement implementation. Section II reviews the role of the Executive Branch in the German, Austrian, and French cases. Section III explains why victims were better protected by the Swiss model and why the Judicial Branch is best situated to guarantee the fairness of the settlement of mass human rights claims.

I.
THE SWISS MODEL: JUDICIAL OVERSIGHT OF SETTLEMENT NEGOTIATIONS AND IMPLEMENTATION, GOVERNED BY DUE PROCESS PRINCIPLES

A. Judicial Involvement In Settlement Discussions

Then-Undersecretary of State Stuart Eizenstat (who ultimately was appointed as Deputy Secretary of the Treasury, but who maintained his position in the Holocaust negotiations until the end of the Clinton Administration), with assistance from State and Justice Department personnel, served as a facilitator in all of the negotiations to resolve Nazi-era class action claims. In the Swiss Banks case, Mr. Eizenstat facilitated initial settlement discussions between the court-appointed Plaintiffs’ Executive Committee (all of whom later became court-appointed Settlement Class Counsel) and Counsel for the defendant Swiss Banks, represented by U.S. Attorney Roger Witten from Wilmer, Cutler & Pickering.6

The Swiss settlement discussions, mediated informally by Mr. Eizenstat, terminated in June 1998 when the Swiss Banks declared they would pay only $600 million USD to resolve the litigation and declared that they would not negotiate above that amount.7 Plaintiffs’ Counsel, including, among others, Melvyn I. Weiss of Milberg Weiss Bershad Hynes & Lerach LLP, succeeded in creating a consensus among themselves and, as importantly, among other victims’ advocates in support of a settlement of no less than $1 billion USD.

Judge Korman actively monitored the litigation from the outset, appointing the Executive Committee of Plaintiffs’ Counsel to manage the case, and regularly meeting with the parties on procedural and other issues. Judge Korman

6. Mr. Witten, who was subsequently retained to represent the “German Economy” in discussions regarding settlement of Nazi-era claims against German entities, was among the most forceful advocates of minimizing the role of the judicial branch in the German negotiations.
7. The author participated extensively in the settlement negotiations.
and Magistrate Judge Marylin Go\(^8\) demonstrated a willingness to grapple with the complex issues raised by the case, and were not overwhelmed by the sheer volume of paper the defendants filed seeking dismissal. In May 1997 defendants filed a motion to dismiss the *Swiss Banks* complaint, or, in the alternative, for a stay. The motions, supported by expert affidavits, argued that the action should be dismissed because plaintiffs allegedly failed to state claims under Swiss and international law, failed to join indispensable parties, lacked personal and subject matter jurisdiction, and lacked standing.\(^9\) The court heard a lengthy argument on defendants’ motions on July 31, 1997. At argument, the court voiced concerns about the viability of certain causes of action, and identified several additional legal issues that the parties subsequently addressed in post-hearing memoranda.\(^10\) Burt Neuborne, the John Norton Pomeroy Professor of Law at New York University and an active member of the Plaintiffs’ Executive Committee who was later appointed Lead Settlement Class Counsel, argued the motions, which were under submission while settlement negotiations took place. The court never decided the motions to dismiss.\(^11\)

Against this backdrop Judge Korman invited the parties to meet with the court to revive settlement discussions. At the pivotal meeting, Michael D. Hausfeld of Cohen, Milstein, Hausfeld & Toll, P.L.L.C., speaking for all plaintiffs, walked the court and defendants through a compilation of data suggesting that the banks’ potential liability was many tens of billions of dollars. Because of the difficulty of reconstructing amounts improperly converted or otherwise obtained by the Swiss bank defendants from the bottom up by examining each account and illicit transfer, plaintiffs’ counsel and their experts attempted to estimate class damages by considering aggregate estimates extrapolated from available historical data. Of course, most of the persons entitled to that disgorgement had perished in the Holocaust, along with most, if not all, of their potential heirs. The passage of 50 years, during which the banks had obstructed efforts to recover dormant accounts, made records scarce and difficult to assemble to prove individual claims.\(^12\)

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\(^8\) Magistrate Judge Go was also assigned to the Nazi-era cases against French banks discussed in note 5, supra. Working with Judge Sterling Johnson, Jr., Magistrate Judge Go was equally involved in the *French Banks* litigation, which was primarily resolved extra-judicially as discussed below.

\(^9\) In re Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139, 142 (E.D.N.Y. 2000).

\(^10\) Id.

\(^11\) Id.

\(^12\) The suits were filed two years after the World Jewish Restitution Organization initiated discussions regarding certain restitution issues. Such negotiations led to, among other things, the creation of the Independent Committee of Eminent Persons (ICEP). ICEP, chaired by Paul A. Volcker (and also referred to as the “Volcker Committee”), was established in May 1996 by the Swiss bankers association, the World Jewish Congress and other Jewish organizations to conduct an audit of the settling defendants and other Swiss banks to identify accounts from the World War II era that could possibly belong to victims of Nazi persecution. The Volcker Committee conducted what is likely the most extensive audit in history, employing five of the largest accounting firms in the world at the cost of hundreds of millions of dollars. In re Holocaust Victim Assets Litigation, 105 F. Supp. at 151. At the conclusion of its investigation, the Volcker Committee prepared a 100-plus page report which it released on December 6, 1999 (the “Volcker Report”), setting forth its findings in detail, which included the revelation that approximately 54,000 Swiss bank accounts were identi-
However, the top-down approach to the evidence articulated by Mr. Hausfeld was effective, and the court announced a range within which it thought the case should settle. It did settle in that range, specifically for roughly twice the $600 million amount that the banks had declared to be their final offer during the settlement discussions mediated by Mr. Eizenstat. The court’s involvement produced principled settlement discussions, based both on an assessment of the strengths and weaknesses of plaintiffs’ claims as well as on evidence regarding defendants’ exposure.

B. The Court’s Involvement in the Settlement Approval Process

The parties reached an agreement in principle in the court’s chambers on August 12, 1998.13 This agreement related only to the general scope of the class release to be provided and to the overall amount of the settlement, i.e. $1.25 billion. It was left to the parties to convert that general agreement into a formal and complete Settlement Agreement, which the parties presented to the court for its preliminary review on March 22, 1999.14

The court followed the two-stage settlement evaluation procedure recommended by the Federal Judicial Center’s Manual for Complex Litigation15 ("MCL-3d") and relevant jurisprudence detailing the review of settlements under Fed. R. Civ. P. 23(e).16 First, the court certified the proposed settlement classes under Fed. R. Civ. P. 23(a) and 23(b) and reviewed the settlement for the purpose of determining whether it had no obvious deficiencies, whether it was the product of collusion, and whether it was sufficiently fair and reasonable to warrant providing notice to the class of its terms.17

The key terms of the proposed Settlement Agreement were as follows:

1. Settlement Fund. Defendants agreed to pay $1.25 billion USD.
2. Defenses Waived. Defendants waived potentially dispositive legal and factual defenses.
3. Distribution. The Settlement Agreement did not preordain a plan for distribution of the settlement fund. Instead, the settlement set forth a mechanism for the development of criteria pursuant to which distribution and allocation determinations were to be made, with direct input from all interested class members.

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14. Id.
16. Rule 23 (e) provides that "a class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."
4. *Settled Claims.* In exchange for the $1.25 billion settlement amount paid by the settling defendants, settling plaintiffs and class members agreed to release settling defendants and other Swiss releasees of liability for any and all claims relating to the Holocaust, World War II, and its prelude and aftermath.

5. *Class Beneficiaries.* The parties agreed that the settlement should benefit persons recognized as targets of systematic Nazi oppression on the basis of race, religion or personal status. Accordingly, four out of the five Settlement classes, defined below, were explicitly designed to benefit “victims of Nazi persecution,” defined to include Jews, homosexuals, Jehovah’s Witnesses, the disabled, and Romani—groups recognized by the United Nations as having been the targets of systemic Nazi persecution on the basis of race, religion or personal status.\(^18\)

In its March 30, 1999 order, the court preliminarily approved the proposed settlement and certified five settlement classes under Fed. R. Civ. P. 23(a) and 23(b)(3). The five settlement classes included: (1) a deposited asset class of persons who were victims or targets of Nazi persecution and their heirs, who had claims relating to deposited assets in Swiss banks; (2) a looted asset class, consisting of victims or targets of Nazi persecution and their heirs, who had claims relating to looted or cloaked assets; (3) a slave labor class, including victims or targets of Nazi persecution and their heirs, who performed slave labor for companies or entities that deposited the revenues or proceeds of that labor with the Swiss Banks or other entities; (4) a second and distinct slave labor class, including individuals and their heirs who performed slave labor at any facility or worksite owned or controlled by a Swiss entity (this is the one class that is not limited to “victims or targets of Nazi persecution”); and (5) a refugee class consisting of victims or targets of Nazi persecution and their heirs, who sought entry into Switzerland to avoid Nazi persecution and were either denied entry or after gaining entry were deported, detained, abused or otherwise mistreated.\(^19\)

In May 1999 after granting preliminary approval, the court appointed four notice administrators to implement an international notice campaign.\(^20\) The campaign involved roughly $6 million in paid advertising in newspapers in 40 countries and in multiple languages. In addition, the notice program involved Internet (including a web site available in 20 languages) and public relations outreach, as well as an intensive program of community outreach involving the enlistment of thousands of local organizations in 100 countries to make direct contact with even the smallest of survivor communities.\(^21\)

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19. *Id.* at 143-44.
20. *Id.*
through these means, pursuant to the jurisprudence surrounding notice of class action settlements under Fed. R. Civ. P. 23, informed potential class members of the terms of the proposed settlement, the method by which they could make objections or comments, the method by which they could provide suggestions regarding allocation and distribution issues, and the procedures for excluding themselves from the settlement to preserve their right to pursue individual claims. This notice was consistent with due process, as articulated by the United States Supreme Court in *Phillips Petroleum Co. v. Shutts.* In response to that notice, and as of May 8, 2000, approximately 243 letters had been received containing comments upon or objections to the settlement, and approximately 448 letters had been received containing comments on or proposals regarding allocation or distribution. Approximately 401 opt-out requests had been received, a few of which were subsequently withdrawn and a percentage of which were from persons who were not class members or did not understand the nature of the request. Also, as of that date in excess of 550,000 persons had submitted Initial Questionnaires, which was the suggested method for indicating a desire to participate in any claims process.

The next and final step in the class action settlement evaluation process was a final approval hearing, also known as a “fairness hearing.” Pursuant to Fed. R. Civ. P. 23(e), the court held a fairness hearing in the United States District Court for the Eastern District of New York on November 29, 1999. The hearing was open to all settlement class members. The court also conducted and presided (by electronic hook-up) over a supplemental fairness hearing that was held in Israel on December 14, 1999. The hearing was open to a random sampling of Israelis who submitted initial questionnaires in response to the notice.

"The central question raised by [a] proposed settlement of a class action is whether the compromise is fair, reasonable and adequate." This determination involves consideration of both the process by which the parties reach settlement and the substantive terms of the settlement itself.

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23. 472 U.S. 797, 105 S. Ct. 2965 (1985); see also *MCL-3d, §30.212.*

24. *In re Holocaust Victim Assets Litigation,* 105 F. Supp. 2d at 147.

25. *id.*

26. *id.* at 145.

27. *id.*


29. *id.* at 73-74
In its August 9, 2000 Corrected Memorandum and Order granting final approval to the proposed settlement, the court evaluated the Swiss Bank settlement negotiation process and determined that it was fair. The court held:

Moreover, based on my extensive personal involvement in the process, I know that the compromises were reached by the result of lengthy, well-informed and arm's-length negotiations by competent and dedicated counsel who provided loyal and effective legal representation to all parties.30

In evaluating the substantive component of the fairness determination, the court was guided by the specific factors identified by the Second Circuit in City of Detroit v. Grinnell Corp.31 These factors, all or some of which may be relevant depending on the case, include:

(1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all of the attendant risks of litigation.32

Other circuits have articulated similar standards.33

The court's evaluation of the settlement was both critical and constructive, and resulted in several substantive improvements to the settlement. For example, the original Settlement Agreement provided for releases to a number of unidentified non-party Swiss insurance companies.34 At the fairness hearing, the judge considered objections to the inclusion of insurers as releasees under the Settlement Agreement. The objections related to the effectiveness of notice to claimants against released Swiss insurers and the appropriateness of releasing such insurers in the absence of a mechanism to pay valid Holocaust-related insurance claims as part of the distribution of the settlement fund.35 In response to these objections, and with the urging of the court, the parties and major Swiss insurers released under the Settlement Agreement, after extensive discussions, agreed on a mechanism to evaluate and pay Holocaust-related insurance claims. This agreement is embodied in Amendment No. 2 to the Settlement Agreement.36

Amendment No. 2 specifically designates up to $100 million USD (including up to an additional $50 million in new money provided by the insurers themselves) for the resolution of unpaid insurance claims.37 The mechanism provides for prompt and fair consideration of all insurance claims, appropriate multipliers for such claims, full cooperation of the participating insurers in pro-

31. 495 F.2d 448, 463 (2d Cir. 1974).
32. Id. (Internal citations omitted).
33. Id.
34. In re Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 160.
35. Id.
36. Id.
37. Id.
viding relevant documentary material to potential claimants, and assurance of payment from the settling defendants. The amendment was made prior to the date on which the court granted final approval, and was submitted to the court. The court held in its August 9, 2000 Memorandum and Order granting final approval:

The Amendment also contains a provision that acknowledges my power to order participating insurers to disclose the holders of policies, with the consequence of an insurer's failure to comply being the exclusion of such insurer from all provisions of the Settlement Agreement. My power to order such disclosure is subject to the application of certain standards that are not inconsistent with the good-faith duty of a releasee to make disclosures necessary to permit class beneficiaries to obtain the benefits of the Settlement Agreement.

Similarly, the court made clear its intention to police the administration of the Refugee Class claims. In December 1999, the Independent Commission of Experts (ICEP)—an independent group of internationally-recognized historians chaired by Jean Francois Bergier established by the Swiss Confederation in 1996 to examine Switzerland's relationship with Nazi Germany (and referred to hereinafter as the "Bergier Commission")—released a report (the "Bergier Report") indicating that approximately 14,500 applications to gain entry into Switzerland were rejected by the Federal Foreign Police, and that more than 24,000 refugees were turned back at the border or expelled during the war years. On March 31, 2000, the Swiss Federal Council authorized the Swiss Federal Archives to release to the Special Master a list of persons denied entry into or expelled from Switzerland during the relevant period. In its August 9, 2000 Memorandum and Order granting final approval, the court noted: "If it proves impossible to assemble the information needed because Swiss entities (including Cantonal entities) refused to provide information that they have in their possession that is needed for the fair administration of the Refugee Class, I will consider an application for modification of the enforceability of releases with respect to those entities."

With respect to the administration of the Slave Labor Class II, the court expressed concern over the ability to administer that class in the absence of information concerning the identities of persons who performed slave labor for a Swiss company or its affiliates during World War II. In its August 9, 2000 Memorandum and Order granting final approval, the court held:

[T]hose Swiss entities that seek releases from Slave Labor Class II are directed to identify themselves to the Special Master within thirty days of the date of this Memorandum and Order. The failure of Swiss entities seeking releases from Slave Labor Class II claims to identify themselves will result in the denial of a release and permit those who have claims against those entities to pursue such claims independently of this lawsuit.

38. Id., See also http://www.swissbankclaims.com/PDFs_Eng/Amendment2.pdf.
40. Id. at 161.
41. Id.
42. Id. at 161.
43. Id. at 162-63.
The court noted that it was not altering the terms of the Settlement Agreement. Requiring minimal cooperation as a condition for a release simply meant that a party who seeks to enforce a contract for a release extinguishing the claims of a particular class, cannot in good faith withhold its identity from class members, who need that information in order to claim benefits to which they are entitled or which may reasonably be ordered pursuant to Fed. R. Civ. P. 23(d). 44

The foregoing are examples of the ways in which the court was involved at the settlement approval stage in guaranteeing that due process concerns were satisfied so that the class members actually received bargained-for benefits that justified the release of their claims. The process by which the court approved and improved upon the settlement also demonstrates the effectiveness of class member input in the settlement approval process. The court carefully considered class members’ objections, and took them into consideration when making its determinations regarding whether to approve and how to prompt the parties to improve the settlement. 45

C. Court and Class Member Involvement in the Development of a Distribution Plan

The negotiating parties in the Swiss Bank Settlement did not make the allocation decisions. Instead, the Settlement Agreement, ¶7.1, called for the appointment of a Special Master to develop a proposed plan of allocation and distribution of the settlement fund employing open and equitable procedures to ensure fair consideration of all proposals for allocation and distribution. 46 Once the parties negotiated the final disgorgement amount of $1.25 billion, all class members were informed of the amount and asked to decide whether to stay in the class and be bound by the settlement. 47 Staying in the class required them to trust the mechanism of allowing a court-appointed Special Master to recommend the allocation plan with input from all interested class members in the decision-making process. The court held:

The appointment of a special master here also obviates the concern that hypothetical conflicts among class members relating to allocation and distribution would require separate representation, and thus call into question the adequacy of representation. This is so because the class members represent themselves on this key issue and have direct access to the special master and to me. The adequacy con-

44. Id. at 163.
45. Id. at 145, 149, 160.
46. As the Second Circuit has recognized:

[t]he formulation of the [distribution] plan in a case such as this is a difficult, time-consuming process. To impose an absolute requirement that a hearing on the fairness of a settlement follow adoption of a distribution plan would immensely complicate settlement negotiations and might so overburden the parties in the district court as to prevent either task from being accomplished.

In re “Agent Orange” Product Liability Litigation, 818 F.2d 145, 170 (2d Cir. 1987); MCL 3d § 30.212 (often the details of allocation and distribution are not established until after the settlement is approved).

47. See May 10, 1999 Order Appointing Notice Administrators, Approving Form of Service and Notice Plan, Scheduling Exclusion Requests and Obligations Deadlines, and Scheduling Final Fairness Hearing, In re Holocaust Victim Assets Litigation, (No. 277).
cerns that informed the Supreme Court's decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295 (1999), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231 (1997), are therefore absent from this case.\(^{48}\)

The court appointed Judah Gribetz, Esq., to serve as Special Master.\(^{49}\)

As noted above, the vast majority of class members opted to remain in the class, and trusted this procedural device as the means by which allocation and distribution decisions would be made. A substantial number of class members actually made specific proposals regarding allocation and distribution, all of which were forwarded to the Special Master and to the court.\(^{50}\)

The work of the Special Master in preparing a comprehensive draft plan of allocation and distribution\(^{51}\) was intimately tied to the multi-phased notice program in the case. Initially, in the most intensive and costly of the three phases, all class members were told of the settlement terms and informed how to provide proposals regarding allocation. Recipients of the first notice were also informed that to receive further notice of a draft plan of allocation once it was prepared by the Special Master, they should identify themselves either by filing an Initial Questionnaire or otherwise writing to the notice administrators.\(^{52}\)

More than 580,000 class members ultimately responded to that notice, and all of them were mailed a summary of the Special Master's draft plan of allocation in approximately September 2000.\(^{53}\) Class members were given a period of time within which to comment on that specific proposal. A number of class members and organizations representing victims of Nazi persecution commented on the draft plan. After a hearing at which the Court heard objections and argument regarding the plan, the Court adopted the plan in its November 22, 2000 order.\(^{54}\)

The class members were then provided yet a third wave of notice, by direct mail and through additional world-wide publication, announcing the adoption of a final plan of allocation and distribution, and describing the procedures by which claims could be made by each of the five different settlement classes, as well as how insurance claims could be made under Amendment No. 2 to the Settlement Agreement. Accordingly, class members had multiple opportunities in the Swiss Banks settlement for direct and consequential contact with the Court regarding allocation and distribution issues.\(^{55}\)

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49. *Id.*


51. A copy can be viewed at www.swissbankclaims.com.


55. The Special Master's Plan of Allocation and Distribution involved a rigorous analysis of available historical data. The Special Master conscientiously based his proposals on the weight of the claims, and on the evidence he collected during his intensive fact investigation, as explained in the Plan. *See* Plan of Allocation and Distribution, *at* http://www.swissbankclaims.com/media/index_media.asp.
The Plan of Allocation and Distribution was subjected to yet an additional level of scrutiny during the course of the Swiss Banks settlement implementation. Three class members appealed from the November 22, 2000 order of the district court approving the Special Master’s proposed plan of allocation and distribution. The Second Circuit affirmed the district court’s approval of the allocation plan, remarked favorably upon the Special Master’s detailed recommendations, and rejected the appeal.56

D. Court Involvement in the Settlement Implementation Process

Once a class action settlement is approved, courts remain active in the implementation and enforcement of the Settlement Agreement. The Second Circuit in In Re “Agent Orange” Product Liability Litigation,57 a products liability settlement regarding injuries associated with the “Agent Orange” chemical utilized during the Vietnam War, set forth some useful guidelines regarding court oversight of settlement implementation: (1) “[d]istrict courts enjoy ‘broad supervisory powers’ over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably”58; (2) the district court must “exercise its independent judgment to protect the interests of class absentees, regardless of their apparent indifference, as well as protect the interests of more vocal members of the class”59; and (3) the court has “discretion to adopt whatever distribution plan he determine[s] to be in the best interests of the class as a whole notwithstanding the objections of class counsel or of a large number of class members.”60 The Second Circuit found that the district court also had within its power: (1) the flexibility to “alter the distribution plan in the future to simplify it more or clarify standards as concrete issues arise”61; (2) the freedom to determine an equitable allocation of the settlement fund without resolving issues of causality62; and (3) the ability to “provide [ ]broader relief [in an action that is before trial] than the court could have awarded after a trial.’”63 The district court’s oversight duties endure “[u]ntil the fund created by the settlement is actually distributed.”64

These principles have animated the district court’s approach to the Swiss Banks settlement. The district court has special masters to handle all aspects of settlement-administration, under the court’s continuing supervision and control. For example, on December 8, 2000, the court appointed Paul Volcker and Michael Bradfield as Special Masters to establish, organize, and supervise the Deposited Asset Class Claims Resolution Process using the Claims Resolution

57. 818 F.2d 179 (2d Cir. 1987).
58. Id. at 181.
59. Id. at 182.
60. Id. (citations omitted).
61. Id. at 184.
62. Id. at 183-184.
63. Id. at 185.
64. Zients v. LaMorte, 459 F.2d 628, 630 (2d Cir. 1972).
They have developed detailed claims guidelines and disseminated claim forms to the class, which have been reviewed and approved by the court.

II.

The victims of Nazi persecution resolved their claims against German, Austrian, and French defendants through a dramatically different process than that described above with respect to the Swiss Banks litigation. The parties used Executive Agreements to reach settlements. The level of judicial scrutiny of the Executive Agreements under Fed. R. Civ. P. 23(e) was limited and produced no improvements to any of the Executive Agreement settlements involving German, Austrian, or French entities. Allocation decisions were not subjected to public scrutiny or participation when they were made and were negotiated by only the persons and interests that happened to be represented forcefully at the political negotiations that led to the Executive Agreements. Finally, while attorneys for plaintiffs in litigation matters participated in the negotiations that resulted in the Executive Agreements resolving German, Austrian and French Nazi-era claims, the role of plaintiffs' counsel in the implementation was minimized. There was no appointment of Settlement Class Counsel as we saw in the Swiss Banks case to oversee the provision of notice and to coordinate with special masters appointed to administer claims. The Executive Agreement settlements have instead been implemented through boards often consisting of a majority of persons who represent the interests of entities other than victims of Nazi persecution.

65. In re Holocaust Victim Assets Litigation (No. 855).
66. See, e.g., March 18, 1998, Letter dated February 20, 1998 from Paul A. Volcker to Judge Korman informing the court of the status of the work of the Independent Committee of Eminent Persons, In re Holocaust Victim Assets Litigation (No. 139); October 5, 1998, Status Report dated September 16, 1998 submitted by Michael Bradfield and prepared by ICEP (No. 193); January 29, 2001, Letter dated January 18, 2001 from Michael Bradfield to Judge Korman requesting an extension of time for the publication of the list of accounts in Swiss Banks identified for publication by the ICEP (No. 907); February 7, 2001, Letter dated February 2, 2001 from Michael Bradfield to Judge Korman attaching a copy of the list of published accounts, the information booklet, claim form and instruction sheet (No. 913); March 20, 2001, Letter dated January 23, 2001 from Michael Bradfield to Judge Korman attaching proposed rules governing the claims resolution process setting forth a framework for the claims resolution tribunals adjudication of claims made by victims of Nazi persecution or their heirs under the claims program established under the Holocaust victim assets class action litigation (No. 949); August 30, 2001, Letter dated December 26, 2000 from Michael Bradfield to Judge Korman enclosing a binder containing an explanatory memorandum, tables and a computer program printout setting forth a draft proposed budget for the Claims Resolution Tribunal (No. 1064).
67. The author participated in the negotiations involving the Executive Agreement between Germany and the United States.
A. The Executive Agreement Negotiation Process

With the exception of the involvement of the court in the French Banks litigation, the courts in which Nazi-era German, Austrian and French class action cases were pending had nothing like the intensive involvement that Judge Korman had in the Swiss Banks litigation. Instead, the German, Austrian, and French claims were resolved through a series of conferences and negotiations organized by the United States and German, Austrian, and French governments. These conferences resulted in Executive Agreements between the United States and the settling countries and in the execution of “Joint Statements” by the negotiation participants, including plaintiffs’ counsel.\textsuperscript{69}

The German negotiations set the pattern for the process of reaching the Executive Agreements. The parties held meetings on a regular and alternating basis in Germany and in the United States. The participants included representatives of the governments of the United States of America, Federal Republic of Germany, Israel, several Central and Eastern European countries, the World Jewish Restitution Organization, plaintiffs’ counsel (including the author), and, depending upon the case, representatives of the private industry for financial companies that were potential subjects of litigation in the United States.

Mr. Eizenstat represented the United States government in each of the categories of Holocaust litigation. There is no doubt that he played a critical and constructive role in the resolution of these matters, and he deserves praise for accomplishing what many persons thought during the course of these negotiations would be impossible, i.e., settlements. However, Mr. Eizenstat was not acting as a judge, and he was therefore not charged with evaluating the class action cases as litigation matters; nor was he limited by the substantial body of case law under Rule 23 setting forth the court’s role as guardian of the class members. Instead, Mr. Eizenstat’s job was to resolve what he viewed, at least in part, as a political problem. Not surprisingly, the settlement discussions that resulted in the Executive Agreements in the German, Austrian and French cases, though often principled, were also affected by political issues and pressures.

For example, the U.S. government promoted the 10 billion DM (roughly $4.5 billion USD) settlement amount (one-half paid by the German government, and one-half by the private German economy) as an appropriate amount for the settlement of all Nazi-era claims against any German entity. This number was not originally suggested by plaintiffs’ counsel, and there is no evidence that it bore any particular relationship to the value of plaintiffs’ claims, especially as to the property portions of the German settlement.\textsuperscript{70} But, when Mr. Eizenstat (and, indeed, then-President Clinton) announced support for that number during the

\begin{itemize}
\item \textsuperscript{69} See supra note 5.
\item \textsuperscript{70} The slave and forced labor claims were settled on the most precise basis, with financial amounts negotiated on a per capita basis; the property and personal injury claims were negotiated more loosely, such that a wide variety of claims were discussed as a single bundle of claims.
\end{itemize}
settlement discussions, it became a ceiling (and, ultimately, a floor), mooting much of the discussion about the true potential value of property claims.

The German negotiations defined an alternative to Fed. R. Civ. P. 23 class action settlements which, after the Swiss Banks settlement was reached, became the preferred method for settlement by the German, Austrian and French defendants in class action cases in U.S. courts. Instead of certifying a settlement class and obtaining a class-wide judgment and release in exchange for the payments made by settling defendants, the defendants in the Executive Agreement settlements received only the more limited legal peace that resulted from the United States' filing of what are called "Statements of Interest" in legal proceedings involving Nazi-era claims. The terms of the Statements of Interest, and the United States government's obligation to file the Statements of Interest in Nazi-era cases, were embodied in documents titled Executive Agreements between the government of the United States of America and the German, Austrian and French governments.  

The German agreement is typical. It is titled an Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America Concerning the Foundation "Remembrance, Responsibility and the Future." This Executive Agreement is referenced in the Joint Statement on Occasion of the Final Plenary Meeting Concluding International Talks on the Preparation of the Foundation "Remembrance, Responsibility and the Future," and was signed by all participants in the negotiations, including the author of this article, on July 17, 2000. The Joint Statement expressly states that the German Foundation is to be the "exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising out of the national socialist era and World War II." The Statement also commits the plaintiffs' counsel that participated in the negotiations to dismiss their class actions with prejudice on a non-class individual basis. This legal peace was a condition precedent for the funding and implementation of the German Foundation Executive Agreement. 

The Executive Agreement, signed on the same date, explains how the Statement of Interest is to be filed in pending and future Nazi-era cases against German entities. In Article 1, the Federal Republic of German commits to provide "appropriately extensive publicity concerning" the Foundation's existence and the availability of funds, and notes that the Foundation "will be subject to legal supervision by a German governmental authority." 

The Executive Agreement Annex A broadly summarizes the structure and function of the German Foundation as for the purpose of making payments through partner organizations to those who suffered as private and public sector

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71. See supra note 5.
72. German Agreement, supra note 5.
73. Id.
74. Id.
75. The level of publicity was never defined to meet Fed. R. Civ. P. 23 or due process standards.
76. German Agreement, supra note 5.
forced or slave laborers and those who suffered at the hands of German companies during the national socialist era.\footnote{Id.}{77} The Executive Agreement contemplated the adoption by the German Bundestag of Foundation legislation that would provide for a board of trustees consisting of an equal number of members appointed by the German government and German companies, and by other governments and victim representatives, except that the chairman was to be a person of international stature appointed by the Chancellor of the Federal Republic of Germany.\footnote{Id.}{78} The Executive Agreement made it clear that the Foundation was to provide potential remedies to all persons who had any kind of Nazi-era claim and to set forth specific funds to pay various broad categories of claims, such as the 50 million DM amount that was to be set aside as a potential remedy for all non-racially motivated wrongs of German companies directly resulting in loss or damage to property during the national socialist era.\footnote{Id.}{79} The Foundation legislation was to also provide for the establishment of a three-member committee for property matters, which would have authority to adopt rules and procedures regarding the evaluation and payment of property claims.\footnote{Id.}{80} Subsequent to the signing of the Executive Agreement, the German Bundestag did adopt a Law on the Creation of a Foundation “Remembrance, Responsibility and Future” which did, on the whole, embody the principles set forth in the Executive Agreement.\footnote{Id.}{81}

From the perspective of the German companies, one of the most important portions of the Executive Agreement was the portion that obligated the United States government to file Statements of Interest in pending and future cases relating to Nazi-era claims filed in U.S. courts. While such Statements are not binding on courts, they rarely fail to prompt dismissal.

B. The “Approval” or “Evaluation” Process for the Executive Agreements

The district courts that were presented with motions for voluntary dismissal of the named plaintiffs’ claims in the German, Austrian and French cases played an extremely limited role in terms of the evaluation of those settlements. The Executive Agreements called for dismissal of Nazi-era class action and individual cases, but they were not class settlements. The court was not being asked to certify a settlement class, to release the claims of absent class members, or to enter a class judgment.

The role of the court was limited by jurisprudence regarding non-class settlements and dismissals of class action claims. By expressly making itself subject to Fed. R. Civ. P. 23(e), Rule 41(a)(1) appears to require a plaintiff to obtain leave of court before voluntarily dismissing an uncertified class action. Because voluntary dismissal of an uncertified class action does not preclude absent class members from continuing to pursue their claims, a district court is generally permitted to interfere with the plaintiff’s desire to terminate the class litigation

\footnote{Id.}{77} \footnote{Id.}{78} \footnote{Id.}{79} \footnote{Id.}{80} \footnote{Id.}{81}
on an individual basis on relatively narrow grounds. First, district courts generally review non-class dismissals of actions initially brought as class cases to determine that the dismissal is not tainted by collusion, such as might occur if the named plaintiff and its counsel obtain exaggerated payments in exchange for dismissal of the individual claim and abandoning class representation. Second, district courts generally review to insure that pre-certification dismissal does not unfairly prejudice absent class members by making it impossible for them to pursue their individual claims, such as might be the case if the class case were to be dismissed without notice, or if absent class members had been relying on the pendency of the class case to toll the statute of limitations. Given the foregoing, it is not surprising that the case law on the role of the trial court under Fed. R. Civ. P. 23(e) when confronted with a motion for voluntary dismissal tends to address almost exclusively whether there was collusion or whether there will be prejudice in the absence of notice to persons who would have been class members had the action proceeded through certification. When Judge Kram, in considering motions for voluntary dismissal of the German Banks cases endeavored to provide a higher level of scrutiny of the actual substance of the Executive Agreement between the United States and Germany, the parties in that case were able to successfully pursue a petition for writ of mandamus. The appellate court noted that the existence of the Executive Agreement persuasively established that the court lacked jurisdiction to set conditions on the dismissal of the claims in that case which would have required the German Foundation to take any action with respect to the treatment of any of the claims.

While each of the reviewing courts considered the Executive Agreements that were reached between the United States and Germany, Austria, and France, the courts had a limited ability to receive input from the beneficiaries or to attempt to modify the agreements. Instead, each court was informed that an agreement had been reached, that plaintiffs' counsel and the named plaintiffs (on the whole) supported the agreements, that the agreements provided substantial and immediate benefits, and that the settlements were not achieved by collusion, did not confer disproportionate benefits upon the class representatives compared to absent class members or in a way that would prejudice absent class members.

82. See Fed. R. Civ. P. 41 (a) and 23 (e); In re Phillips Petroleum Securities Litigation, 109 F.R.D. 602, 607 (D. Del. 1986) (noting limited scope of analysis).
84. See, e.g., Shelton v. Pargo, Inc., 582 F.2d 1298, 1314-17 (4th Cir. 1978).
85. See, e.g., Diaz v. Trust Territory of the Pacific Islands, 876 F.2d 1401 (9th Cir. 1989); Shelton v. Pargo, 582 F.2d 1298 (4th Cir. 1978).
86. Duveen v. United States Dist. Court (In re Austrian & German Holocaust Litigation), 250 F.3d 156 (2d Cir. 2001).
87. Id.
88. Interestingly, plaintiffs' counsel actually fared better under the Executive Agreement settlements; their fees were paid more promptly, and their individual fee applications were subject to less public scrutiny than was the case in the Swiss Banks settlement. The German Foundation, for example, made fee payments to counsel after fee applications were confidentially evaluated by two
C. Executive Agreement Allocation Determinations

The German, Austrian, and French negotiations all had unique facts and circumstances, but negotiations regarding allocation in each of those matters followed the same essential pattern: fundamental allocation decisions were made by the negotiating parties without input from affected persons, who would have been class members had the cases been settled on a class basis. In the German Foundation negotiations, for example, a dollar amount was first negotiated. Once it was determined that the German litigation would be resolved for a specific amount, i.e., 10 billion DM or roughly $4.5 billion USD, the parties to the negotiation then turned to the issue of how to allocate that 10 billion DM among the various categories of victims. The negotiation participants understood that the 10 billion would have to cover every category of claim that could possibly be raised relating to the Nazi-era in order to justify the filing of the Statement of Interest by the U.S. government to prompt dismissal of future-filed claims. The negotiation process was affected by the dominance of Eastern and Central European interests in the negotiations. Two of the more prominent plaintiffs’ counsel involved in the negotiations—Michael D. Hausfeld of Cohen, Milstein, Hausfeld & Toll, P.L.L.C., and Washington D.C. attorney Martin Mendelsohn—represented the Eastern and Central European countries in the negotiations, and the Eastern and Central European countries had government delegations at the negotiations as well.

The slave and forced labor claims ended up consuming roughly 80% of the value of the German Foundation funds.\(^\text{89}\) This is explained in part by the fact that unlike many categories of property claims, there had never been any restitution provided to survivors for slave and forced labor. The disproportionate payment to slave labor also reflects the fact that most survivors of the Holocaust at one time were forced to perform slave or forced labor, and non-Jewish victims of Nazi persecution who survived as of the date of the negotiations were also often young forced laborers during World War II. Thus, the slave labor payment was in essence a way of uniformly distributing settlement benefits to the vast majority of survivors. Almost every survivor who was entitled to payment for a property claim was also entitled to a slave or forced labor payment. One additional consideration in setting the amount allocated to pay forced and slave labor claims was the fact that, unlike many categories of property claims which were mainly capable of being asserted only by heirs (because the principal holders of the claims had perished), the payments to surviving slaves and forced laborers amounted to direct payments to living survivors and therefore seemed to have a peculiar moral weight and significance. It is also possible that the slave and forced labor claims had a better chance of success in the class litigation in U.S. courts, but the strength of the labor claims relative to the property claims did not determine allocation decisions and was not a prominent subject of mediators, one chosen by the plaintiffs and one by the German government. It should be noted that fee payments in all of the Holocaust-era cases were relatively modest.

89. See German Agreement, supra note 5.
discussion during the negotiations that led to the creation of the German Foundation.90

D. Implementation of the Executive Agreements

For slave and forced labor claims, allocation was relatively easy. In the German and Austrian agreements, the payments were made pursuant to a formula. For example, in Annex A to the Executive Agreement between Germany and the United States, Section 4, the amount to be provided to each category of eligible slave or forced laborer is expressly set forth, with each slave or forced laborer being entitled to receive up to a specific portion (e.g., 15,000 DM for slave laborers). Foundations that have existed for decades in Eastern and Central Europe to provide benefits to survivors of Nazi persecution are distributing the money.91 For Jewish survivors, the World Jewish Restitution Organization has continued to play a role in distributing these funds, and for non-Jewish survivors outside of Central and Eastern Europe, the International Office of Migration has provided services relating to the distribution of slave and forced labor payments.92

With respect to property claims, the settlements have been far more difficult to implement. Most of the settlements were reached without negotiating any detailed claims process. For example, in the German case, while substantial amounts were allocated to pay property claims, claims for medical experimentation, and other non-labor claims, the claims guidelines have been slow to develop. The claim forms, to the extent they even exist now more than a year after the German Foundation settlement was announced, have yet to be widely disseminated, and the vast majority of victims, who were the intended beneficiaries of the property components of these settlements, have yet to learn how or if they can make claims.

No court is monitoring the claims process to make sure that it is equitable, and plaintiffs' counsel, except for Professor Burt Neuborne, who is a member of the German Foundation Board, have been relatively disenfranchised from the implementation process by virtue of the fact that they have no formal role.

III.

THE SUPERIORITY OF RULE 23 SETTLEMENTS

In the Holocaust and Nazi-era litigation cases, it is still too early to conclusively determine how the different models used to achieve these settlements—

90. The author, Morris Ratner, participated in the negotiations in Washington, D.C., Cologne, and Berlin that resulted in the announcement in June 2000 of the establishment of the German Foundation.
91. See, e.g., German Agreement, supra note 5. Claims program websites maintained pursuant to the German, Austrian and French Executive Agreements can be found at the following addresses: http://www.compensation-for-forced-labour.org (German); http://www.reconciliationfund.at/start_en.html or http://www.claimscon.org (Austrian Labor); http://www.nationalfonds.org/english/index.htm (Austrian Property); http://www.civs.gouv.fr or http://www.wiesenthal.com (French Banking); http://www.icheic.org (Insurance).
92. Id.
through the Judicial Branch and the Executive Branch—will play out in terms of settlement implementation. However, the early indication is that the settlements achieved through the Judicial Branch are better at guaranteeing the due process rights of and fairness to victims who are the intended beneficiaries of these settlements.

First, the Rule 23 settlement model has been more democratic. The extensive notice provided to class members in the Swiss Banks case gave them an opportunity not only to comment on the Settlement Agreement itself, and thereby change some of the fundamental terms of that Agreement; but, moreover, class members also had direct and substantial input in the shaping of the allocation of the settlement fund once a settlement amount had been negotiated by plaintiffs' counsel. Conversely, in the settlements negotiated by the Executive Branch, there were virtually no opportunities for comment or participation by large numbers of affected victims, and notice by the Foundations has been generally less intensive. The Executive Agreements were announced to the public after being approved by the Executive Branch and the participants in the negotiations and without room for further substantive review or improvement. The beneficiaries of the Executive Branch settlements had no input into the allocation process, except through the implementing bodies erected by governments in connection with the settlements, such as the German Foundation Board, whose connection with the victim groups can be described as attenuated at best.

Second, the Swiss Banks model, or Judicial Branch model, of effecting mass settlements of human rights claims under Fed. R. Civ. P. 23 is superior to the Executive Branch model in terms of its ability to guarantee scrutiny of the settlement negotiation process and of the settlement terms from a due process perspective. When considering motions for voluntary dismissal pursuant to the Executive Branch settlements, the various trial courts in which Holocaust cases were pending did have the obligation to ensure that there was no collusion and that absent class members would not be prejudiced by the dismissal of the named plaintiffs’ claims. However, this level of scrutiny was nothing like the intense scrutiny provided in a Rule 23 class settlement by a judge charged with evaluating the settlement pursuant to Rule 23(e) standards for class action settlements. Judge Korman, for example, looked not only for evidence of collusion and prejudice, but also examined the process of the negotiations, determined that potential conflicts had been eliminated by the appointment of a Special Master to deal with allocation issues upon notice to the class, and helped the parties refine the settlement terms to guarantee due process when objections were raised that highlighted inadequacies in the settlement. Judge Korman was charged with being the ultimate guardian of the class members’ interests. The Executive Branch, on the other hand, approached all of these settlements with multiple objectives in mind. It was concerned not only with protecting the interests of victims of Nazi persecution, but also was undoubtedly affected by its ongoing diplomatic relations with foreign countries who were being asked to contribute to the settlement funds.
Third, settlements effected through the Judicial Branch have a greater chance of being implemented fairly. In the Swiss case, Judge Korman has closely supervised all aspects of settlement administration and has appointed multiple settlement masters who report directly to the court to address the needs of the different settlement classes, including due process needs for information needed to make claims. Notice of the claims process has also been comprehensive.

The Executive Branch settlements of Nazi-era claims may ultimately prove to have fair implementation procedures. However, the process has been painful, and there is no single arbiter such as a judge, who has ultimate control over the process with an eye towards ensuring fairness to the claimants and the victims. Instead, there are foundation boards and periodic meetings of representatives of different interests, which have to date resulted in less notice to class members, delayed development of claims guidelines, and other problems with which the parties to these settlements are still grappling.

Finally, because of reporting requirements, settlements effected through the Judicial Branch are more likely to be the subject of continuing scrutiny by class members and the public. For example, in the Swiss Banks case, we have continuously updated the court with reports that are filed and a matter of public record regarding the provision of different phases of notice. Similarly, the special masters have filed reports with the court regarding the status of their efforts during the implementation phase.93 While the Executive Branch settlements have certain reporting requirements built into them, the reporting has generally been less detailed, and the reports are not as easily accessed by members of the general public or victim classes.

The Executive Agreements reached between the United States and Germany, Austria, and France have produced substantial compensation to victims of Nazi persecution and of the misconduct of private corporations during World War II. However, the settlements reached in the United States federal courts under judicial supervision have been more transparent and have better protected the due process interests of the settlement beneficiaries.

93. See supra notes 21 and 53.