

Testimony of the
National Association of Insurance Commissioners

Before the
Committee on Government Reform
United States House of Representatives

Regarding:
Insurance Restitution for Holocaust Victims

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Good morning, Mr. Chairman. As the chair of the National Association of Insurance Commissioners (NAIC) Holocaust Task Force, I'd like to thank you, Representative Waxman, and your committee for your interest in this very important matter. I'd also like to say that as an American, I thank you for continuing the people's business in the House and its committees even as the very buildings you work in have literally become the targets of enemies of the United States. One of the reasons I feel so strongly about how important it is to have this hearing despite the roadblocks caused by terrorism is that my friend Neil Levin was killed in the World Trade Center on September 11th. Before he became Executive Director of the Port Authority of New York/New Jersey last spring, Neil was the Superintendent of Insurance in New York State for four years, where he was a national leader in advocating for the rights of Holocaust victims and their heirs with respect to unpaid insurance benefits. Thus I am eager to press forward with the important work that was started by Neil and others.

I'll start by describing the role of insurance commissioners in the International Commission on Holocaust Era Insurance Claims (ICHEIC). The NAIC and its members were the driving force that brought European insurers to the table in order to create a mechanism for identifying and paying Holocaust era claims. Several commissioners, including Superintendent Levin and former commissioners Deborah Senn of Washington and Jay Angoff of Missouri, raised the issue in the organization and convinced their fellow commissioners that the issue must be addressed in order to meet an essential end of insurance regulation – the fulfillment of the insurer's obligation to those who entered a contract, paid premiums, and expected themselves or their beneficiaries to receive a benefit in the case of an insured event. Obviously, the question of the jurisdiction of American regulators over contracts issued in Europe over 60 years ago is a tricky one. It has been the position of NAIC members that it is indeed our business to seek to protect consumers affected by this matter, and much of the success we have had probably relates to the fact that we regulate the subsidiaries or corporate relatives of many of the affected European companies. My view is that our involvement is most appropriate because the issue here is not one of reparations in the normal usage of the word; rather, the issue is making sure that contractually owed benefits are fully, if belatedly, paid out, which is of course a core regulatory principle.

The details of the NAIC's involvement in Holocaust insurance claims are as follows. At its 1997 fall meeting in Washington, D.C., the NAIC held its first informational meeting on Holocaust issues and received testimony from survivors and their heirs. The interest at the commissioner level was extraordinary. As a result of this landmark meeting, the NAIC formed the Holocaust Insurance Issues Working Group, drawing membership from 25 states.

Following the formation of the working group, the NAIC held informational hearings across the country between September, 1997, and February 1998, in the District of Columbia; Skokie, Illinois; Miami; Seattle; Miami Beach; San Francisco; Los Angeles; Philadelphia; and New York City. (An NAIC representative also testified before a House Banking Committee hearing on Holocaust issues on February 12, 1998.) At the NAIC hearings, survivors and their heirs provided compelling testimony of unpaid claims and lost policies from nearly all lines of insurance, including life insurance; property and casualty coverage for homes and businesses; and dowry insurance, an annuity-type product purchased on the birth of a daughter that matures at the age of majority. Commissioners also questioned and took testimony from representatives of several of the largest European insurance companies that have been identified in this matter. Representatives of Assicurazioni Generali, the Allianz Group, the Winterthur Group, and Zurich Insurance Company, among others, appeared or submitted written statements.

On March 16, 1998, the working group adopted the following mission: "To pursue justice on behalf of both victims and survivors of the Holocaust and their heirs, consisting of a full accounting by insurance companies that sold policies to Holocaust victims and survivors, and by fully recovering the insurance policy benefits owed to them. The working group recognizes that injustice has gone unanswered for more than a half century. Thus, action must be taken as quickly as possible. This requires careful coordination and strong cooperation among all state insurance departments to accomplish this mission."

State insurance commissioners agreed with the witnesses at NAIC hearings who called for a thorough accounting of insurance company actions during the Holocaust period and the honoring of valid life and property claims submitted by survivors and their families. Many survivors brought actual pre-war policies to the hearings and provided evidence of past denials of claims by leading insurers in Europe. These disclosures, and the resulting pressure on the companies coming from consumers and regulators, led to the creation of ICHEIC in August, 1998 and the signing of the Memorandum of Understanding (MOU) that effectively acts as the organization's charter. ICHEIC is a private, non-profit association established to resolve unpaid Holocaust-era insurance claims. Charter members include American and European insurance regulators; Jewish representatives; and five major European insurers: Allianz, Generali, AXA, Winterthur, and Zurich, all of which have affiliates with major stakes in the U.S. insurance market (the Swiss company Basler was an original MOU signatory but pulled out of ICHEIC shortly after its inception). Since then, the Dutch Association of Insurers joined ICHEIC, and the German Insurance Association is currently negotiating with ICHEIC the terms of its members' participation in resolving Holocaust issues per the U.S.-German Executive Agreement calling for the creation of the German Foundation, Remembrance, Responsibility, and the Future. ICHEIC is ably chaired by former U.S. Secretary of State Lawrence Eagleburger. The current American regulators who are participants in ICHEIC

are California Commissioner Harry Low, Florida Commissioner Tom Gallagher, New York Superintendent Greg Serio, Pennsylvania Commissioner Diane Koken, and myself. State commissioners have sought to act collectively through the NAIC and ICHEIC in order to seek uniform solutions to the problems presented by Holocaust era insurance issues. It is in everyone's best interest – regulators, claimants and companies – to have these issues handled for the most part uniformly. Thus ICHEIC provides stability in concept to its participants and all their constituencies.

My own participation in Holocaust insurance issues is as follows. I was appointed Director of Insurance by Governor George Ryan in January, 1999. Soon thereafter, I became aware of this issue and immediately began asking NAIC leadership for a role in Holocaust matters and ICHEIC. I told NAIC officers that as a Jewish commissioner who grew up in Evanston, Illinois, right next door to Skokie, which has one of the highest per capita concentrations of Holocaust survivors in the country, I had a particular interest in this matter. (I might point out that this area is in the 9th Congressional District, represented by Congresswoman Schakowsky, who has been a tireless advocate for survivors and their heirs as long as she has held elected office.) Because of concerns about making the ICHEIC process too unwieldy, I was told that commissioner attendance would be limited to five states at ICHEIC meetings but I was encouraged to participate at the NAIC through the workings of its Holocaust Task Force. I became vice chair of that task force in 2000 and was allowed by Chairman Eagleburger to observe ICHEIC meetings in that capacity. My main involvement during that year was to help encourage the American affiliates of Dutch insurers to persuade the Dutch Association of Insurers to join ICHEIC. I did not really become a full and active participant in ICHEIC until this year, when I became the chair of the NAIC task force and became one of the five American regulators on ICHEIC. In September, I was named by Chairman Eagleburger as the regulators' representative on a small group that has been negotiating with the German Foundation in his absence as he recuperates from a recent health problem.

I expect that much of this hearing will be concerned with frustrations about the process expressed by members of the committee, survivors, companies, and even the ICHEIC chairman. I share much of the frustration that has surfaced from time to time in the press (particularly with respect to the companies' reluctance to give claimants the benefit of the doubt when they have produced plausible evidence of a valid claim) and I will elaborate on some of my concerns. But first I would like to point out the context that I try to remember as I evaluate the successes and failures of ICHEIC's endeavor to achieve a measure of justice for Holocaust insurance claimants.

- ICHEIC is the first and only organization of its kind formed to serve as a mechanism for resolving unpaid Holocaust era insurance benefits. This means the commission has, starting from scratch, addressed thorny

issues such as evaluating claims -- standards of proof, valuation, etc.; production of lists, audits, and appeals of adverse decisions; dealing with claimants who speak a variety of languages; publicity and outreach; and nationalized policies and blocked accounts, for starters.

- All of the issues I just mentioned are framed by the fact that we are talking about events that happened 60 years ago in the context of the most traumatic event in human history that was a part of the most destructive war in human history.
- ICHEIC has made the conscious and affirmative decision to encourage survivors and heirs to make inquiries through filing claim forms. By erring on the side of too many claims rather than too few, the number of claims paid will increase, but the number of denied claims and frustrated expectations will be higher as well.
- ICHEIC is not unique in the spectrum of programs recently set up to seek restitution and justice for Holocaust survivors in that the level of frustration felt by many with these projects, which aim to right wrongs 60 years after a terrible crime against humanity, is high.

This context makes Chairman Eagleburger's job difficult if not thankless. Against this backdrop, the state regulators involved in ICHEIC have attempted to try and support his efforts to prod the commission to resolve issues quickly and to give claimants the benefit of the doubt. I have held regular conference calls among regulators this year to try to identify and reach consensus amongst ourselves on issues of concern. In turn, I have requested opportunities for myself and other regulators to speak with Chairman Eagleburger, Vice Chairman Geoffrey Fitchew, and Chief of Staff Neal Sher on a regular basis. ICHEIC is not a public body, most of its key operations are located overseas, and it has been criticized for its budget and expenditures. As public officials, we regulators are thus dealing with an operation that, for a variety of reasons, has been set up much differently than our agencies and is run in ways that are unnatural to us. (For instance, ICHEIC's budget is not appropriated through the government as our agencies' are. Also, ICHEIC is not subject to open meetings and open records laws.) We therefore see regular calls as a modest way for regulators to express concern about ICHEIC's operation and budget. However, regulators are obviously not in a position to micro-manage ICHEIC operations. That must be done by ICHEIC and its committees. For instance, recognizing that the commission had grown quickly without commensurate oversight, ICHEIC developed a means for addressing concerns regarding budget and accountability by establishing the Financial Administrative Advisory Committee (FAAC). FAAC is chaired by Pennsylvania Insurance Commissioner Diane Koken. FAAC was established in the fall of 2000 to "monitor the financial performance of the ICHEIC operation.... FAAC will provide oversight for the creation of appropriate financial and reporting relationships with ... partner organizations.... FAAC will recognize the importance of effective cost controls while meeting the overall mission of ICHEIC." (FAAC purpose statement.)

I should say that the Chairman has welcomed and encouraged FAAC's development and also a continuing dialog with the regulators. As the process moves forward and the claims deadline approaches, he has been forced to issue chairman's decisions to resolve key issues where consensus is impossible to reach. I admire him for his leadership in these situations because all too often it has been impossible to resolve matters by consensus as called for by the ICHEIC MOU.

Unfortunately, the difficult tasks faced by ICHEIC have been exacerbated for the better part of two years by the slow progress of the German Foundation negotiations. Because my involvement in ICHEIC has been the heaviest in the past six months or so, and because Chairman Eagleburger asked me to join the ICHEIC negotiating team, the Foundation is the aspect of this hearing of which I have the most direct knowledge. Therefore, I will focus the rest of my remarks on this subject.

The German Foundation, "Remembrance, Responsibility and the Future," was created as a result of an Executive Agreement signed by representatives of the United States government, the German government and German industry, and other interested parties including plaintiffs' attorneys and Jewish groups. The foundation will distribute DM 10 billion, half from the German government and half from German industry, to Holocaust survivors and the heirs of Holocaust victims. Postwar German governments have made nearly \$50 billion in restitution for the crimes committed by their country during the World War II era, but the Foundation represents the first time that German industry has directly participated in postwar reparations. German industry stands to gain legal peace from this endeavor, as plaintiff's lawyers have sought dismissal and the U.S. government has filed commensurate statements of interest in these cases.

The vast majority of Foundation money will go to victims of slave and forced labor, but DM 1 billion is allocated for property losses, including DM 200 million for insurance claims, DM 100 million for insurance claims reserves, and DM 350 million for insurance humanitarian purposes. The Executive Agreement thus calls for at least DM 550 million in insurance monies to be processed according to ICHEIC standards. Participants in the process of establishing the Foundation have repeatedly acknowledged that the insurance aspects of this project should be administered by ICHEIC. A recent such example is Deputy Secretary of State Armitage's statement that "affirm[s] that the United States government continues to support ICHEIC and believes it should be viewed as the exclusive remedy for unresolved insurance claims from the National Socialist era and World War II." (Letter to Chairman Eagleburger, June 18, 2001.) Per the Executive Agreement, the Foundation and ICHEIC have been attempting to reach agreement on the allocation of the insurance money since last year.

The Foundation negotiations have dominated ICHEIC activities during the last year and a half. The Chairman and the commission have been forced to divert

attention and resources from our basic task of implementing the MOU as we negotiate with the Foundation. This has delayed many important aspects of the ICHEIC's business, including the development of a mechanism for handling so-called 8a1 claims, which refers to the "Specific Humanitarian Section" of the ICHEIC Memorandum of Understanding that calls for "relief for claimants who seek relief under policies that cannot be attributed to a particular insurance company as well as to claimants who seek relief under policies issued by companies no longer in existence." Since over 80% of the claims filed with ICHEIC do not name a specific company, this is a crucial matter that must be brought to a conclusion. On behalf of the regulators, I have pressed repeatedly for an 8a1 procedure to be developed and adopted, but many factors, most prominently the difficulties posed by the German Foundation negotiations, have prevented substantial progress on this matter.

Major points of the Foundation negotiations have centered on publication of lists of policyholders by companies; audits of company records and processes; appeals of adverse decisions; and reimbursement of company costs from Foundation funds allocated for insurance purposes. In my opinion, negotiations should not have taken so long and we should have had an agreement by now. This is most unfortunate, because, even though slave and forced labor payments have begun, deserving and long-suffering insurance claimants have had to wait because no claims or humanitarian aid have been processed. This is particularly distressing as the affected population continues to age and survivors die at an increasing pace. I can only speak of direct knowledge of the negotiations since summer, and I acknowledge that ICHEIC is probably not without blame of its own in these lengthy and as yet unsuccessful negotiations, but I still feel comfortable expressing the view that the German insurance companies and the ICHEIC companies have been primarily responsible for the problems we have encountered. I also believe, however, that in recent weeks, the Foundation, through the capable leadership of its lead negotiator, Dr. Hans Otto Brautigam, has made significant and good faith efforts to bridge the gap between the sides.

The legal framework surrounding these negotiations places a heavy and affirmative burden on German industry to cooperate with ICHEIC and to meet basic standards developed by ICHEIC that are designed to bring legitimacy to the process. This duty on the companies is established in the Executive Agreement that the German government and German industry signed in order "for the Foundation to be the exclusive remedy and forum for the resolution of all claims that have been made or may be asserted against German companies arising from the National Socialist era and World War II" (Article 1, Paragraph 1). The Executive Agreement specifically calls for the Foundation's cooperation with ICHEIC: "The Federal Republic of Germany agrees that the insurance claims that come within the scope of the current claims handling procedures adopted by the International Commission on Holocaust Insurance Claims ("ICHEIC") and are made against German insurance companies shall be processed by the companies and the German Insurance Association on the basis of such

proceedings and on the basis of additional claims handling procedures that may be agreed among the Foundation, ICHEIC, and the German Insurance Association" (Article 1, Paragraph 4). Upon the signing of the executive Agreement on July 17, 2000, Deputy Secretary Eizenstat elaborated on the importance of core ICHEIC processes to fulfill both the letter and the spirit of the Executive Agreement: "It is critically important that all German insurance companies cooperate with the process established by the International Commission on Holocaust Era Insurance Claims, or ICHEIC. This includes publishing lists of unpaid insurance policies and subjecting themselves to audit. Unless German insurance companies make these lists available through ICHEIC, potential claimants cannot know their eligibility, and the insurance companies will have failed to assume their moral responsibility."

I will not comment on the details of negotiations over lists, audits, and appeals, as they are ongoing and it would not be appropriate to get into a high level of specificity. I will, however, stress that it is essential that the basic characteristics of ICHEIC methods be incorporated into any agreement with the Foundation. Public confidence in our work rests on the integrity of these processes. Lists must be produced so that potential claimants who lack documentation and may have only the slimmest memories can be alerted of their rights. Audits with a stamp of independence are necessary to confirm to the public that all company representations have been verified. And reasonable and fair appeals procedures give legitimacy and acceptance to disappointed claimants. I will generally comment that, while until recent months, progress on these issues was slow and disappointing, recent negotiations have been much more productive. Dr. Brautigam is a straightforward and experienced diplomat whose professional manner is reflected in his substantive approach to disputed issues. He has put forth proposals on lists, audits, and appeals that serve as the basis for reasonable negotiations. I believe that he acts in good faith and I am optimistic that we can resolve the open claims related issues in the next several, if not the next few, weeks.

Unfortunately, similar progress has not been made on the issue of costs and company reimbursements. No final agreement between ICHEIC and the Foundation can be completed until the Foundation drops its plan to reimburse tens of millions of dollars, out of Foundation funds, to ICHEIC companies for their previous payments to the commission. I will comment on this issue at length because the details of the dispute have been previously reported in the press and because the NAIC has passed a resolution, which I authored, which expresses strong views on this subject.

The Foundation in June presented ICHEIC with a proposal regarding the recoupment of company expenses. It called for a total of \$76 million in "payments and expenses to be covered" out of the two Foundation funds dedicated to insurance - \$51 million from the DM 200 million claims fund and \$25 million from the DM 350 million humanitarian fund. The reimbursements from the

claims money amount to well over half the amount in that fund, based on today's exchange rates. Furthermore, at least \$36 million of the reimbursements (\$21 million from claims and \$15 million from humanitarian) are retroactive payments to the original ICHEIC companies for amounts they previously paid into the commission. The largest recipient of these repayments would be the German insurer Allianz, the corporate parent of the American concern Firemen's Fund, which would receive well in excess of \$10 million from this plan. The companies argue that this proposal must be understood as a virtual fait accompli because it is mandated by the German law that sets up the Foundation. I disagree. I believe, and the NAIC's resolution is predicated on the notion, that the Foundation's proposal is unacceptable legally, politically, and morally.

Most of the discussion of the plan has centered on the legal issues surrounding company reimbursements. The U.S.-German Executive Agreement does contemplate that some expenses will be paid for out of Foundation money in some fashion. The basis for this is found in Annex B to the Joint Statement accompanying the signing of the Executive Agreement. Annex B describes an allocation of DM 200 million (150 million originally and 50 million in interest) for "Insurance Claims" and DM 350 million for "Insurance Humanitarian/ICHEIC." There is a footnote on the claims money that reads "Includes ICHEIC administrative expenses." There is no such footnote on the humanitarian money.

The Foundation and the companies argue that language in Section 3 of the German Law requires their proposed reimbursements. This part of the law describes DM 5 billion that "German industry have agreed to make available, including the payments that German insurance companies have provided to the International Commission on Holocaust Era Insurance Claims or will provide in the future" (German Law, Section 3, Paragraph 1, Subsection 1). However, their argument is unsupportable because the provision they have cited, or at least their interpretation of it, is inconsistent with the U.S.-German Executive Agreement. Furthermore, the Foundation's argument is inconsistent with the German Law's specific provisions that deal with insurance.

The Foundation and the companies' argument about the German Law is directly contrary to the U.S.-German Executive Agreement. The provisions from the Annex to the Joint Statement that I quoted above ("Includes ICHEIC administrative expenses") are very simply written, are not in the past tense, and say nothing about retroactive reimbursements. It is nonsensical under all traditional notions of contractual interpretation and statutory construction to read into these words an intended retroactivity. Since the Executive Agreement and its accompanying documents are the sole reflection of the will of all parties to this process, it is unacceptable to me as an American public official for the companies to argue that I should defer to any interpretation of the German Law that is inconsistent with the Executive Agreement.

Even if, for the sake or argument, I thought ICHEIC should ignore the clear language of the Executive Agreement and its accompanying documents and follow only the German Law, the Foundation reimbursement plan is still incongruous. Despite the language the companies rely on in Section 3, "Donors and the Foundation's Capital Assets," Section 9, "Use of Foundation Resources" is more directly relevant. Unlike Section 3, which provides details on how the money is to be raised, and essentially describes the relationship between the Foundation and German industry, Section 9 provides the details of how the money is actually to be allocated. Thus Section 3 governs the relationship between the companies and the Foundation, but only Section 9 could possibly control the relationship between the Foundation and ICHEIC (and of course, the claimants). Paragraph 4 of Section 9 describes the DM 1 billion "intended for payments to persons who suffered property loss." The third provision of this paragraph is for insurance claims, "including the costs incurred in this connection." This section has a reasonable basis in the Executive Agreement as it closely tracks the language in the footnote of Annex B to the Joint Statement – both contain no retroactive language. Furthermore, the fifth provision of Paragraph 4 provides further evidence that the true intent of the Executive Agreement is to provide for the payment of future costs only, and only from the DM 200 million claims funds. The fifth provision allocates DM 350 million for insurance humanitarian uses and makes no mention at all of cost reimbursements from this fund. This again tracks the footnote in Annex B to the Joint Statement: the footnote references costs, but not retroactive, and not from the humanitarian monies. Thus I believe that a proper understanding of the German Law goes beyond the companies' misleading citation to Section 3. In the context of Section 9's interaction with the Executive Agreement and its accompanying documents, the Foundation's proposal to divert so much money from claimants to the companies is baseless. Suffice it to say that the NAIC will never stand for such a result, which, besides being unfaithful to the Executive Agreement (and, in point of fact, the German Law), would be a moral affront to every Holocaust survivor.

I would like to conclude by saying that I welcome Congress's interest in this very difficult and complicated matter. Congress has a legitimate and necessary oversight role to play as it prods all of us involved in Holocaust matters to see that the best interests of survivors are kept front and center. The German people and the postwar German governments have repeatedly shown a genuine commitment to making amends for the horrific crimes committed by that country during the National Socialist era. The current Foundation effort, whereby German industry for the first time acknowledges and offers recompense for its untoward gains during the Holocaust, is a necessary step to providing an appropriate level of justice for those who survived and for honoring the memories of those who perished. It is my high personal priority to make sure that state insurance regulators are doing everything reasonably within our power to aid this process, and I am gratified by the committee's commitment to this effort. I

therefore thank you, Mr. Chairman, for the opportunity to share my views with you today.