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Allocating the Proceeds of Settlements: Looted Assets, Successor Interests, Recovered Properties, and Settlement Funds

Transcripts*

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Abstract

Record of panel discussion on how the proceeds of Holocaust restitution settlements should be allocated. Special attention is paid to looted assets, successor interests, recovered properties, and settlement funds.

ALLOCATING THE PROCEEDS OF SETTLEMENTS: LOOTED ASSETS, SUCCESSOR INTERESTS, RECOVERED PROPERTIES, AND SETTLEMENT FUNDS

NOVEMBER 1, 2001

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† Judah Gribetz has served as Special Master of the *Swiss Banks* Settlement at the designation of Chief Judge Edward R. Korman of the United States District Court for the Eastern District of New York. Mr. Gribetz prepared the Proposed Plan of Allocation and Distribution of Settlement Proceeds, which was adopted in its entirety by the District Court and upheld by the United States Court of Appeals for the Second Circuit. Mr. Gribetz continues to serve as Special Master for the *Swiss Banks* Settlement, assisting the Court in its implementation of the Allocation and Distribution Plan. Mr. Gribetz currently is of counsel to Bingham Dana LLP. He has served as Counsel to New York Governor Hugh L. Carey and Deputy Mayor to New York City Mayor Abraham D. Beame.

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Neal Sher, *Chief of Staff, International Commission on Holocaust Era Insurance Claims*†††

PROFESSOR ROSENBAUM: The moderator for this panel is Daniel Jonah Goldhagen, who you may remember is the author of *Hitler's Willing Executioners*,[1] a book that was an internationally acclaimed best seller. He is also affiliated with Harvard University in its Center for European History. So let me now turn the final panel over to Daniel Jonah Goldhagen.

MR. GOLDHAGEN: Thank you, Thane. This panel is logically last in the discussion today, which is on the disbursement of recovered assets and moneys.

[opening remarks omitted at request of Moderator]

First I will ask the people who are experts on the settlement claims to tell us what exactly is going on in the disbursement of funds, and then later on we will have a discussion about the issues.

We will begin with Judah Gribetz.

MR. GRIBETZ: Thank you.

It is good to be on the panel and to sit here all day and see people whom I have known for the last three years since I have been introduced to this effort. It is easy to be confused because,

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1. DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST (1997).

just starting with 1996, let alone with the programs that have been negotiated and implemented since 1952, one can be confused. So I would like to tell you what I do and what I do not do with respect to what you have heard today and try to put it into context.

I am involved in the class action lawsuit brought in the U.S. courts in Brooklyn against the Swiss banks. That lawsuit started in 1996. It was settled by way of handshake in August of 1998. From August of 1998 to March of 1999, what was the handshake and the agreement to pay U.S.$1.25 billion by the Swiss banks who were the defendants in the lawsuit was the subject of negotiation, which resulted in an agreement, known as the settlement agreement of a class action lawsuit.[2]

As you have heard if you have been here all day, class actions are essentially a unique U.S. phenomenon, and a body of law has developed through the highest courts in the United States to make sure that class action lawsuits comport with the concern of our courts that the people who are bound by the class action lawsuits know about them and have an opportunity to be heard.

So in March of 1999, this settlement agreement was entered into. There were five classes of claimants—Bank Deposit, Slave Labor I, Slave Labor II, Looted Assets, and Refugees. Because of the potential conflicting interests of the lawyers who brought about this settlement, the concept of somebody hopefully assisting the Court, the Special Master, is looked upon as an appropriate device; a neutral party who will hear everyone who believes they are interested in the settlement agreement and recommend to the Court a plan of allocation and distribution of the settlement proceeds.

So in March of 1999, in response to a request by Chief Judge Korman, I assumed the responsibility of preparing the plan of allocation and distribution of the Swiss bank settlement proceeds. Now, I think it is appropriate to tell a little about it, the problems that have evolved, to see to it that this lawsuit stands the test of appeal from the district court to the higher courts, and fulfills the terms of the Settlement Agreement.

The Settlement Agreement in the *Swiss Banks* case—just

2. The text of the Settlement Agreement is published as Appendix 2 in this issue of the *Fordham Int'l L.J.*

starting with 1996, not going back to the Luxembourg Agreements or 1952—was one of the elements of a whole series of events that took place in the late-1990s. It was preceded by organizational and newspaper efforts that resulted in our legislature in Washington getting involved, and holding congressional hearings—you have heard a lot about this from Carl McCall, Melvyn Weiss and others. Before the class action lawsuit was started, the Swiss banks prevailed upon their government—incidentally, as Melvyn Weiss, has indicated, their government was not a party to the lawsuit—to relax their banking secrecy laws and to ask an "Independent Commission of Eminent Persons" to do an audit of the bank deposits of victims who deposited their funds in Swiss banks from 1933 to 1945.

That process was chaired by Paul Volcker, assisted by his Counsel, seated to my right, Michael Bradfield, and was under way when the class action lawsuit was started in 1996. The process was consolidated before Judge Korman, and resulted in the settlement in principle of August of 1998, which then was finalized in the Settlement Agreement terms in March of 1999.

The Settlement Agreement—which is a document that at least the law students who are here should take cognizance of, and which is the subject of discussion in Professor Bazyler's articles, which are part of the materials that have been handed out—is the governing document. The activities of Paul Volcker, Michael Bradfield, and their international commission, which moved from an audit of bank deposits to include a claims resolution process, were incorporated into the Settlement Agreement and became the highest priority of the five categories of claims that the settlement agreement encompassed.

So that is where I am. I am not a party to the government-to-government discussions that Stuart Eizenstat and others mentioned with respect to the German Government and the U.S. Government, and the German Government's obligation to pay slave and forced laborers, the majority of whom were non-Jews.

I am not part of the efforts with respect to the recovery of lost art, which, if one remembers, in truth started in 1998 with the seizing of the Shiele paintings at the Museum of Modern Art by the District Attorney of New York County, Robert Morgenthau. This opened up a whole area, resulting in activities the leading role of which is undertaken by the State of New York's

Banking Department. My colleague to my right, Monica Dugot, to my knowledge, is the architect of the return of the North Carolina Cranach painting that Stuart Eizenstat mentioned in his remarks.

I am not part of Neal Sher's activities at the International Commission on Holocaust Era Insurance Claims ("ICHEIC"). There is a small component of insurance in the *Swiss Banks* case, and Michael Bradfield has undertaken to help in that area by way of assignment of Chief Judge Korman, which I will get to.

So I would like to continue what I call the "context and timeline" so that we can address these issues of what has happened to the U.S.$1.25 billion, which is now on the plate, plus artwork and whatever the insurance proceeds bring forth. Under class action law, the courts have to be satisfied that persons who are in the class know about the class action and have an opportunity to tell the court: "We do not want to be part of this. We are going to sue on our own." Under our law, if you notify the class and the notification is appropriate, if you—the class member—do not opt out, you are in. So it is crucial that the court is satisfied that people know of the class action lawsuit and its details.

So there were newspaper advertisements worldwide, in twenty-seven languages. Also, 580,000 questionnaires filed by survivors were received by the court, showing that there was the effort on the part of the District Court, Judge Korman, to know what survivors felt about this enterprise.

While the questionnaires were being received by the Court, the newly-appointed Swiss Bergier Commission was studying bank deposits and refugees—and it is understandable for one to think on this side of the Atlantic the Swiss may know more about the refugees that they let in and abused, or did not let in, or would know more about bank deposits or Swiss companies that used slave labor. Switzerland created a historical commission to investigate these activities. That inquiry was under way in 1999. The Volcker audit was under way in 1999.

And, lo and behold, the German "slave labor" negotiations came forth. An effort was made to try to coordinate with those negotiations and limit confusion as much as possible to enhance clarity and understanding to survivors. I am not going to mention the Austrian negotiations or the French negotiations or the

Eastern European negotiations, but around this table that is what we had.

If one looks at the Settlement Agreement, there are things that jump out that have to be addressed. I will just mention a few which dictated how I recommended to Judge Korman the distribution of the U.S.$1.25 billion. They were not easy decisions.

If one looks at this case which was brought by the class action lawyers, it would not have been brought but for the continued efforts of organizations and media to have the Swiss own up to what happened to bank deposits that were with them from 1933 to 1945. That class—"Deposited Assets"—was the highest priority of this lawsuit and drove the lawsuit.

Another category under the Settlement Agreement was "Slave Labor I," which encompassed people who worked for a Nazi organization, say at Auschwitz, and the proceeds of those activities found their way into Swiss banks. It would seem that somebody who can prove this is eligible under this Settlement Agreement. If you cannot, you are not eligible. So if you were in Auschwitz working for a slave labor organization, it is possible that you did not even know the name of the organization and you did not know where the proceeds went. That was a problem for the Special Master in how to cope with that issue.

"Slave Labor II" was defined under the Settlement Agreement as Swiss-owned companies that used slave labor. "Looted Assets" were defined as assets that were looted that found their way into Swiss financial institutions. The "Refugee Class" was defined as refugees that were not let in, expelled, or mistreated if let in to Switzerland.

I am not mentioning that a "victim or target of Nazi persecution," another term of the Settlement Agreement, included not just Jewish individuals, but Romani, Jehovah's Witnesses, the disabled, and homosexuals. And I am not mentioning definition of a victim or target of Nazi persecution that was entitled to payment under this Settlement Agreement also included heirs.

Just to highlight the single most difficult issue, if one studied certain class action law fundamental principles, we were obligated to create a process that was administratively simple for the victims, the members of the class, and to also *not* make payments so small that it would be a meaningless settlement. Further, our

study of past restitution programs revealed that heirs are not included in most of the other distribution plans.

So one had to justify that our plan did not include heirs except for the bank deposits, with the further exception that, to be consistent with the "German Fund," which was being negotiated at the same time, if somebody died after February 15, 1999, their heirs are eligible. We took that into account.

We also took into account that there might be, under the law of New York under which this Settlement Agreement was governed, about ten million heirs worldwide. Everybody in this room of the Jewish faith is probably an heir of a victim or target of Nazi persecution.

MR. GOLDHAGEN: Could you just tell us briefly what is happening to the monies now? How much has been given out? What is the schedule?

MR. GRIBETZ: As of November 1, 2001, the slave labor payments, U.S.$58 million, 5,800 U.S.$1,000 checks, have started to be paid. Under the Settlement Agreement no payments could be made until after all appeals expired plus thirty days. Mr. Dubbin, who spoke on an earlier panel, was one of the gentlemen who filed an appeal, after which the Judge ruled that the plan was appropriate on November 22, 2000, and on July 26, 2001, the Second Circuit Court of Appeals affirmed the District Court's decision adopting the recommended plan of allocation and distribution.

Within four days after that the first U.S.$35 million was sent out. Last week another U.S.$23 million was allocated. In tandem with the German Foundation, our designee who distributes to the Jewish survivors, the Claims Conference, is giving that out.

MR. GOLDHAGEN: Thank you.

MR. GRIBETZ: There is other money being given out. There is looted assets money being given out—about U.S.$10 million. And Mike Bradfield will talk about where we are with the U.S.$800 million that has been allocated for the deposited assets claims.

MR. GOLDHAGEN: Okay. Thank you.

Mr. Bradfield, you have been given your cue here.

MR. BRADFIELD: I have thirty-five single-spaced pages of prepared remarks, but I will put them aside and give you my short version.

You started out with a moral question, a truth, a justice, a fairness question. I am a simple-minded fellow and I have a very simple-minded solution for a particular problem. What could be fairer, what could be more just, what could be more right, than giving back to people who deposited money in a bank the money to which they are entitled? That seems to me to be an enormously fair thing.

What Judah was trying to do, what I am trying to do, what Paul Volcker is trying to do, everyone who has contributed to this—and I have to say that maybe it was serendipity and a whole bunch of different initiatives from different people, different organizations, have come together for this particular problem, and I am not going beyond this particular problem—for this particular problem what seems to me is a just result. I include in that the class action lawsuit, the work of the Independent Committee of Eminent Persons ("ICEP"), Volcker's Committee, Jewish representatives, Jewish organizations, the Swiss banks, and Monica Dugot's Holocaust Claims Processing Office are all included within the scope of that, under the pressure that was talked about earlier this afternoon from political parties and from the public, I think all contributed to what I think is a just solution.

Let me just say I think it is a difficult problem to do what we are trying to do. We are dealing with a problem that is, as everybody knows, more than a half-century old. The people who participated in all this are basically no longer alive. Even if we are talking about Holocaust survivors, we are really talking about the children of Holocaust survivors.

And the records basically are no longer available. The records that maybe in 1962 or maybe in 1970 might have been available are no longer available. The Swiss say that under their law they have a law that says financial records or any business records can be destroyed after ten years. When I say back to the Swiss that when you run a banking system like they do, where there is no SC law, there is no law like in New York—I am sure you have had a bank deposit, and if you do not go to the bank for three years, you get a letter that says "unless you send us a letter, we are going to send your money to Mr. Pataki"—they do not have a law like that in Switzerland. But somebody who does not have a law like that has an unending obligation to the depositor to keep the records necessary to pay that depositor's money when he shows up at the door.

I am talking about the absence of records, and I am going to say about the opposite later. There are actually a tremendous number of records, but critical records are missing.

I also point out that there is really a historical failure here. There is a historical failure. The Swiss had many opportunities from the closing of the war in 1945 until now to come clean on this issue, and they failed the test every time. There were numerous occasions, and they failed the test every time. That is one of the most serious—I'll call it—indictments against the Swiss banking system that the investigation of the Swiss banks came up with.

I want to give you an idea of really how thorough this investigation was, because a lot of the talk here has been about, well, we do not really go based on fact, it is sort of a moral obligation.

We tried to get the facts. We had over 300 auditors working. It took three years. Of the Swiss banks' money, we spent U.S.$200 million to do this investigation, the largest accounting investigation in history.

What were the results? They found that there were 6.8 million accounts in Swiss banks in this period 1933 to 1945. They identified 4.1 million accounts, as having records—with respect to 4.1 million of the 6.8 million—so you have a big chunk of accounts for which there are no records. In a sense, it is very hard with respect to those accounts to identify anybody.

They found 350,000 of those were relevant to investigating Holocaust victim accounts. Out of that, some ten percent of those, 36,000 were identified as probably or possibly those of victims of Nazi persecution.

Again, in the context of the Swiss effort from 1945, you should realize that the Swiss knew that there was a problem. In Swiss newspapers, in their public debates, they debated this subject, what they called the "heirless assets problem." They debated this problem quite intensively, and eventually it resulted in legislation which nationalized those accounts.

But all of the time they did such a miserable job that it is really quite remarkable that after all these years, when the Swiss came up with something like maybe 5,000 accounts for everybody, that they found 36,000 accounts that had not been accounted for yet.

Are these results sort of realistic? Do they make sense? The Swiss banking system at that time, in 1945, had total deposits of

somewhere around 20 billion Swiss francs. A study made for the ICEP indicated that the Jewish community in Europe at that time had about U.S.$3 billion of movable assets—that wasn't their total assets; they were the assets that they could move, ship somewhere, to get them out of harm's way.

I do not think it is unrealistic to think that U.S.$1 billion of that could have gone to Switzerland. I do not think it is unrealistic that five percent of the Swiss banking system could have constituted those assets. So you are dealing with something that I think is inherently credible.

Now you come to something that has happened recently. An announcement was made that a claims proceeding had been completed and the claims proceeding indicated that only twenty percent of the accounts that had been examined were Holocaust victims' accounts. They said: "Isn't that really so minuscule that really the whole problem doesn't amount to anything?" In fact, the *London Times* carried the story that said: "Holocaust victim assets problem is a myth."

When you look at that, you have not seen the context in which this took place. If I may have a minute of Judah's time, I will just explain very briefly what that is all about.

In 1997, in anticipation of all the class action lawsuits, the ICEP investigation, the Swiss suddenly got religion, and they published 5,570 accounts—not just Holocaust victim accounts; they just published accounts which they called "dormant" in Swiss banks at that time, dormant accounts. A claims tribunal has been working on those accounts in Switzerland.

There were some 9,500 claims to 2,500 accounts. Of those accounts, 360 were determined to be accounts related to victims of the Holocaust.

In that context what is surprising to me is that there are so many, not that there are so few. Here they made no effort to try and find Holocaust victim accounts. They only made an effort—a superficial effort, as I am going to explain—to find those accounts that were dormant in a very, very narrow definition of dormant, and the result seems to me not to show that there are so few accounts, but so many.

Then you look at the ICEP investigation, which I am going to get to, the result of the ICEP, was 36,000 accounts. What the Swiss did when they did their accounting, this was about the

fourth accounting that they did from 1945 on. Every time they found a few more accounts. The 5,570 was the largest number that they had found throughout this period.

They left out what they called "suspended" accounts. The Swiss banks had a practice that they would reduce the accounts to fees and charges, and sometimes special charges, and when they got to be small enough, they put them into an aggregated account, and they didn't always keep track of whose money was put into the aggregated account.

Now we have this claim procedure for the 36,000 accounts identified by ICEP, plus anybody else who can come in and present evidence of a claim. We had a claims procedure and we have 31,000 claims. Those 31,000 claims are now being processed.

Let me just tell you something about what characterizes these claims. Most of the people on whose behalf claims were made died in concentration camps. Many of the account values are unknown because the records are not sufficient. We decided to use presumptions, presumptions that if the account value was unknown, we have information about the average value of accounts that existed at that time, and we were going to use the average value.

When you make a claim, you have to show that you are related in some way to the account holder in order to qualify for an award. Most of the claims have very strong identification of the account owner by the claimant. That is, they know things about where they lived, what was the mother's married name, what was the aunt's name—they know things about the account owner, which nobody else knows.

A lot of the accounts were what we call "closed," and it is unknown to whom the accounts were paid. We believe, and we are operating on this assumption, that when you die in a concentration camp, it is almost impossible that you would have received the proceeds of the account. We do know that in many cases the Swiss banks took the funds and they took them into profits or they exhausted them with fees and charges.

One of the things that stands out from this is that the cases make you realize that these are not statistics or just pieces of paper, but real people are involved. Reading the decisions in these cases is for me like standing in the Holocaust Museum in Wash-

ington or in Yad Vashem in Jerusalem. What it tells me is man's inhumanity to man breaks your heart.

MR. GOLDHAGEN: Thank you. Neal Sher?

MR. SHER: I do not want to incur the wrath of Dr. Goldhagen, who, by the way, wrote one hell of a terrific book. You said something that a lot of us knew, but you had the guts to do it. You took a lot of grief for it, but as far as I am concerned, God bless you. I think it is terrific.

MR. GOLDHAGEN: Thank you.

MR. SHER: I will talk about ICHEIC very briefly.

First let me say, because the theme was justice and doing the right thing, which of course we all want to do, having served as essentially the chief war crimes prosecutor for our government for almost fifteen years, I came to this work at ICHEIC, the Insurance Commission, under the leadership of former Secretary of State Larry Eagleburger, with sort of a different perspective. I realized that there never could be, on any issue regarding the Holocaust, anything that comes close to perfect justice—simply impossible.

The example I use to prove that point is a very fundamental one, and that is that in 1960 the Israelis captured Adolph Eichmann, the architect of the Final Solution, responsible for millions of deaths. They brought him to Israel, they put him on trial, he was convicted in 1961, appealed to the Supreme Court of Israel, appealed to the President of Israel, he was sentenced to death, he was executed, he was hanged, cremated, his ashes strewn into the sea.

A government, a democratic government, exacted the most severe penalty any government can exact in any criminal case, capital punishment. And yet, I do not think there is anyone in this room, or anyone anywhere, who would say that that was perfect justice. There never could be, because the crimes were of such enormity that it is beyond any civilized nation or any group, any individual, to come close to pure justice.

That perhaps applies to everything regarding the Holocaust, including compensation, reparations, or restitution. The fact of the matter is that, whether it was with the Swiss banks—and Volcker and Bradfield have done a superb job, and Judah Gribetz in administering it has been spectacular—this is very difficult work, and you are never going to satisfy everybody. But the

fact of the matter is that you can never even approximate returning to the victims what they really lost.

If, just for example, we were to seek from the Germans what they really owed the Jewish world—whether it was monetary loss, pain and suffering, or wrongful death, to use the context of legal terms that we are all used to—there is not enough money in the world to satisfy those losses.

You read every day in the United States how someone is unlawfully detained by some government for three days, a wrongful arrest, and they get millions of dollars in settlement. Now, if those who suffered in the work camps and the death camps, working in the ghettoes and the slave labor factories, were to get what they really deserve, there is not enough money, as I said, in the world.

And so what happens in all of these cases? Let us face it, let us be honest—it is a raw, hard-nosed, political decision. And essentially, when there are settlements and the people who are acting on behalf of the survivors—and yes, Sam Dubbin, who has done a great job, has some concerns, many of which are legitimate—and I know there are survivors who feel that they have been left out, but the fact is that there are umbrella organizations that represent a lot of victims. The State of Israel and other Jewish organizations have been involved and they are doing the best they can.

In essence, any settlement along these lines will bring in what the traffic can bear, politically and economically. I did not hear Lambsdorff before, but he said they were picking numbers out of thin air, in essence, and of course that's what they were doing. One can make the argument that the Germans got off very, very cheaply. There is no question.

By the same token, if it was not for the guts of a handful of individuals, although the lawsuits were important, it was the activity of a handful of people, principally the World Jewish Congress, that went to the seats of power in a raw, hard-nosed, political operation. That is what it was, make no mistake about it. Everything flowed from that.

It is easy to sit back and be critical, because there is a lot that legitimately can be criticized, but the fact is that we came very close, "we" meaning modern society, to none of this ever, ever happening, never happening.

No survivor is going to get what he should get. And by the same token, there are those who claim that this is an industry, there are those who claim that survivors are just greedy. No survivor is going to get rich on any amount of money he gets from any of these settlements, none. And even if they got millions per individual, it would not be nearly enough to cover what they deserve.

When it comes to the issue of insurance, it is a very complicated issue, because we are not just dealing with one country. Mike Bradfield had the luxury of just dealing with Switzerland. That was not quite a bargain, but at least it was just one country. We have to deal with Germany, with Italy, with Switzerland, with France, with Austria, and what have you.

Different currencies were involved, and policies written in all sorts of languages. Many of them do not exist. Many of the policies were very, very small. It is exceedingly complicated.

I can tell you what Eagleburger's mantra is, if you will. That is that he is going to do everything he can to attract people to file claims. We have spent over U.S.$10 million in advertising in newspapers, magazines, radio, TV, and what have you, to attract claimants and also to pay legitimate claims.

Now, pursuant to that philosophy, we have undertaken independent research, not just relying on companies to give us lists. We have gotten quite a few names of open policies from the Italians, *Assicurazioni Generali*, a few from some others. We are still in negotiations with them to get as many lists as possible to publish them on our Web site. We have over 55,000 names published on our Web site of possible claims. It is not a guarantee, but at least it can jog somebody to perhaps file a claim, which will then be investigated.

We have 77,000 so-called claims that have been filed with the ICHEIC. I say "so-called" because for a large number it is really a misnomer to call them a claim. It is essentially somebody coming in and saying, "You know, I think my family, which was wealthy, must have had insurance; we don't know the name of the company, we don't even know where the policy would have been bought, but can you check it out?" Well, we categorize that as a claim, but it is more in the nature of an inquiry, and those are checked out by all the companies that are participating in our organization.

I do not know how many claims ultimately will be filed or how many ultimately will be paid off. Under the guidelines and evaluation requirements that were promulgated by Eagleburger (and even though we've been in business for a little over two and a half years, active business, we are still pretty early on in the claims processing department) thus far about U.S.$12 million has been paid out to claimants. The vast majority were claimants against Generali, the large Italian insurer, which insured principally in Eastern and Central Europe.

I do not know what the ultimate figure will be. No one knows. And I cannot tell you, and I do not think anybody could tell you, what the figure should be.

MR. GOLDHAGEN: Is there a cap on the figure?

MR. SHER: A cap in the sense that with Generali there was an agreement negotiated for U.S.$100 million to cover claims. The best estimate of those who negotiated it—and basically it was negotiated by the Jewish organizations with Generali and with the State of Israel—is that it should suffice. I think if it does not suffice, Generali understands that they will honor claims. I cannot imagine that they would not honor someone who comes in with a legitimate claim, even though the U.S.$100 million has been exhausted.

To the extent that the U.S.$100 million is not exhausted for claims, it will be used for humanitarian purposes. That is in respect to, I think, the valid comment that Sam Dubbin made, about calling these humanitarian gestures, which essentially are designed to represent heirless claims. Everyone understands, particularly in the East, that entire families were wiped out and there is not even a distant, distant relative who can step forward to establish the fact that they've got a claim, that there was a legitimate policy that has to be paid. So, in recognition of that, there is a humanitarian fund.

The interesting aspect—and it is something that is unfolding presently—is that we were brought into the German Foundation, the slave labor settlement. Suffice it to say that Eagleburger was not all that thrilled when this was broached. But, for a variety of reasons, insurance is part of the agreement that Lambsdorff and Geier and others were talking about.

What is anticipated in that agreement is essentially DM 200 million to cover claims for the German market, and also to cover

expenses in administering those claims, plus DM 350 million to go to the ICHEIC Humanitarian Fund.

Now, we have not got the money yet, and we have not gotten that money for one simple reason, that there first has to be an agreement reached between ICHEIC and the German authorities on how the claims are going to be processed and paid, to ensure there is a legitimate appeals process, a legitimate audit process, and that we get from all the relevant German companies that did business during the Holocaust years their lists.

There is also serious debate as to financing. To make a long story short, the companies that are part of ICHEIC also are part of the German Foundation: Alliance because it is, of course, a purely German company, the largest insurer in Germany and one of the largest in the world; and the other companies—the Swiss, the French, and the Italians—all have German operations, so they have contributed to the German Foundation. They are claiming that, under the German law, there should be deductions from the claims pot of the German Foundation, that is, the DM 200 million. They want to get basically reimbursed for monies they gave to ICHEIC to pay our previous expenses. That is, suffice it to say, a serious, serious bone of contention.

MR. GOLDHAGEN: Has it been determined what will be done with the so-called Humanitarian Fund?

MR. SHER: No. In one word—no. Essentially we do not have the Humanitarian Fund yet. Eagleburger is not going to spend the U.S.$100 million from Generali on any humanitarian purposes until we reach the point that he is satisfied that all the claimants can be paid.

If we reach an agreement—and I am going to be in London next week negotiating with the Germans, and we are hopeful that we will reach an agreement, but it has been a long, drawn-out, and tough negotiation—we will have approximately U.S.$170 million.

Essentially, Eagleburger's belief is that its primary focus will be to aid needy Holocaust survivors. There is no question. It is a matter of not having finalized the structure and how it is going to work. But Eagleburger's first objective is to pay claimants and then needy Holocaust survivors.

MR. GOLDHAGEN: Thank you.

We move now from the large sums of money and large clas-

ses of people to very particular items of property that need to be returned, have been returned. Monica Dugot will begin us on that subject.

MS. DUGOT: Thanks, Danny. Thank you, Thane and Fordham, for the invitation to come and speak here today. As Deputy Director of the Holocaust Claims Processing Office ("HCPO"), I oversee all activities relating to Holocaust-era art claims filed with the HCPO.

As many of you probably already know, the HCPO is a division of the New York State Banking Department and was established by Governor Pataki in the summer of 1997. Its mission is to assist claimants seeking recovery of assets held in European banks, proceeds from Holocaust-era insurance policies, and lost, looted, or stolen art. I would like to share with you some brief observations from almost four years of close work with owners and heirs seeking to recover art collections lost or looted during the Holocaust.

The HCPO's experience provides evidence that non-litigious and just resolution of Holocaust-era art claims is possible, although it takes perseverance, particularly diverse skills, and the willingness amongst all parties involved to do the right thing. We have done our utmost to ease the difficulties often faced by claimants as they attempt to advance their legitimate claims.

Our work has also shown that a fair and swift resolution cannot be arrived at by one party acting in isolation. In the last decade, via diplomatic initiatives, class action lawsuits, new laws, declarations, and guidelines, there has been an expansion of the legal framework, which has greatly facilitated resolution of these claims. Given that each art claim involves a specific object, art claims have necessarily been resolved on a case-by-case basis. Where lawsuits have been filed on the art front, they have been individual lawsuits rather than class action litigation. It is unclear whether a class approach to Holocaust looted art could be formulated, given the idiosyncratic nature of each case.

I should also note that art was carved out of every Holocaust asset settlement to date and has, therefore, not been the subject of a systemic remedial process.

Art cases raise serious allocation issues because each case may involve the laws of several countries, none of which may complement each other. Art cases may also involve the law of

any given state, which may by itself seriously impede a claimant's ability to lodge or pursue a claim.

I speak from experience when I tell you that restituting a painting is not an easy task. Before the process of recovery can even begin, the looted art object must be located. Holocaust-era provenance research, research into the history of ownership, is a labor-intensive and time-consuming process, and cooperation from museums, archivists, auction houses, and all other participants in the sale and transfer of artwork is critical. Although significant steps have been taken towards making much-needed information publicly available, full access to provenance data still remains elusive.

The information needed to resolve the case is usually in more than one place. Pre-war collections have not survived in their entirety. They have been dispersed and, consequently, items can surface anywhere, presenting considerable challenges.

It is a decidedly international issue, and with claimants in fifty countries and forty-two states within the United States, the HCPO's outlook is, by definition, global. Unless those involved in the various aspects of research and restitution coordinate efforts and willingly share all available information, and unless government archives across the globe make relevant records accessible to the public, successful location and return of items to Holocaust survivors and their heirs will be unlikely.

Locating the object is often the first of several hurdles we face as part of the recovery effort. As is evident from the handful of lawsuits filed in the United States involving World War II looted art, courts do not offer the perfect solution to these types of cases. The HCPO is committed to arriving at resolution outside of the parameters usually set by litigation, given the high financial and emotional costs associated with litigation.

Not only is looted art extremely expensive to recover, one must also remember that the legal process can be a particularly lengthy and public one. Moreover, it often introduces a rancorous climate not conducive to amicable resolution, and usually results in resolutions that are money and expense-driven. The reality is that survivors are well into their eighties and simply cannot afford the cost of a long, drawn-out battle.

It is important to note that, unlike dormant Swiss bank account claims, where the perpetrators knew or were in a position

to know that they were taking part in wrongful activities, a number of current possessors of Nazi-looted art acquired the objects in good faith, without knowledge of their dubious provenance.

As the HCPO has shown, an early dialogue between the claimant and the current possessor, before expenses have been incurred, presents many opportunities to resolve these types of disputes to the benefit and satisfaction of both parties. Permit me to provide an example from the HCPO's experience, a case which Mr. Eizenstat briefly described earlier. The case of Lucas Cranach's "Madonna and Child" in the North Carolina Museum of Art could serve as a model of how coordination amongst groups can provide an alternative to litigation.

The claimants filed a claim with both the HCPO and the Commission for Art Recovery. The Commission for Art Recovery located the object in the North Carolina Museum of Art and asked for the HCPO's assistance. We, in turn, worked with the claimants and with the museum to ultimately reclaim the painting, which had originally belonged to Philip von Gomperz, their great-uncle.

As a result of reasoned dialogue and the family's extensive documentation, the North Carolina Museum of Art undertook a review of its own files regarding the painting's provenance. The painting was ultimately returned without undue legal expenses being incurred on their side. The parties' mutual respect for one another was critical in another sense, too. When all was said and done, the owners were able to arrive at an amicable solution that helped preserve the painting for the museum and the North Carolina public, and in a manner, which paid tribute to the original owner.

Cooperation and coordination between groups is one aspect of successful restitution. Another key facet to successful resolution has been the critical review countries have given to their past, which in some instances has resulted in new laws, directives, and declarations concerning art restitution matters. These new laws, while often limited in scope, are an encouraging and significant step forward and make positive contributions to the moral climate surrounding Holocaust-era restitution, the importance of which should be underscored.

Another example from the HCPO's experience might illustrate this best. A painting by Lesser Ury, owned by a German

businessman and sold under duress in 1941, was located in the *Neue Galerie* in Linz, Austria, and returned to the grandson of the original owner.

In December of 1998, the Austrian National Council passed a federal law stating that all works of art that had become Austrian State property as a consequence of Aryanization or which had been extorted from owners as part of export proceedings after 1945 should be returned. Given that this law only covers art objects from Austrian federal collections, the *Neue Galerie*, a municipal museum, fell outside its scope. However, this case was resolved as a direct result of climatic change in Austria triggered by this new legislation.

In early 1999, the *Neue Galerie* looked into the problems of their collection, published a report of its findings, and made the information freely accessible. As a result, the HCPO was able to successfully match the Lesser Ury with its rightful owner. It appears that the new legal climate encouraged the mayor of Linz and the city council to act on what they believed was their moral obligation to return the painting.

As a final example, last January the HCPO was able to assist the heirs of Dr. Ismar Littmann recover Alexander Kanoldt's "Olevano," which hung in Berlin's *Nationalgalerie* since 1951. "Olevano" was part of a large collection originally owned by Dr. Littmann, a prominent attorney, art collector, and supporter of the arts in prewar Breslau. With the Nazis' rise to power, Dr. Littmann faced overt persecution, culminating in his suicide in 1934. Part of his considerable collection was sold at auction and many other pieces of the collection were confiscated.

The *Nationalgalerie* acknowledged the legitimacy of the Littmann claim and ultimately released the painting to the Littmann heirs relatively soon after being presented with the claim. This and other more recent claims were expeditiously settled, in part, thanks to a new policy adopted by the Prussian Cultural Heritage Foundation and supported by a subsequent government declaration to speed the return of art works that Jews were forced to sell, often at bargain-basement prices, under the Nazi regime. The Foundation has made clear that it feels a moral obligation to return these art objects to their rightful owners not only because they were wrongfully taken, but also because Berlin

museums had benefited greatly from the generosity of Jewish collectors and patrons for decades leading up the mid-1930s.

Although lacking statutory authority, the Declaration reflects a strong political commitment to swiftly settle Holocaust-era claims. Thus, although attention needs to be paid to legal aspects, to truly assist claimants in recovering their art objects, the discussion needs to be taken out of an exclusively legal context and elevated to a moral and political level.

In closing, I would like to leave you with some additional thoughts. Art restitution is a painful exercise for everyone involved and requires all of us to think creatively and find solutions that at first glance may appear unusual. But there is nothing usual about the events that have led up to this point. Museums and private and public collections find themselves faced with doing things that are not in the normal course of business—rewriting provenances, conceding the legitimacy of claims, and on occasion de-accessioning valued objects.

The art market as a whole finds itself suffering from the effects of uncertainty. European countries are finally undergoing historical self-examination, and claimants, in an effort to recover a family painting, find themselves having to confront traumatic events that took place some sixty years ago. Moreover, while successful return of a family treasure is a happy and momentous occasion worth celebrating, it is also a bittersweet moment that reinforces painful loss.

Of course, the thievery of Nazi Germany pales in comparison to the genocide perpetrated upon its millions of innocent victims, but theft, unlike murder, is a wrong that we can, and therefore must, put right. Failure to act in the full knowledge of the facts only compounds the original crime.

The restitution process is both complicated and painful for all persons involved, claimants and current owners alike. The HCPO's experience, however, shows that it can be less complicated and less painful by means of a frank and reasoned dialogue and in a spirit of cooperation that sets out to avoid the rancor inherent in litigation.

The HCPO's commitment to these ground rules stems from our belief that survivors should not be traumatized anew through their recovery efforts. In addition, the HCPO philosophy is based on the recognition that it is in all our interest to

arrive at just resolution of these claims in an effort to achieve closure for claimants, current possessors, and future generations alike.

What has been accomplished thus far is only a beginning. There is still much that needs to be done.

MR. GOLDHAGEN: Thank you.

Professor Marcus?

PROFESSOR MARCUS: I am Maria Marcus. I am a Professor here. I will be very brief.

Why is it significant to get politically looted works of art back? Unlike money, art is unique and identifiable, and it is a tangible connection between those who have perished or managed to survive and, therefore, families feel moved to fight for it.

I have had that experience personally. My father was a Justice of the Austrian Constitutional Court. A bronze bust was done of him by a sculptor named Ambrosi. The statue was lost during the war when we had to leave suddenly because the Nazis took over the country. Then we were in the United States, and our efforts to locate the statue were completely unsuccessful.

One day, a woman walked into an antique shop in Vienna, and there it was. She recognized Ambrosi's style. She called the sculptor. He got in touch with my father. My father called a friend in Vienna to rush over to the antique shop to buy it and ship it to us. I'll never forget the joy when it arrived. It was the only thing that was saved from our old apartment, and it was a link to his former identity, which had not been destroyed.

Now, it was found by a coincidence, but it is often difficult for people whose paintings and sculpture have been stolen to trace those objects, or even to prove that they were the original owners.

You have heard a lot at this conference about records being unavailable. Well, these delays can become insurmountable barriers under foreign laws. In some European countries, for example, after five years of possession by a good-faith purchaser—meaning somebody who did not know that the goods were stolen—that work is considered the property of that purchaser, the permanent property of that purchaser.

But shouldn't purchasers have some duty to investigate? New York thinks so.

There are tip-offs that should make purchasers suspicious.

For example, wartime gaps in ownership or sales by notorious collaborators with Nazi looters. Some art dealers have said that a duty to inquire would cripple the art business. Now, that is not true with other kinds of business.

In an earlier New York case, a defense was raised that in the art world it is considered an insult to question a dealer about title. The court there said, "Well, let's just risk the insult anyway."

Now, where the original owner tries to get the object back from a private purchaser, the obstacles can be many. Ms. Dugot has pointed out one of them, that survivors can usually not afford a battle. But the other problem is: How do you find out where the object is?

Friedrich Gutmann was murdered in Theresienstadt because certain Nazi officials wanted his art collection. His grandson Nick has expended a huge amount of time, of effort, and of money to try to locate the pictures. For example, he had to pay translators and to struggle even to get an auction house to reveal the name of the person who bought one of the paintings. So yes, he was very ready to negotiate, but he could not negotiate until he found out where the picture was.

Now, these are some of the problems in getting back politically looted art.

There are some legislative solutions that could be fair both to the original owners and to an innocent subsequent good-faith buyer, but we do not have time to go into them now.

MR. GOLDHAGEN: Thank you.

One of the themes that has been brought out by today's discussion, which I think all the panelists could speak to, is whether Holocaust victims are principally—and they may not be principally—interested in recognition or are principally interested in monetary or other property returns that they might accrue. Both have been asserted today, both have been asserted rather vigorously, and all of you have some experience with the people who care about this, who are at issue here. I would like to hear briefly what you think about this.

MR. SHER: The experience that I have seen is that many times both of those factors together come into play. There are any number of times that I have spoken with people at conferences like this, or giving speeches, who have come up to me and

said they are exceedingly well-to-do, America has been very good to them, they are very successful, and they might have an insurance policy that might be worth U.S.$2,000, but they are going to file, they are going to get what is owed to them—for two reasons: one is that it will make them feel better; and secondly, in the words of one survivor I met, "I don't want the *monzerim* to hold on to it." That is a very fundamental, very basic instinct, and frankly there is nothing wrong with it.

MS. DUGOT: From our experience, it has been very much more recognition and acknowledgment that something was taken, certainly on the art front, but with regard to all assets taken from their family, an acknowledgment that an injustice was done and, to the extent that the wrong can be righted, that is very significant, much more significant, from what we have seen, than the monetary value.

With regard to art specifically, when we are trying to get back a painting for a claimant, oftentimes it might be the last link they have to their grandparents. The last time they saw the painting was in a dining room when they were two or three years old. It is extremely important emotionally. It does not matter if the painting is worth U.S.$2, it is emotionally and psychologically important for the claimant to recover the painting.

MR. GRIBETZ: The question was recognition or monetary return. To me, I do not separate them. The plan that Judge Korman approved returns funds to individuals, with the exception of U.S.$10 million of the U.S.$1.25 billion to, hopefully, create once and for all a comprehensive list of victims.

But if one looks—again, trying to bring it back to the real world—at judgments that were made: Who is eligible under the Swiss bank settlement for compensation? Looking at the definition of a "victim or target of Nazi persecution," not only does it include individuals, it includes corporations, partnerships, sole proprietorships, unincorporated associations, communities, congregations, groups, organizations, or any other entity persecuted.

So in the effort for transparency to try and do the job, we asked people to come forward with suggestions. Over sixty well-known organizations said, "We're entitled, just as anybody else under this agreement."

The difficult judgment was made that funds in distribution

go to bank deposit holders, which is a historical recognition of prime importance, and also to slave laborers, needy survivors, and refugees. That has come forward to me in the three years that I have been dealing with the human beings who are the claimants from whom we try to learn. Fundamentally they are interested in utilization of the funds individually.

MR. GOLDHAGEN: If my understanding is correct, the people who had bank accounts are to be repaid their accounts, and also with insurance policies. The slave laborers, though, get only some small percentage, however one would reasonably calculate it, of what was taken from them, of what they are owed. Is that also correct?

MR. GRIBETZ: Judgments were made in the distribution of the U.S.$1.25 billion, just like judgments were made with the German Foundation how much to pay slave laborers, which was DM 7,500. A judgment was likewise made to give U.S.$1,000 to each slave laborer, Jewish and non-Jewish, eligible under the Swiss bank settlement, which hopefully will amount, based on our calculations, to U.S.$200 million.

With respect to bank deposits, there will be a return of the funds deposited based on plausible evidence submitted to the Claims Restitution Tribunal ("CRT") under Paul Volcker and Mike Bradfield, who are now Special Masters—they were appointed by Judge Korman and graciously agreed to serve as Special Masters to oversee the return of funds that people entrusted to the Swiss banking system.

MR. GOLDHAGEN: Why, given that there are limited funds that could be gotten in the agreement, which is a political settlement, was there not more money apportioned for slave laborers, since obviously their suffering was of enormous magnitude, at the expense of some of the bank account holders?

MR. GRIBETZ: A judgment was made based upon the development of the lawsuit, the purpose of the lawsuit. The Swiss were not the Nazis, they were the Swiss, and their activities, in accordance with the settlement agreement, encompassed more than bank deposits. But the highest legal priority was bank deposits.

As a matter of fact, Judge Korman in his opinion, analyzing Paul's and Mike's audit, said that the amount of money that could be returned to bank depositors could exceed the

U.S.$1.25 billion settlement. That is the point that Sam Dubbin made early on about why this settlement should be more. It is easy to say that if you are not a negotiator with the Swiss and having to come to closure after all these years.

So one of the most difficult recommendations that we made to the court was, in effect, to cap the bank deposits at U.S.$800 million. Talk has been made of a second round, on the belief that perhaps U.S.$800 million of bank deposits will not be plausibly proven. It is not going to be "sprinkled" to anybody who comes in and said he had a bank deposit. There are rules that have been published as to how to go about this and determine claims.

Now, there is a cap. If the awards total more than U.S.$800 million, somebody's bank deposit to which he would be entitled would have to be apportioned. The plan allocates an immediate thirty-five percent of what has been determined, and we will wait to see how this plays out.

MR. GOLDHAGEN: Okay. I have a question for the experts on art. Unlike in these other matters, it is at least possible—and I think there probably are cases—that people have acquired the art in good faith who now are asked to relinquish it. How do we conceive of the rights of these people? Is an injustice being done to them when the art is removed from their possession in one way or another?

PROFESSOR MARCUS: I think that is definitely an important question. There have been some legislative suggestions that could balance those interests. One of them is to establish through legislation a central registry of stolen art. There are some private ones that already exist, but they do not have the force of law.

So let us assume that a state or the federal government, or even internationally, such a legislative mechanism is established. Here is how it would work. The person whose art is stolen would enter a description of that on the list. Then she continues to search. When she finds the art, she is protected from statute of limitations or laches defenses.

On the other hand, the good-faith purchaser consults that list before buying and if the art is *not* on the list, then after three years he is protected from any lawsuit to try to get it back. Now, of course, that does not preclude owners and purchasers from

deciding between themselves. But this is an incentive for the owner to list it so that people who are going to buy will know, and it is an incentive for the buyer, instead of saying "See no evil, hear no evil, I'll just buy it," to look and say, "Oh, it's listed, I had better not buy it," or "I had better realize that I'm going to have a negotiation."

MR. BRADFIELD: Can you get title from a thief?

MS. DUGOT: Not in this country, certainly not under common law.

PROFESSOR MARCUS: The problem is something else. The problem is that the purchaser's defenses of laches and statute of limitations can cut off the right of the owner to reclaim her property. The Uniform Commercial Code ("UCC") says a thief cannot pass good title, yet there are defenses that could be available to the purchaser which cut off the possibility of the original owner getting the art object back. The purchaser's title may not be good, but it can sometimes become unassailable.

MS. DUGOT: They could certainly use registries though, because they are also always linked to a statute of limitations of some kind, so that would encourage these paintings to go underground; also the fact that some people would have greater access to certain registries than the person living in a small town in Poland.

PROFESSOR MARCUS: That is why I think the central legislative one would be important. Also, the lack of sophistication of the person searching is taken into account when that is done.

MR. BRADFIELD: Would you toll the statute, whatever laches or whatever claims there may be, would be tolled if you did not know where the painting was?

PROFESSOR MARCUS: That is an interesting question.

MR. BRADFIELD: If you knew where the painting was and you did not go after it, I could understand that. But if you did not know where the painting was, like in the cases that Monica pointed out?

PROFESSOR MARCUS: Right, that is a difficulty that I emphasized in my earlier remarks. The way that it would work is this: the statute of limitations would kick in only if a continuous search would have revealed the location of the object.

There is a nice irony here really, because the person who has a painting, exhibits it, puts it in catalogs, his interest as a

good-faith purchaser is better protected than the person who tries to hide it, because if the person hides it, then the original owner can say, "No matter how I searched, I never would have found it." Whereas if it has been in catalogs and so on, the purchaser can assert, "Hey, if you had looked, you would have been able to locate it." So that purchaser is better protected. There were negotiations—with Gutmann's grandson, for example—where that was a defense: "I exhibited it, I had it in catalogs, you should have found it," and that was part of the reason why the settlement had to be fair to both sides.

MS. DUGOT: With regard to this, the bottom line is—it has actually been touched upon earlier—there is also a time factor when you raise the issue of good-faith purchaser. I think that is why it is key in these art cases, to the extent possible, not to end up in litigation.

Maybe we have been lucky thus far, but so far wherever we have been able to just sit down and have a conversation, creative solutions have been found that are fair to both parties.

MR. GOLDHAGEN: Our time has long come to an end. I want to thank all the panelists and Thane Rosenbaum for organizing the conference and Fordham University for hosting it.

PROFESSOR ROSENBAUM: Thank you, everyone. On behalf of the Stein Center, we are very grateful to our moderators and to our panelists and to all of you for spending this important day with us. Thank you.