AMERICAN INSURANCE ASSOCIATION V. GARAMENDI:

U.S. SUPREME COURT REJECTS EFFORTS TO ADDRESS HOLOCAUST-ERA INSURANCE CLAIMS THROUGH STATE INSURANCE LAWS

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JULY 3, 2003

INTRODUCTION

In a significant development for the U.S. insurance industry, the United States Supreme Court recently held, in *American Insurance Association v. Garamendi*, ___ S.Ct. ____, No. 02-722, 2003 WL 21433477 (June 23, 2003) ("*Garamendi*"), that a California law requiring insurance companies to disclose information about Holocaust-era insurance policies impermissibly infringed on the President's power to conduct foreign affairs. The *Garamendi* decision will also invalidate similar statutes in several other states that sought to facilitate compensation to policyholders for lost or stolen policies outside of the international treaties negotiated by the United States Government.

BACKGROUND

Garamendi arises from litigation involving the Nazi Government's systematic campaign to steal Jewish assets, including insurance policies, as well as the failure of many German insurance companies to pay claims after the Second World War. In the late 1990s, cognizant of the numerous class action lawsuits filed against foreign and domestic insurers, the U.S. Department of State sought alternatives to litigation in settling claims against European insurance companies that sold policies to Jews in Europe between 1920 and 1945.

Negotiations produced the German Foundation Agreement, under which the German Government and German insurance companies agreed to establish a fund of 10 billion deutsch marks to repay victims of Holocaust-era insurance theft, in exchange for the U.S. Government's

recommendation to U.S. courts that all Holocaust-era suits against European insurance companies be dismissed. Under the Agreement, the process is to be administered by the International Commission on Holocaust Era Insurance Claims ("ICHEIC"). Among the provisions of the Agreement is a requirement that European insurers publish information about unpaid insurance policies to help those who are entitled to payment identify policies and ultimately file claims.

As the Agreement was being finalized, California began its own process of investigating the payment of Holocaust-era insurance claims. In 1999, the California state legislature enacted the Holocaust Victim Insurance Relief Act ("HVIRA") which required "any insurer currently doing business in the state" to disclose the details of "life, property, liability, health, annuities, dowry, educational, or casualty insurance policies…[issued] to persons in Europe, which were in effect between 1920 and 1945." Cal. Ins. Code Ann. §13804 (2003). The Act's provisions extend to any related organization, including "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer," whether or not the organizations were related at the time the subject policies were sold. Id. If a California insurance company failed to comply with these directives, the mandatory penalty for default was suspension of the insurance company's license to do business in the state. Upon implementation of the statute, the U.S. Department of State requested that California halt its efforts, arguing that the California statute "threatened to damage the cooperative spirit [of the ICHEIC]." Despite this request, the California Commissioner of Insurance announced that he would enforce HVIRA to its fullest extent, requiring the affected insurers to make the disclosures, leave the state voluntarily, or lose their licenses.

Several American and European insurance companies, along with the American Insurance Association, filed suit for injunctive relief. The district court granted a preliminary injunction, finding that HVIRA was unconstitutional because it violated the federal foreign affairs power. The U.S. Court of Appeals for the Ninth Circuit reversed, holding that there was no federal preemption. However, the Ninth Circuit remanded the case for reconsideration of whether there was a due process issue on the basis that the statute might deprive insurance companies of their license without a meaningful hearing. On remand, the district court again issued a preliminary injunction, this time noting a violation of procedural due process. On appeal, the Ninth Circuit again reversed. The Supreme Court granted certiorari, citing the importance of the issue in light of the fact that many states including Arizona, Florida, Maryland, Minnesota, New York, Texas, and Washington have passed similar statutes. [1]

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[1] *See* Ariz.Rev.Stat. Ann. §20-490 (West. Cum.Supp. 2003); Holocaust Victims Insurance Act, Fla. Stat. § 626.9543 (West.Cum.Supp. 2003); Holocaust Victims Insurance Act, Md. Ins. Code. Ann. §§ 28-101 to 28-110 (West.Cum.Supp. 2003); Holocaust Victims Insurance Relief Act of 2000, Minn.Stat § 60A.053 (Cum.Supp. 2003); Holocaust Victims Insurance Act of 1998, N.Y. Ins. Law § 2701 (2000); Texas Ins.Code Ann. Art. 21.74 (2003); Holocaust Victims Insurance Relief Act of 1999, Wash.Rev.Code §§ 48.104.010-48.104.903 (2003).

ANALYSIS

The Supreme Court addressed only one issue in its opinion: whether HVIRA interferes with the foreign policy function of the Executive Branch. The Court began its analysis by stating that although the Constitution does not explicitly confer special foreign relations powers on the President, historical precedent supports the President's "vast share of responsibility for the conduct of our foreign relations." In particular, Presidents have traditionally entered into executive agreements to settle claims of American nationals against foreign governments.

The Court noted that settling Holocaust-era insurance claims is well within the Executive Branch's foreign policy responsibilities, and that state law could not interfere with this process. In the Court's view, the Federal Government's nearly exclusive role for more than half of a century in addressing restitution for Nazi crimes indicated that obtaining appropriate settlements for victims of Holocaust-era insurance theft was predominantly a matter of national, not state, interest. California's policy to compel disclosures, moreover, conflicted directly with the longstanding federal policy of encouraging voluntary compliance and rectification of Holocaust crimes, a policy that the Federal Government argued was preferable to coercive action because it maintains cordial relations between America and Europe. The Federal Government also contended that the system created by the ICHEIC was sensitive to European insurance privacy laws, while the HVIRA system was indiscriminate.

The Court determined that California's interest in resolving Holocaust-era insurance claims was small. While California pointed to consumer protection as its primary goal, the Court recognized that the policies at issue were sold in Europe to Europeans over 55 years ago. They were not California policies, for which the insurance commissioner had a legitimate interest in protecting consumers. The Court held that while there were several thousand Holocaust survivors living in California, this fact alone could not overcome a federal interest in a uniform settlement of a foreign policy matter. Finally, the Court would not substitute its wisdom for that of the Federal Government in a foreign policy debate. Even if the California policy were more appropriate, or better able to obtain meaningful results, the Court could not competently evaluate the Executive Branch's approach and rationale. Dissatisfaction, the Court noted, must be addressed in the political system, through the election of a President and Congress.

California raised two final claims, which the Court dismissed without significant discussion: first, California argued that HVIRA could not be preempted because it was covered under the McCarran-Ferguson Act, and, second, the state argued that HVIRA was within the language and intention of the federal Holocaust Commission Act. The McCarran-Ferguson Act provides that insurance regulation is properly within a state's domain, but that it can be preempted by federal legislation that "specifically relates to the business of insurance." 15 U.S.C. §§ 1011-1015 (1998). The Court noted that the Act was inapposite, however, because its principal aim was to prevent the Federal Government from overstepping its commerce power, and that it could not "sensibly be construed to address preemption by executive conduct in foreign affairs." The Holocaust Commission Act, on the other hand, required a federal commission to prepare a

report on Holocaust-era assets that came into the possession or control of the Federal Government, with the help of state insurance commissioners. 22 U.S.C. §1621 (1998). The Court explained that the role of state insurance commissioners was specifically limited to gathering information to the extent that it was already available and that HVIRA did not fall within that description. The Court, addressing both of California's contentions, stressed that Congress has done nothing to express disapproval with the President's course of action relating to Holocaust-era insurance claims. The Court pointed to the fact that there have been several attempts to enact a similar statute in Congress, but none of the bills has come close to making it into law.

SUMMARY

The Court's holding in *Garamendi* has made clear that state insurance laws may not interfere with the federal policy of resolving Holocaust-era insurance claims amicably with European allies. The Court relied heavily upon the Executive Branch's power to resolve foreign policy matters within its own discretion. The effect of this decision is to invalidate several state attempts to facilitate recovery by mandating disclosure of Holocaust-era policies. This decision leaves only the international treaties, which balance the need for disclosure with other foreign policy concerns, as the major avenue for disclosure of policies and recovery by the proper beneficiaries.

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If you have any questions concerning the *Garamendi* decision, please do not hesitate to contact any of the following persons at Simpson Thacher & Bartlett LLP: Peter J. Gordon (212-455-2605; pgordon@stblaw.com), Gary I. Horowitz (212-455-7113; ghorowitz@stblaw.com), Lee Meyerson (212-455-3675; lmeyerson@stblaw.com), Steven R. DeLott (212-455-3426; sdelott@stblaw.com), or Craig S. Waldman (212-455-2175; cwaldman@stblaw.com), summer associate.

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