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AALS Workshop

Remedial Issues in Reparations Cases

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Discussions of legal issues raised by efforts to use courts to secure reparations for past unlawful conduct imposing massive losses on a victim population usually, and quite properly, center on the difficult substantive issues associated with establishing liability and quantifying loss. I assume that my colleagues on this panel will devote themselves to those important issues. I plan to discuss the more prosaic topics of how to structure and administer a reparations payment.

I will build on my experiences as Lead Settlement Counsel in the Swiss Bank Holocaust case, which was settled in August, 1998 for \$1.25 billion, and which has been administered as a classic Rule 23(e) settlement in the Eastern District of New York; and my experience as a principal counsel in the German slave labor cases, which were settled in July, 2000, for approximately \$5.2 billion through the creation of a non-judicial German Foundation: "Remembrance, Responsibility and the Future," designed to pay compensation to victims of WW II behavior by German industry.

Thus far, the Rule 23 Swiss bank settlement has distributed a total of approximately \$950 million to almost 400,000 persons – more than \$400 million to holders of Swiss bank accounts, averaging approximately \$135,000 per account; more than \$300 million to more than 150,000 surviving slave laborers in payments of \$1,450 each (supplementing \$7,500 payments from the German Foundation); \$205 million to the poorest survivors, \$15 million to refugees denied access to Switzerland because of ethnicity or religion; and \$10 million to Yad Vashem to establish a definitive list of victims. I anticipate that several hundred million dollars in bank account payments will be made in the next two years.

Thus far, the \$5.2 billion German Foundation, funded 50-50 by the German government and German industry, has distributed approximately \$5 billion to approximately 1 million victims, with 80% going to former slave and forced laborers in amounts between \$7,500-\$500 per person, depending upon the severity of the conditions of labor.

The Swiss Bank case consists of a classic Rule 23(e) settlement agreement creating five classes: bank account, slave labor for Swiss companies; slave labor for German companies; victims of looting; and refugees. In order to qualify for membership in four of the five classes, a claimant must be a Jew, a Jehovah's Witness, Sinti-Roma, gay, or disabled. Membership in the slave labor for Swiss companies class is unlimited.

Allocation among the classes and the victims groups is handled initially by a Special Master, who recommends allocations to the Court, which then holds a hearing. I serve as Lead Settlement Counsel for everyone pursuant to a virtually unique arrangement designed to satisfy *Amchem* without plunging the administration of the settlement into a welter of adversary arguments between and among categories of victims.

The German Foundation was created by the Berlin Accords, three documents signed in Berlin on July 17, 2000 – a Joint Statement of Principles setting forth the basic bargain that calls for dismissal of all U.S. cases in return for the creation of a \$5.2 billion German Foundation; an Executive Agreement between Germany and the United States providing a degree of protection against future lawsuits arising out of WW II behavior; and the Foundation Law, a statute of the Bundestag creating the Foundation, providing for its governance by a 27 person international Board of Trustees, and setting forth detailed, pre-negotiated allocations for various categories of victims. The United States has two seats on the Board of Trustees – one member of the State department; one private lawyer representing the victims – both appointed by the Executive. I have served as the United States’ lawyer-trustee since 2000.

The simultaneous administration of the Swiss case and the German Foundation, serving many of the same victims, and involving many of the same administrators, provides a textbook opportunity for a comparative look at the strengths and weaknesses of Rule 23 judicial/and German Foundation non-judicial methods of organizing and disbursing reparations payments. I will contrast the operations of the two parallel institutions, and hazard some thoughts on their relative performance.

Persons interested in the topic may want to read an earlier descriptive piece setting out the basic structure of the two reparations systems. Burt Neuborne, Preliminary Reflections on Holocaust-Era Litigation in American Courts, 80 Wash. U. L. Q. 795 (2002).

Gluttons for punishment may want to read some of the voluminous case law produced by the two settlements:

Selected Swiss Bank case law:

In re Holocaust Victim Assets Litig., 105 F. Supp.2d 139 (EDNY 2000)(describing litigation and upholding fairness of settlement)

In re Holocaust Victim Assets Litig., 225 F.3d 191 (2nd Cir. 2000)(upholding definition of settlement class)

In re Holocaust Victim Assets Litig., 413 F.3d 183 (2nd Cir. 2002)(upholding allocation plan and use of *cy pres* doctrine)

In re Holocaust Victim Assets Litig., 424 F.3d 132 (2nd Cir. 2005), cert denied, ___U.S.__(2006). (upholding structure of settlement and *cy pres* allocation)

In re Holocaust Victim Assets Litig., 270 F. Supp.2d 313 (EDNY)(setting ground rules for attorneys fees)

In re Holocaust Victim Assets Litig., 302 F. Supp.2d 889, rehearing den., 311 F. Supp.2d 363 (EDNY 2004), aff'd 424 F.3d 150 (2nd Cir. 2005)(denying attorneys fees to Samuel Dubbin)

Selected German Foundation case law:

In re Nazi Era Cases Against German Defendants Litig., 198 F.R.D. 429 (D.N.J. 2000)(describing German Foundation and granting leave to dismiss 50 pending cases);

Frumkin v. JA Jones, Inc., 129 F. Supp.2d 370 (D.N.J. 2001)(enforcing provisions of Executive Agreement)

Duveen v. U.S. Dist. Court, 250 F.3d 156 (2nd Cir. 2001)(granting writ of mandamus permitting establishment of German Foundation)

Gross v. German Foundation Industrial Initiative, 456 F.3d 363 (3rd Cir 2006)(rejecting political question defense to attempt to enforce promises contained in Joint Statement)

Burger-Fischer v. Degussa AG, 65 F. Supp.2d 248 (D.N.J. 1999), appeal withdrawn as moot after creation of German Foundation)(dismissing complaint as non-justiciable)