New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 258—NO. 95
THURSDAY, NOVEMBER 16, 2017

Outside Counsel

Expert Analysis

Prizing Apart Bad Facts From Good Law

BY LANIER SAPERSTEIN, MARK SULLIVAN AND KRISTA BOLLES

Early next month the U.S. Supreme Court will hear argument in *Rubin v. Islamic Republic of Iran*, 137 S. Ct. 2326, 2327 (2017) to decide a hotly contested issue that pits the Ninth, Second and District of Columbia Circuits, on one side, against the Seventh Circuit, the U.S. government and the University of Chicago, on the other. The issue arises out of a 2008 Congressional amendment to the Foreign Sovereign Immunities Act (FSIA). In enacting §1610(g) as part of the National Defense Authorization Act of 2008, Congress made changes to the FSIA as applied to state-sponsored terrorism. Section 1610(g) eased the process for victims of state-sponsored terrorism to enforce judgments by eliminating the rule that property of foreign sovereigns and their instrumentalities are treated separately for execution purposes. Therefore, a terrorism victim who obtains a judgment against a foreign state can execute on property of the foreign state and on property of agencies or instrumentalities of that foreign state. The question in the *Rubin* appeal is whether §1610(g) also establishes a freestanding terrorism exception to execution immunity that allows a judgment creditor to go after all of that foreign state's assets located in the United States to satisfy the judgment, or only property used for commercial activity pursuant to the FSIA's preexisting exceptions to attachment and execution immunity. While it is a seemingly esoteric issue, its resolution has real world consequences.

LANIER SAPERSTEIN *and* MARK SULLIVAN *are partners and* KRISTA BOLLES *is an associate at Dorsey & Whitney.*

The policy implications animating the case are significant. The petitioners, who are victims of an awful terrorist attack, have struggled unsuccessfully for nearly 15 years to collect on their default judgment against Iran. Yet, this "plaintiffs' diplomacy," a term coined by Prof. Anne-Marie Slaughter of Princeton University to describe the trend of plaintiffs suing sovereigns via claims created by Congress, unsettles key U.S. allies and complicates sensitive U.S. diplomacy by undermining attempts to ease tensions with countries such as Iran. See Anne-Marie Slaughter & David Bosco, Plaintiff's Diplomacy, 79 Foreign Aff. 102, 103 (2000). Indeed, the U.S. government submitted an amicus brief over the summer agreeing with the Seventh Circuit's interpretation of §1610(g), explaining that the overly broad seizure of a foreign sovereign's property in the United States can negatively affect the United States's foreign relations. So, on an emotional level, one would hope the petitioners prevail in their appeal. But the law as well as broader policy implications would suggest that the U.S. Supreme Court take a more measured approach, siding with the U.S. government and affirming the Seventh Circuit's ruling.

Seventh Circuit's Decision

The petitioners are U.S. citizens (joined by their close relatives) who survived a suicide bombing attack carried out by Hamas in Jerusalem on Sept. 4, 1997. Petitioners hold a $71.5 million default judgment against Iran based on Iran's alleged sponsorship of the attack. Petitioners sought to satisfy their default judgment by attaching and executing on the Persepolis collection of ancient Persian artifacts, which consists of approximately 30,000 clay tablets and fragments containing some of the oldest examples of human writing. Iran owns the Persepolis collection but it has been on loan to the respondent, the University of Chicago, since 1937 for study. The Seventh Circuit rejected the petitioners' efforts, and hence their appeal to the Supreme Court.

The policy implications animating the case are significant.

Under what is known as the *Bancec* doctrine, there is a presumption of separateness between a foreign state and its agencies and instrumentalities. That is, separate agencies and instrumentalities of a foreign state cannot be held liable for the debts of their foreign sovereign owners. Federal courts in the United States have developed a set of five factors to determine whether, in limited circumstances, the *Bancec* presumption of separateness may be overcome to permit veil-piercing. In *Rubin*, the Seventh Circuit reasoned that §1610(g)'s inclusion of the five *Bancec* factors (permitting veil piercing regardless of whether they are met) was clear evidence that §1610(g) was a measure aimed at abrogating the *Bancec* presumption of separateness with respect to terrorism judgments, and nothing more. Basing its decision on statutory interpretation, the court concluded that §1610(g) expands the potential assets available for post-judgment execution by enabling terrorism judgment creditors to execute upon the property of a foreign state's juridically separate agencies and instrumentalities, provided one of the commercial activity exceptions to execution immunity in FSIA is met.

Ninth Circuit Reached A Different Result

In contrast, the Ninth Circuit concluded that the text of §1610 is ambiguous, and resorted to legislative history. While it agreed with the Seventh Circuit that §1610(g) abrogated

the *Bancec* presumption of separateness for terrorism judgments, it went further and held that §1610(g) abrogated execution immunity entirely for terrorism judgments. The court held that §1610(g) established an independent terrorism exception to execution immunity that allows for attachment and execution upon *all* property of state sponsors of terrorism, regardless of whether one of the commercial activity exceptions is met. The Ninth Circuit reasoned that its expansive interpretation effectuated the congressional intent behind §1610(g), which, according to the Ninth Circuit, was to ease the collection process for successful terrorism victims by subjecting any property a foreign state sponsor of terrorism has a beneficial ownership in to attachment and execution.

The D.C. and Second Circuits have also joined with the Ninth Circuit in finding, albeit without analysis, that §1610(g) constitutes an independent exception to execution immunity for terrorism judgments, irrespective of whether the assets at issue have any nexus to commercial activity.

Policy Considerations

The Supreme Court must decide whether §1610(g) simply modifies the existing exceptions to executional immunity under the FSIA by permitting attachment and execution against the commercial property of a foreign state and the foreign state's agencies and instrumentalities, as the Seventh Circuit held, or instead establishes a freestanding terrorism exception to execution immunity, as the Ninth Circuit held.

While the terrorism victims in both cases certainly deserve justice, the Seventh Circuit's decision is supported by the text of the statute, and it is also consistent with the common law "restrictive theory" of foreign immunity. Under the restrictive theory, foreign sovereigns enjoyed jurisdictional immunity for their sovereign or public acts, but not for their private or commercial acts, and their property was absolutely immune from execution. The FSIA codified a narrower version of that theory, permitting execution upon the commercial property of foreign states. The Ninth Circuit's decision, however, upends traditional notions of sovereign immunity by allowing a foreign state's property of any kind to be seized, even if the state uses the property in an entirely sovereign, non-commercial, capacity.

Judicial seizure by the United States of a foreign sovereign's property constitutes a serious affront to the dignity of the foreign government, particularly so with terrorism judgments reaching into the billions of dollars.

Further, judicial seizure by the United States of a foreign sovereign's property constitutes a serious affront to the dignity of the foreign government, particularly so with terrorism judgments reaching into the billions of dollars. The Seventh Circuit's holding is the wiser course, as unwarranted judicial expansion of the exceptions to foreign sovereign immunity poses significant impediments to U.S. foreign relations and diplomacy, particularly with respect to countries such as Iran, where relations are already strained. Moreover, indiscriminate execution upon any property of a foreign state sponsor of terrorism seems a rather blunt instrument to combat state-sponsored terrorism. As Professor Slaughter has noted, "Massive court judgments against rogue states are clumsy weapons that, if complied with, would ultimately place the heaviest burden on the general population, not their rulers." Slaughter, *supra*, at 113. In this case, executing upon the Persepolis collection would harm Iran's cultural heritage, not its government.

Reprinted with permission from the November 16, 2017 edition of the NEW YORK LAW JOURNAL © 2017 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-11-17-21