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Legal Sidebar

United States Off the Hook for Vacated Terror Judgment against Libya

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Update: The United States Court of Appeals for the Federal Circuit affirmed the decision below in Alimanestianu v. United States, *disagreeing with plaintiffs that a 2015 Supreme Court case*, Horne v. Department of Agriculture*, required a different result. The plaintiffs argued that under* Horne*, the loss of their right to collect on the judgment against Libya amounted to a* per se *taking for which the government is categorically obligated to pay just compensation. The appellate court disagreed, emphasizing that* Horne *involved a physical appropriation of property (portions of a raisin crop) rather than the espousal of a claim against a foreign government, which did not involve a physical invasion of property. The court concluded that* Horne *did not disturb its precedent holding the government's espousal of a claim against a foreign sovereign is not a compensable taking of property rights. The plaintiffs may appeal the decision to the Supreme Court.*

The original post from January 17, 2017, follows below.

The United States Court of Federal Claims in late December 2016 denied the claim of the family of a U.S. victim of Libyan-sponsored terrorism for compensation from the United States. The lawsuit essentially seeks to make up the difference between what a federal district court judge had awarded against Libya (about $1.3 billion) and what the Foreign Claims Settlement Commission of the United States (FCSC) awarded ($10.8 million) under the 2008 Claims Settlement Agreement with Libya, as ratified by the Libyan Claims Resolution Act (LCRA). At the time, Libya's government was led by Muammar al Qadhafi, who was toppled by an uprising in 2011. The family of Mihai Alimanestianu, who was killed in 1989 by the bombing of UTA Flight 772 over Niger, argued that the U.S. government's settlement of terrorism claims against Libya effected a taking of their previously obtained district court judgment and therefore required just compensation under the Fifth Amendment's Taking Clause.

Background

The Alimanestianu family, along with the families of six other U.S. nationals who perished in the airliner bombing, sued Libya in 2002 in the U.S. District Court in D.C. in a case captioned *Pugh v. Socialist People's Libyan Arab Jamahiriya*. The plaintiffs asserted claims against the Libyan government under the

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state-sponsored terrorism exception to the Foreign Sovereign Immunities Act (FSIA). The terrorism exception stripped Libya of sovereign immunity with respect to certain claims stemming from its acts of state-sponsored terrorism. (Libya's designation as a state sponsor of terrorism was lifted in 2006, but its immunity for prior conduct was not restored.) The lawsuit also asserted claims under the Anti-Terrorism Act (ATA) against six named high-level Libyan officials who had been convicted in absentia in France for their roles in the bombing. Rejecting Libya's contention that the court lacked jurisdiction over the defendants, the court awarded the seven *Pugh* families a total of more than $6.9 billion. Damages were trebled against the individual defendants pursuant to the ATA, which significantly raised the level of damages above those in similar cases. The defendants appealed.

On the same day the appeal was filed (August 14, 2008), Libya and the United States entered into the Claims Settlement Agreement, which restored Libya's sovereign immunity to terrorism lawsuits in exchange for the creation of a "humanitarian settlement fund" containing $1.5 billion for the compensation of U.S. victims of Libyan terrorism. The LCRA restored sovereign immunity to Libya and its agencies and instrumentalities, officials, and property, upon certification that Libya had provided funds sufficient to cover settlements it had already agreed to pay to victims of the Pan Am 103 airliner bombing and the LaBelle Disco bombing, as well as to provide "fair compensation" to U.S. nationals who had pending cases against Libya, which included the Alimanestianu family.

After the Secretary of State made the appropriate certification, President George W. Bush mandated that the claims of U.S. nationals covered under the CSA were espoused (i.e., taken over and asserted) by the United States, ending U.S. courts' jurisdiction. The executive order also terminated pending suits, including those with judgments still subject to appeal, coming within the terms of the CSA. The U.S. Court of Appeals for the D.C. Circuit granted the United States' motion to intervene in Libya's appeal of the *Pugh* decision, vacated the district court's judgment, and ordered the case dismissed.

The Alimanestianu family filed their claims with the FCSC, which awarded the decedent's estate $10 million and each of the decedent's four children $200,000, but denied compensation to the estates of three brothers and to the widow. The FCSC rejected the family's claim for extra compensation because it found that the award of their district court judgment did not constitute a special circumstance warranting compensation above the $10 million awarded for the death of the victim (the standard amount recommended by the State Department as roughly equivalent to the Lockerbie plaintiffs' settlement). The Alimanestianu family brought suit against the United States.

"Taking" Factors

While the judge had earlier rejected the government's contention that the Alimanestianu family's judgment was non-final and thus had not vested sufficiently to become a protected property interest, she nevertheless concluded that no compensation is due. Citing circuit precedent in takings cases involving government espousal and settlement of claims against foreign governments, the court applied the three-part test originally set out in the 1978 Supreme Court decision, *Penn Central Transportation Co. v. New York City*, to establish the existence of a compensable taking. The three factors are: (1) the economic impact of the government action; (2) the "extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) the character of the governmental action.

Addressing the second factor first, the court concluded that the government's espousal of the plaintiffs' claims against Libya did not interfere with plaintiffs' reasonable expectation of actually collecting the $1.3 billion judgment from Libya. At the time of the injury in 1989, the court explained, plaintiffs could not have expected to receive any compensation from Libya because the state-sponsored terrorism exception to the sovereign immunity of foreign states was not enacted until 1996. Noting the difficulty terrorism victims have encountered attempting to satisfy judgments against foreign states since that time, the court concluded that the plaintiffs' ability to secure payment was purely speculative. Here, the court explained, "the Government provided an alternative tailored to the circumstances which produced a result as favorable to the plaintiffs as could reasonably be expected."

Analyzing the third factor, the court emphasized that the character of the governmental action was permeated by its conduct of foreign affairs and executive authority to settle the claims of its nationals with foreign governments. The court viewed the plaintiffs' property interests as "necessarily constrained by their own Government's paramount right to conduct foreign affairs and concomitant right to compromise its nationals' claims in the process." This principle, along with the ever-present possibility that a change in foreign sovereign immunity law or its application to Libya might render a lawsuit impossible further diminished the Alimanestianu family's expectation of recovery.

Finally, with respect to the economic factor, the court described the government's conduct as beneficial to the plaintiffs by enabling them to recover $10.8 million through the FCSC Libya program, especially considering the reasonable expectation of receiving nothing by continuing to pursue the lawsuit against Libya. Thus, the alternative forum provided through the FCSC could not be said to be "demonstrably and measurably inferior" to plaintiffs' right to pursue their claims against Libya in federal court and attempt to enforce any judgment that might be sustained on appeal.

Accordingly, the court concluded that here, as in similar previous cases, "Plaintiffs' dissatisfaction with the settlement amount negotiated by the Government and the compensation awarded by the Commission do not establish a compensable taking."

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