

Client Alert

June 2014

U.S. Supreme Court Denies Foreign Sovereigns Special Protection From Post-Judgment Discovery

On June 16, 2014, the Supreme Court issued its opinion in *Republic of Argentina v. NML Capital, Ltd.*, which could lead to more prolific post-judgment discovery against foreign sovereigns. Lower courts might also interpret the decision as requiring them to show less deference to the executive branch when dealing with matters that implicate foreign relations, and more deference towards a strict interpretation of statutory text.

After Argentina defaulted in 2001, it urged bond-holding investors to participate in two debt swaps in 2005 and 2010. While the grand majority of those investors agreed to the debt swaps, and thus received only a portion of the original value of their bonds, a handful of investors did not. Respondent NML Capital, Ltd. is a holder of the original bonds and brought various suits against Argentina in the Southern District of New York. NML Capital prevailed and attempted to obtain post-judgment discovery from two banks which supposedly handle Argentina's accounts. The district court ruled in favor of NML Capital allowing the discovery. The United States Court of Appeals for the Second Circuit upheld the district court ruling. Argentina again appealed and argued that the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§ 1330, 1602 *et seq.*) ("FSIA") prevented the kind of broad-sweeping discovery NML Capital was seeking. The United States Government made a similar argument in its *amicus* brief in support of Argentina.

In a 7-to-1 ruling,¹ the Court affirmed the appellate court's ruling that the FSIA does not expressly address post-judgment discovery, and, as a result, traditional discovery principles under the Federal Rules of Civil Procedure apply. In an opinion authored by Justice Scalia, the Court states that the FSIA is a comprehensive act, enacted to replace an "executive-driven, factor-intensive, loosely common-law-based immunity regime." As such, any immunity defense must be found in the text of the act. The Court further held that although FSIA does grant certain immunities from executions against sovereigns' property, it does not prevent the exchange of information regarding that property.

Some U.S. courts may interpret the opinion to mean that they should show less deference to the preferences of the executive branch when it comes to matters that implicate foreign relations. Although Argentina and the United States Government argued that the Court's ruling would undermine international comity, provoke adverse treatment of the United States in foreign proceedings, and generally harm the United States' foreign relations, the Court stated that "[those] apprehensions are better directed to that branch of government with authority to amend the Act—which, as it happens, is the same branch that forced our retirement from the immunity-by-factor-balancing business nearly 40 years ago." This departs from previous Circuit Court holdings which seemingly adopt the U.S. Government's position. Here, the Court places emphasis on the FSIA's statutory text.

Without any sort of FSIA immunity against discovery, and without granting deference to the executive branch, this decision could lead to greater post-judgment discovery against sovereigns. Those who oppose that discovery, however, may be able to achieve comparable results under traditional discovery objections—particularly relevance. For example, the Court stated that if the subpoenas at issue only

¹ Justice Sotomayor recused herself from the case. Justice Ginsburg was the sole dissenter.

sought information regarding assets that were entitled to immunity under the FSIA, then they would not be “relevant” under Federal Rule of Civil Procedure 26. Any party seeking to obtain or prevent post-judgment discovery against a sovereign nation should consult with counsel regarding the impact of this decision.

Contacts

Gustavo J. Membiela
gmembiela@hunton.com

Jordi C. Martínez-Cid
jmartinez-cid@hunton.com

© 2014 Hunton & Williams LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.