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9th Circuit to Reconsider Armenian Genocide Case En Banc

The 9th Circuit has ordered an en banc rehearing of a challenge to a California statute that has spawned lawsuits against insurance firms on behalf of victims of the Armenian genocide. Earlier, a three-judge panel had upheld the statute, reversing its own initial decision dismissing the case.

Amanda Bronstad

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A federal appeals court has ordered an en banc rehearing of a challenge to a California statute that has spawned lawsuits against insurance firms on behalf of victims of the Armenian genocide.

The case, against two German insurers and their parent company, Munchener Ruckversicherungs Gesellschaft A.G., or Munich Re, will be reheard in oral arguments during the week of Dec. 12 in San Francisco, according to a Nov. 7 order by the 9th U.S. Circuit Court of Appeals.

Earlier, a three-judge panel had upheld the statute, reversing its own initial decision dismissing the case.

"We're delighted that the court has agreed to rehear the decision," said Neil Soltman, a partner in the Los Angeles office of Mayer Brown who represents Munich Re. "We think reversal of the initial decision was obviously incorrect and we're glad to have the opportunity to present it to the full en banc court."

Brian Kabateck, a partner at Kabateck Brown Kellner in Los Angeles, and one of the lead plaintiffs attorneys in the case, said he wasn't surprised by the decision.

"Obviously, we would have preferred they denied it," he said. "But I do think in one respect it's important, because this is an important issue with respect to the Armenian genocide and it's important that possibly this case reach the Supreme Court to deal with the question of the recognition of the Armenian genocide."

Between 1915 and 1923, more than 1.5 million Armenians died at the hands of the Ottoman Empire. The government of modern Turkey, an important member of the North Atlantic Treaty Organization, has strenuously denied that any genocide occurred, and the U.S. does not recognize the episode as genocide.

Kabateck and Mark Geragos have taken the lead in filing cases against insurance firms and banks on behalf of Armenian descendants of genocide victims, often obtaining big settlements. In 2004, New York Life Insurance Co. agreed to pay \$20 million, and in 2005 AXA S.A. agreed to a \$17 million settlement.

The latest case was filed in 2003 by Vazken Movsesian, a priest in the Armenian Apostolic Church, as a class action. Munich Re moved to dismiss, arguing that the foreign-affairs doctrine pre-empted the statute, which also violated the due process clause of the United States Constitution. Munich Re cited failed legislative efforts in the United States to formally recognize the Armenian genocide.

In 2007, U.S. District Court Judge Christina Snyder in Los Angeles rejected the company's motion, prompting Munich Re's appeal to the 9th Circuit.

The en banc hearing will be the third go-round for the case before the appellate court. In 2009, a three-judge panel initially upheld dismissal for Munich Re in a 2-1 decision, concluding that the California statute -- Section 354.4 of the California Code of Civil Procedure, approved in 2000 to extend the statute of limitations for Armenians to file insurance claims -- was unconstitutional. The court also found that U.S. foreign policy pre-empted the California law, citing the U.S. Supreme Court's 2003 decision in *American Insurance Associates v. Garamendi*, which concluded that U.S. foreign policy pre-empted a California law granting insurance relief for Holocaust victims.

The 9th Circuit used the same reasoning in another case heard at the same time, striking down a 2002 California law meant to help plaintiffs recover artwork allegedly looted by the Nazis in *Von Saher v. Norton Simon Museum*.

In the Munich Re case, the majority opinion came from Dorothy Nelson and the late David Thompson, with Harry Pregerson dissenting.

But on Dec. 10, 2010, in a rehearing by the same panel, Nelson reversed course and sided with Pregerson. In that 2-1 decision, the panel found that there was no "express federal policy forbidding states to use the term 'Armenian Genocide'" and that, unlike the Holocaust, no executive agreements existed to resolve victim claims.

"The panel's holding is both incorrect and a danger to U.S. interests," wrote Soltman, Munich Re's attorney, in a Jan. 3 petition to rehear the decision en banc. "The panel consequently misapplied the law governing an area of national importance and international sensitivity, allowing California to interfere with the President's authority to determine foreign policy and threatening vital U.S. interests," he wrote.

Joining Munich Re was the Republic of Turkey, which filed an amicus brief.

In their response, filed on Feb. 1, Kabateck and Geragos of the Law Offices of Geragos & Geragos, said a few "carefully selected remarks" from government officials did not constitute a foreign policy position on the Armenian genocide.

The Armenian Bar Association; the Center for the Study of Law & Genocide at Loyola Law School, Los Angeles; U.S. Rep. Adam Schiff, D-Calif.; and various human rights organizations filed briefs supporting the claims.

In several notices filed with the court, Soltman noted the U.S. Supreme Court's June 27 refusal to hear a petition to overturn the 9th Circuit's ruling in *Norton Simon*, the case over alleged Nazi looting of artwork. Also in that case, the U.S. solicitor general filed a brief to deny review.

Soltman said that decision meant the Munich Re case was ripe for en banc review.

"The two cases in our view are indistinguishable from one another, yet after the panel changed its decision, the two decisions didn't make any sense," he said. "The art case and our case were no longer consistent with each other, and the whole purpose of the en banc procedure is to eliminate inconsistencies with the circuit's cases. This is a perfect example."

Kabateck disagreed that there was a conflict in the circuit.

"They're politically completely different events. Our position is the United States government has never taken a position on the genocide. It's not in conflict," he said. "We've got an issue where we're not running contrary to, not afoul of, a particular policy of the United States."

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