

Justices Nix Expanded Sovereign Immunity Ruling

By **Caroline Simson**

Law360 (February 21, 2025, 10:36 AM EST) -- The U.S. Supreme Court on Friday overturned a D.C. Circuit ruling greenlighting expropriation claims brought by Holocaust survivors against Hungary, ruling that the historical commingling of assets is not enough to overcome the country's sovereign immunity.

In a unanimous ruling authored by Justice Sonia Sotomayor, the high court concluded that alleging the commingling of funds alone is not enough to invoke the expropriation exception in the Foreign Sovereign Immunities Act, under which plaintiffs must sufficiently show that funds from expropriated property have been used for a commercial purpose in the U.S.

The justices concluded that the plaintiffs' allegations that Hungary deposited the proceeds from the sale of their expropriated property into an account at some time and eventually used that account for commercial activity in the U.S. did not satisfy that requirement.

"That is because an allegation of commingling alone does not give rise to a plausible inference that the specific property 'exchanged for' the expropriated property, i.e., the cash proceeds from the sale, is 'present in the United States,'" the opinion says. "To the contrary, it will typically be indeterminate whether an expenditure of commingled funds includes any of the proceeds connected to the expropriated property."

"Commingling allegations are therefore not enough on their own because they do not allow for plausible tracing of specific funds," according to the opinion. "To conclude otherwise requires accepting an attenuated fiction that commingling funds in an account, even if done decades earlier, means the account today still contains funds attributable to the sale of expropriated property."

The Supreme Court noted that the issue is particularly acute in the present suit since Hungary is alleged to have used commingled funds not just for commercial activities in the U.S., but also for commercial and governmental operations all over the world. That means it's no more likely that the funds connected to the expropriated property ended up in the U.S., rather than elsewhere in the world, according to the opinion.

The justices did leave the door open for plaintiffs to overcome sovereign immunity using some version of the commingled funds theory — just not the one asserted in the present suit.

"The court does not today purport to identify all circumstances in which commingling allegations may be part of broader allegations that collectively satisfy §1605(a)(3)'s commercial nexus," the justices wrote,

referring to the relevant section of the FSIA. "Instead, the court holds only that an allegation that a foreign sovereign liquidated expropriated property, commingled the proceeds with other funds, and then used some of those commingled funds for commercial activities in the United States (or that a foreign instrumentality retained such proceeds and then commingled them with other funds) cannot itself establish the required commercial nexus of §1605(a)(3)."

The case relates to the Hungarian government's confiscation of property owned by Jews during the Holocaust and whether survivors of the Holocaust in Hungary can sue the Hungarian government in the United States over the expropriation of this property.

The plaintiffs invoke the FSIA's expropriation exception as a means to pierce the Hungarian state's sovereign immunity and assert jurisdiction in federal district court. During a hearing in December, the justices appeared dubious about the D.C. Circuit's decision finding that the plaintiffs had overcome this jurisdictional hurdle by arguing that the proceeds of expropriated items were historically commingled with the country's general revenues.

At issue in particular in the case is a provision in the FSIA's expropriation exception under which claims involving rights in property taken in violation of international law may be heard if "property or any property exchanged for such property" has a commercial nexus with the United States.

In the case, the plaintiffs, including a woman called Rosalie Simon, accuse Hungary and its national railway, Magyar Államvasutak Zrt., of violating international law when it seized their property.

The case was previously before the justices in 2021 when they vacated a decision from the D.C. Circuit allowing the case to proceed in line with their decision in *Federal Republic of Germany v. Philipp*. In that case, the justices rejected an argument asserted by the heirs of German Jewish art dealers that their claims fell within the FSIA's expropriation exception since the forced sale of a collection of medieval relics known as the Welfenschatz constituted an act of genocide.

Rosalie Simon, Rosanna Weksberg Finkelberg (as heir to Helena Weksberg), Rose Miller and Thomas Schlanger (as heir to Ella Feuerstein Schlanger) are represented by Shay Dvoretzky, Parker Rider-Longmaid, Timothy G. Nelson and Adam Cohen of Skadden Arps Slate Meagher & Flom LLP, Charles S. Fax of Rifkin Weiner Livingston LLC, David H. Weinstein of Weinstein Kitchenoff & Asher LLC and L. Marc Zell and Noam Schreiber of Zell Aron & Co.

Hungary is represented by Joshua S. Glasgow of Phillips Lytle LLP.

The case is *Republic of Hungary et al. v. Rosalie Simon et al.*, case number 23-867, in the Supreme Court of the United States.

--Editing by Daniel King.