Bloomberg BNA

The United States
Law Week
Case Alert & Legal News™

VOL. 84, NO. 48 JUNE 23, 2016

Foreign Affairs—Sovereign Immunity

Grassley Considers FSIA Fix, Cites China National Drywall Suit

A ''fix may be in order'' for the Foreign Sovereign Immunities Act to allow suits against foreign state-owned companies, such as a contaminated drywall suit against China National Building Materials Group, Sen. Chuck Grassley (R-Iowa) said.

CNBMG is the parent company of a manufacturer of drywall, which allegedly made some New Orleans homes uninhabitable.

But Congress should wait because the act protects U.S. sovereign immunity and ''shouldn't be tinkered with lightly,'' John B. Bellinger III, former State Department legal adviser in the George W. Bush administration, told Bloomberg BNA by e-mail June 22.

Grassley suggested in prepared remarks released June 21 that foreign state-owned companies are taking advantage of sovereign immunity ''to avoid having to answer a lawsuit entirely in a way the FSIA doesn't contemplate.''

Chinese Drywall Litigation. The act's commercial activity exception is intended ''to treat foreign governments like any other market actor when they enter into commerce,'' the Senate Judiciary Committee chairman said.

But companies like CNBMG ''are arguing that many of their affiliates don't have to answer the claims of American companies and consumers,'' even if ''it's clear that at some level the company engaged in market activity that may have harmed Americans.''

A district court found CNBMG was immune from a suit alleging that drywall installed in New Orleans after Hurricane Katrina caused health problems, *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, No. 09-02047, 2016 BL 131813 (E.D. La. March 9, 2016).

As a result of the FSIA's ''early dismissal mechanism,'' the plaintiffs ''could only proceed against one subsidiary'' of CNBMG, Grassley said.

Waiting Recommended. Bellinger—who is now head of the international law practice at Arnold & Porter, Washington—isn't convinced that an FSIA fix is necessary immediately, if at all.

''At the very minimum, Congress should wait for more court decisions and potentially for a Supreme Court decision, rather than acting hastily to amend the FSIA to reverse a couple of lower court rulings,'' he said.

It's not clear to Bellinger ''that the statute needs to be amended to allow lawsuits against the foreign state-owned companies that own the companies that engage in business'' in the U.S., he said.

The act already has a ''broad'' commercial activities exception that allows suits against such companies, he said.

Further, the act ''is a very important statute that protects the sovereign immunity of the United States and reflects generally accepted principles of international law.''

The U.S. therefore ''has more to lose than to gain by stripping other countries of their sovereign immunity.''

Bellinger has previously warned that ''Congress should be very cautious about amending legislation, especially the Foreign Sovereign Immunities Act, to help plaintiffs' lawyers when they have lost in court.''

Discovery Alternative. One alternative already exists to address part of Grassley's concerns, Ingrid Wuerth, director of the international legal studies program at Vanderbilt Law School, Nashville, told Bloomberg BNA by e-mail June 22.

Grassley is concerned ''that plaintiffs may not understand the corporate structure of the foreign entities they are suing under'' the Act, Wuerth said.

But ''jurisdictional discovery,'' which ''typically occurs early in the litigation,'' enables plaintiffs to learn about such structures.

Grassley is also concerned ''that foreign corporations may avoid liability under circumstances in which private corporate entries would be liable,'' she said.

But ''the presumption that legally distinct corporate entities cannot be held liable for each other's conduct is a principle taken from general corporate law and is not unique to the FSIA,'' she said.

Private corporate defendants also benefit from that principle, not just foreign state-owned companies, she said.

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 ISSN 0148-8139

  LW ISSN 0148-8139