

Marquette University Law School

Marquette Law Scholarly Commons

Faculty Publications

Faculty Scholarship

2008

When May a Government Challenge a Decision That an Action Can Proceed In Its Absence?

Jay E. Grenig

Marquette University Law School, jay.grenig@marquette.edu

Follow this and additional works at: <https://scholarship.law.marquette.edu/facpub>



Part of the [Law Commons](#)

Publication Information

Jay E. Grenig, When May a Government Challenge a Decision That an Action Can Proceed In Its Absence?, 35 Preview U.S. Sup. Ct. Cas. 267 (2008). © 2008 American Bar Association. This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Repository Citation

Grenig, Jay E., "When May a Government Challenge a Decision That an Action Can Proceed In Its Absence?" (2008). *Faculty Publications*. 452.

<https://scholarship.law.marquette.edu/facpub/452>

This Article is brought to you for free and open access by the Faculty Scholarship at Marquette Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

When May a Government Challenge a Decision That an Action Can Proceed in Its Absence?

by Jay E. Grenig

PREVIEW of *United States Supreme Court Cases*, pages 267–272. © 2008 American Bar Association.

Jay E. Grenig is a professor of law at Marquette University Law School in Milwaukee, Wisconsin. He is co-author of *Electronic Discovery And Records Management*. Prof. Grenig can be reached at jgrenig@earthlink.net or (262) 646-3324.

ISSUE

May a district court award property claimed by a foreign government even when that government is absent from the litigation by virtue of its invocation of sovereign immunity?

FACTS

This litigation is part of an ongoing dispute between the government of the Republic of the Philippines and creditors of the estate of Ferdinand E. Marcos over assets Marcos allegedly secreted from the government while he was president of the Philippines. In 1972, Marcos transferred approximately \$2 million to Arelma, S.A., a Panamanian stock corporation. Arelma invested the funds with Merrill Lynch, Pierce, Fenner & Smith in New York. By 2000 that investment had grown to approximately \$35 million. The shares of Arelma, a Panamanian corporation, are held in escrow by the Philippine National Bank pending an ownership determination by the Philippine courts.

After Marcos was deposed from power in 1986, President Corazon Aquino created the Presidential Commission on Good Government (PCGG), an agency charged with recovering assets of the republic wrongfully acquired by Marcos while he was in office. In July 2000, the PCGG asked Merrill Lynch to turn over the Arelma assets to the Philippine National Bank. The PCGG proposed the bank act as an escrow agent and hold the assets pending a ruling in the Sandiganbayan, a Philippine anti-corruption court, on whether the assets belonged to the Republic or to the Marcos estate.

Merrill Lynch denied the request, apparently because of the existence of other claimants, and instead filed an interpleader action in the U.S. District Court for the District of Hawaii seeking to resolve conflicting claims to the Arelma assets. The complaint named as defendants several possible claimants including the Republic, the PCGG, Philippine National Bank, Arelma, the estate of

(Continued on Page 268)

REPUBLIC OF THE PHILIPPINES
ET AL. V. MARIANO J. PIMENTEL
ET AL.

DOCKET NO. 06-1204.

ARGUMENT DATE:
MARCH 17, 2008
FROM: THE NINTH CIRCUIT

Case at a Glance

This appeal involves an interpleader action brought to settle ownership of assets misappropriated by Ferdinand Marcos when he was president of the Republic of the Philippines. The assets are claimed both by the Republic and by a class of private judgment creditors of the Marcos estate. The Republic was dismissed from the action on sovereign immunity grounds, but the action continued in the absence of the Republic and its Presidential Commission on Good Government.

Roger Roxas, the Golden Budha Corporation, and Mariano J. Pimentel. The Roxas estate and Golden Budha asserted claims on the basis of judgments obtained in state courts.

The estate of Roger Roxas and the Golden Budha Corporation have similar interests. Roxas worked as a locksmith in Baguio City, the Philippines. He was also an amateur treasure hunter. In 1961, Roxas met a man who claimed that his father had been in the Japanese army and had drawn a map identifying the location of the legendary “Yamashita Treasure.” (There is disagreement whether the Yamashita Treasure ever existed.) The treasure purportedly consisted of booty plundered from various Southeast Asian countries during World War II by Japanese troops and allegedly buried in the Philippines during the final battle for the islands to keep it out of the hands of the Americans. (General Yamashita, also known as “the Tiger of Malaya,” was executed for war crimes after World War II.)

Roxas organized a group of partners and laborers to search for the treasure and obtained a permit for that purpose from Judge Pio Marcos, a relative of Ferdinand. Judge Marcos informed Roxas that, in accordance with Philippine law, a 30 percent share of any discovered treasure would have to be paid to the government.

Roxas’s group claimed to have found a network of tunnels. After several weeks spent digging and exploring the tunnels, his group discovered a 10-foot thick concrete enclosure in the floor of the tunnel. In 1971, the group broke through the enclosure. Inside, Roxas discovered a gold-colored Buddha statue, which he estimated to be about three feet in height. The statue was extremely heavy and required 10 men to trans-

port it to the surface using a chain block hoist, ropes, and rolling logs.

On April 5, 1971, men purporting to be from two Philippine national security agencies forced their way into Roxas’s home. They took the treasure and told Roxas that Marcos had ordered the confiscation. Roxas was later tortured and imprisoned. After he filed suit in Hawaii, a jury awarded \$22 billion in compensatory damages and interest for a total award of over \$40 billion. The jury did not award punitive damages. On November 17, 1998, the Hawaii Supreme Court reversed \$22 billion of the judgment and returned the matter to the trial court for a recomputation of the damages. Roxas claimed the Arelma assets both as a creditor of Marcos and on the basis that the \$2 million used by Marcos to set up the Merrill Lynch account were most probably derived from the Yamashita Treasure and can be traced to the property stolen from Roxas.

Pimentel is the representative of 9,539 persons who brought suit against Marcos after his fall from power. In 1996 he won a judgment against Marcos’s estate of nearly \$2 billion. *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir.1996). Pimentel had been arrested two weeks after the declaration of martial law in the Republic in 1972. He was held in detention centers for four out of the next six years. On his trip home from his final detention, the military kidnapped him. They beat him with rifles, breaking his teeth, an arm and a leg and dislocating his ribs. They then took him to a remote sugarcane field, buried him up to his neck, and left him for dead.

The Republic and the PCGG argued that they were entitled to sovereign immunity under the Foreign Sovereign Immunities Act (28 U.S.C.

§ 1604). They also argued that their unavailability because of sovereign immunity required dismissal of the action against them. Pimentel also moved to dismiss the Republic and the PCGG from the suit, claiming they were not “real parties in interest” as required by the Federal Rules of Civil Procedure.

On December 20, 2001, the district court granted Pimentel’s motion to dismiss the Republic and the PCGG. The court concluded that they were not real parties in interest and that they were neither necessary nor indispensable parties because they had no enforceable claim to the Arelma assets. The court declined to decide any issue of sovereign immunity.

On appeal, the Ninth Circuit reversed the district court, holding that since the Republic and the PCGG were immune from suit under the Foreign Sovereign Immunity Act, the district court should have granted their motion to dismiss them on that ground. Because of that immunity, the Ninth Circuit said the district court had no authority to inquire into the merits of their claim. The Ninth Circuit also determined that the Republic and the PCGG were “necessary” parties under Rule 19(a) of the Federal Rules of Civil Procedure who should participate in the action “if feasible” because they have a claim to the assets at issue in the litigation. The Ninth Circuit ordered that the litigation be stayed pending resolution of litigation in the Philippines regarding ownership of the Arelma assets. *In re Republic of the Philippines*, 309 F.3d 1143 (9th Cir. 2002).

The matter was then returned to the district court for further proceedings. The district court dissolved the stay and ruled that the Republic and the PCGG, because

they had been dismissed on sovereign immunity grounds, were not indispensable parties within the meaning of Rule 19(b) of the Federal Rules of Civil Procedure. The district court found it would be unjust to prevent the “Class of Human Rights Victims,” persons tortured, summarily executed, and “disappeared,” from receiving the proceeds of the Arelma account at Merrill Lynch to partially satisfy their judgment. However, it found that Golden Budha and the estate of Roxas had not proved that the assets in the Merrill Lynch account derived from assets allegedly stolen from them. The court concluded that Pimentel and the Class of Human Rights Victims were entitled to the entirety of the interpleaded assets. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Arelma, Inc.*, 2004 WL 5326929 (D. Hawaii 2004).

The Republic and the PCGG appealed the decision. They maintained that they were indispensable parties because the Arelma assets were acquired by Marcos illegally and never lawfully belonged to him but rather from the beginning of his acquisition they belonged to the Republic. The Ninth Circuit found that the Republic and the PCGG were necessary parties because they claim “an interest relating to the subject to the action and [are] so situated that the disposition of the action in [their] absence may (i) as a practical matter impair or impede [their] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [their] claimed interest.”

Recognizing that Federal Rule of Civil Procedure 19(b) distinguishes between “necessary” and “indispensable parties,” the court

explained that indispensability must meet a higher standard than necessity. The court concluded that the Republic and the PCGG were not indispensable parties and affirmed the district court. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp.*, 464 F.3d 885 (9th Cir. 2006).

The Republic, the PCGG, the Philippine National Bank, and Arelma asked the Supreme Court to review the Ninth Circuit’s decision. The Supreme Court granted certiorari on December 3, 2007. In addition to the issue posed by the petition for certiorari, the Supreme Court directed the parties to brief and argue the following question:

Whether the Republic of the Philippines (Republic) and its Presidential Commission on Good Government (PCGG), having been dismissed from the interpleader action based on their successful assertion of foreign immunity, had the right to appeal the district court’s determination that they were not indispensable parties under Federal Rule of Civil Procedure 19(b); and whether the Republic and its PCGG have the right to seek this Court’s review of the court of appeals’s opinion affirming the district court.

CASE ANALYSIS

While the history of this litigation involves tales of hidden treasure, torture, and kidnapping, the case before the Supreme Court concerns procedural issues.

The underlying action in this case is an interpleader action. “Interpleader” is a procedure in which a person holding a fund or stake against which two or more persons have claims that cannot both be satisfied out of the value of the stake may compel the adverse claimants to litigate their claims to the stake in a single suit

that will determine who gets what. Interpleader seeks to avoid double or multiple litigation of the same basic controversy and affords protection against inconsistency of results that might impose unfair liability.

Interpleader prevents the stakeholder from being obliged to determine at its peril which claimant has the better claim, and when the stakeholder has no interest in the fund, forces the claimants to contest what essentially is a controversy between them without embroiling the stakeholder in the litigation over the merits of their respective claims. Even if the stakeholder denies liability, in whole or in part, to one or more of the claimants, interpleader still protects the stakeholder from the vexation of multiple suits and the possibility of multiple liabilities that could result from adverse determinations in different courts. The device also can be used to protect the claimants by bringing them together in one action and reaching an equitable division of a limited fund.

In this action, Merrill Lynch is the stakeholder and the claims include those of the Republic, its PCGG, the Bank, Arelma, the estate of Roger Roxas, the Golden Budha Corporation, and the class of persons represented by Pimentel. The stake is the approximately \$35 million held by Merrill Lynch.

While the Republic and the PCGG were named as defendants in the interpleader action, they were dismissed from the action as a result of their assertion of sovereign immunity. They now claim that, under Rule 19 of the Federal Rules of Civil Procedure, the interpleader action cannot proceed in their absence because they are necessary and indispensable parties.

Normally a plaintiff, including a plaintiff in an interpleader action,

(Continued on Page 270)

has the right to decide who shall be the parties to its lawsuit. This right is defined by the rights of others, however. The interests of a non-party who cannot be joined must be considered.

Rule 19 is intended to protect the interests of absent persons as well as those already before the court from multiple litigation or inconsistent judicial determinations. While a court may not bind absent persons or those who do not have a legally sufficient connection or shared interest with the actual parties, the nonparty's claim or defense may be impaired as a practical matter. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968). The focus of Rule 19 is on the interest of the courts and the public in complete, consistent, and efficient settlement of controversies.

The objection to the failure of a plaintiff to join a party under Rule 19 may be made by a motion to dismiss. However, the court will not dismiss unless the suit cannot continue without the absent parties under Rule 19(b). The burden is on the person making the motion to dismiss to show that the absent party is indispensable and that the action should therefore be dismissed.

Rule 19(a) defines those persons who should be joined as parties to the action. These parties are sometimes characterized as "necessary" or "indispensable." Rule 19(a) is applicable when nonjoinder would have either of the following effects. First, it would prevent complete relief from being accorded among those who are parties to the action or, second, the absentee "claims an interest relating to the subject matter of the action and is so situated" that the nonparty's absence from the action will have a prejudicial effect on that person's ability to protect that interest or will "leave any of the persons already parties sub-

ject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations."

The decision regarding whether a particular nonparty must be joined under Rule 19(a) is made in terms of the general policies of avoiding multiple litigation, providing the parties with complete and effective relief in a single action, and protecting the absent persons from the possible prejudicial effect of deciding the case without them. Consideration of what other alternatives are available to the litigants must also be given.

If one or more of the tests in Rule 19(a) are met, the second sentence of the Rule 19(a) requires that, if the nonparty has not been joined, the court must order that the person be made a party. Difficulties arise when joinder of an absent party is not feasible. When joinder of someone described in Rule 19(a) is not feasible, such as where the absent person has sovereign immunity, the court must examine the four considerations described in Rule 19(b) to determine whether the action may go forward in the nonparty's absence or must be dismissed, "the absent person being thus regarded as indispensable."

When it is not feasible to join someone described in Rule 19(a), Rule 19(b) directs the court to determine "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed." Under Rule 19(b), the court also must evaluate the degree of actual prejudice to the nonparty as opposed to the theoretical possibility that injury will occur. Whether a particular nonparty described in Rule 19(a) will be regarded as indispensable depends to a considerable degree on the circumstances of each case.

Rule 19(b) enumerates four factors that must be given attention by the

court. (These factors are not mutually exclusive and are not the only considerations that may be taken into account in a particular case.)

The first factor is the extent to which adverse consequences may result from proceeding without the absentee. This factor emphasizes the need to protect absent persons from litigation that might adversely affect their interests in the subject matter of the action, including inconsistent judgments, and the need to protect those who are parties from the threat of multiple actions.

The second factor is whether the court has any way to minimize the possible adverse consequences to the absentee. This requires the court to make a fact-specific analysis.

The third factor is whether a judgment rendered in the person's absence will be adequate. This factor recognizes the public's interest in efficient and final disposition of legal disputes.

The fourth factor provided by Rule 19(b) is whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder of the absentee. Dismissal will not be a hardship when a plaintiff is able to bring the action in another federal or state court. However, there may not always be an alternative forum in which all interested parties can be joined.

With respect to the question of whether the Rule 19 issue is properly before the Supreme Court, the petitioners contend that it was properly before the Ninth Court and therefore is properly before the Supreme Court. Petitioners say that the Philippine National Bank and Arelma had an unquestioned right to appeal and seek certiorari. When they did, petitioners argue that the

Supreme Court became obligated to apply Rule 19(b) so as to protect the absent party, who had no opportunity to plead and prove its interest in the lower courts.

Pimentel argues that Arelma and the bank lack standing to raise the issue of the Republic's indispensability on appeal because they no longer challenge the lower courts' rulings that they are not entitled to the disputed assets, and thus they have no further direct interest in the outcome of this litigation.

In addition, the petitioners assert that the Republic had the right to appeal the Rule 19 question on its own. The petitioners note that the Republic was named a party to this litigation and that while a party it requested the relief it is seeking now on appeal and by certiorari. Under the circumstances of this case, petitioners contend the appeal simply permits the Republic to continue pursuing the relief it requested before its technical dismissal from the suit.

Pimentel, however, argues that the Republic does not have the power to appeal the judgment. According to Pimentel, the Republic made the strategic determination to withdraw from this interpleader action, and it chose not to intervene in the trial proceeding even after the trial judge ruled that it was not an indispensable party. Pimentel points out that the Republic is not bound in any way by the rulings made by the lower courts during the course of the interpleader procedure. It is Pimentel's position that allowing the Republic to appeal at this point would be contrary to the core principle that only parties (or those that intervene) can appeal, and allowing the appeal would disrupt the orderly conduct of litigation.

With respect to the merits of this case, petitioners argue that the case

should be dismissed under Rule 19(b). They assert that the sovereign immunity of an absent party is a substantive factor that is compelling and requires dismissal of the action. According to the petitioners, permitting the suit to proceed in the Republic's absence would override its immunity as a practical matter, effectively depriving the Republic of assets it claims under Philippine law and coercing it to participate in the litigation.

Apart from the question of immunity, the petitioners say the Ninth Circuit's analysis misapplied the equitable considerations that bear on indispensability under Rule 19. The petitioners claim the judgment substantially impaired the Republic's interest in the Arelma assets. They reason that the Ninth Circuit's belief that the Republic would not prevail if it brought suit to recover those assets is both legally immaterial and wrong on its own terms. The petitioners state that the judgment could not possibly be structured to protect the Republic's interest.

Disagreeing with the petitioners, Pimentel argues that in determining that the Republic was not an indispensable party to the interpleader the lower courts followed the language of Rule 19(b) and the Supreme Court's guidance in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968). He says the courts' decisions, made after weighing all relevant factors under the standard of equity and good conscience, were not an abuse of discretion.

Pimentel points out that the Republic has participated actively in litigation in U.S. courts regarding purported Marcos assets without previously asserting sovereign immunity in those actions. Pimentel says the Republic has known about

the Arelma assets since at least 1986 and notes that it sought the assistance of a U.S. court to freeze those assets in 1987. Pimentel stresses that prior to the entry of the interpleader judgment, the Republic never made any effort whatsoever to establish its claim to ownership of these assets, in either a Philippine or a U.S. court.

Pimentel points out that the lower courts concluded the assets were owned by Marcos and determined the Class of Human Rights Victims was entitled to these assets. He argues that since the Republic made the strategic decision to withdraw from the interpleader, it should be bound by the consequences of its decision.

The petitioners argue that the judgment could not possibly be structured to protect the Republic's interest. They also argue the judgment is not adequate because it wholly discounts the Republic's claim and does not, even in the Ninth Circuit's own view, completely resolve the Arelma dispute. The petitioners contend there is no need for an alternative remedy because resolution of the Pimentel class claim should occur after ownership of the Arelma assets is settled in the Philippines and because the unavailability of a forum is a consequence of the Republic's sovereign immunity.

Pimentel responds that the Ninth Circuit has determined that if the interpleader proceeding is dismissed, the members of the Class will have no forum within the Philippines open to their claims. Additionally, Pimentel notes that the Ninth Circuit found that a proceeding against Merrill Lynch in New York would merely raise the same question of indispensability.

The respondent goes on to say that the Class of Human Rights Victims

(Continued on Page 272)

has tried to pursue collection efforts in the Philippine courts but has been stymied in its efforts. Pimentel also notes that the United Nations Human Rights Committee has ruled explicitly that the failure of the Philippine courts to permit collection efforts constitutes a violation of the obligations of the Philippines under Article 2(3) of the International Covenant on Civil and Political Rights.

Petitioners, however, declare that entry of judgment in this case would effectively preclude the Republic from recovering assets stolen by its former president, short-circuiting litigation now pending in the Philippine courts and interfering with one of the Republic's essential interests.

Pimentel counters that the Republic's effort to dismiss the interpleader at this point is not supported by any evidence or offer of proof substantiating its contention that it is the legitimate owner of the assets. If the Supreme Court were to dismiss the interpleader action, Pimentel suggests its ruling would allow any foreign governmental body to block any interpleader or any other proceeding brought by any judgment creditor to collect its judgment merely by asserting a claim to the assets in question without having to present any evidence to substantiate its claim.

Petitioners conclude that continuation of this litigation threatens to disrupt broader international cooperation in combating official corruption, causing friction in the United States' relationship with important allies.

Pimentel claims no significant negative foreign policy consequences will follow if the U.S. courts apply logical legal principles to determine ownership of assets long held in the

United States. He asserts that the petitioners have not addressed the inconsistency between their present contentions and the position the Republic expressed in its amicus curiae brief filed in 1987, which stated "without hesitation or reservation that its foreign relations with the United States will not be adversely affected if these human rights claims are heard in U.S. courts."

Pimentel concedes that the courts must give careful consideration to foreign policy concerns raised by foreign governments. However, he says the need to defer to such concerns is minimal when the courts possess jurisdiction over the assets at issue and the matter concerns procedural issues related to the courts' management of their dockets.

SIGNIFICANCE

The petitioners assert that this is a case of exceptional practical and doctrinal importance. By announcing a rule permitting the award of property claimed by a foreign government, even when that government is absent from the litigation by virtue of its invocation of immunity, the petitioners contend the Ninth Circuit's decision undercuts the vital interests served by the doctrine of foreign sovereign immunity, threatening to cause considerable friction in the relations of the United States with other nations.

Although recognizing that the present case involves a foreign government and international issues, Pimentel says the case is essentially a case involving judicial procedure. He claims the petitioners are advocating for a rule that would totally prevent courts from adjudicating disputes over assets, because they assert the right to block any such adjudication merely by claiming the disputed assets, without having to

present any evidence to substantiate their claim.

ATTORNEYS FOR THE PARTIES

For Petitioner Republic of the Philippines et al. (Stephen V. Bomse (415) 772-6000)

For Respondent Mariano J. Pimentel et al. (Robert A. Swift (202) 887-1500)

AMICUS BRIEFS

In Support of Petitioner Republic of the Philippines

United States of America (Paul D. Clements (202) 514-2217)

In Support of Respondent Mariano J. Pimentel

Philippine Human Rights Groups (Mark S. Davis (808) 524-7500)

Professors of International Law (William J. Aceves (619) 525-1413)

In Support of Neither party

Merrill Lynch, Pierce, Fenner & Smith (Daniel A. McLaughlin (212) 839-5300)