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Immunity Under Fire

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SECRET WARDLE NOTES

Plaintiff Rote hits his mark by arguing the Foreign Sovereign Immunities Act does not protect Argentinian manufacturer DGFM's private sale of ammunition because it is a "commercial activity". The Sixth Circuit held that DGFM's sale of ammunition is an activity of the type in which private individuals engage, is classified as a private activity based on its core commercial nature and not as a ploy to evade the Act, and has a direct effect on the United States. Therefore, DGFM cannot rely on sovereign immunity as a defense.

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In *Rote v. Zel Custom Mfg. LLC*, 2016 U.S. App. LEXIS 4237 (6th Cir. Ohio 2016), the Sixth Circuit Court of Appeals heard arguments regarding whether U.S. Courts have subject matter jurisdiction over a foreign sovereign instrumentality's sale of ammunition within the U.S. U.S. citizen Troy Rote injured his hand at his home in Ohio when a round exploded as he loaded his rifle. The manufacturer was Direccion General Fabricaciones Militares ("DGFM") whose sole owner is the government of Argentina. DGFM moved to dismiss based on its immunity as an instrumentality of Argentina under the Foreign Sovereign Immunities Act ("Act").¹

The Act provides instrumentalities of a foreign state with immunity from U.S. Courts. Under the Act, a foreign state is immune unless one of the statutory exceptions applies. There are several exceptions to the

¹ 28 U.S.C. § 1602 et seq.

Act's blanket immunity including, among others, a foreign instrumentality's waiver of immunity, a foreign instrumentality's acquisition of U.S. property rights, and a foreign instrumentality's participation in a commercial activity.²

As a defense, the Act grants blanket immunity unless the claim fits into one of the broad exceptions under the Act, such as the commercial activities class.³ Once a governmental instrumentality avails itself of the profits of the commercial market, it must also abide by the laws and regulations governing the market. The intent of Congress in this situation is to level the playing field, and it does so by removing the shroud of protection governmental instrumentalities otherwise enjoy under the Act.

For a party to shoehorn an instrumentality's activities into the commercial activity exclusion, the activity must meet two statutory factors: (1) the activity must be of the type in which private individuals engage; and (2) the activity cannot be defined as private simply as a semantic ploy to exploit a loophole. The activity must also have a direct effect on the U.S. This effect is defined as an outcome that follows as an immediate consequence of the instrumentality's activity flowing in a straight line without deviation or interruption. Routinely, Courts have held that if an injury is caused by defective products it meets the "direct effect" element of the Act.⁴

In *Rote*, Troy Rote was injured when a round that he was loading into his rifle exploded in his hand. Citing the Fifth Circuit, the Sixth Circuit, and the Eleventh Circuit, the Sixth Circuit held that the design and manufacture of ammunition is one in which private instrumentalities engage. It was not a ploy to circumvent the Act, and it met the direct effect on the U.S. test because it injured a U.S. citizen as a result of a defective DGFM round.⁵

The Sixth Circuit's decision outlines the path for individuals to recover damages based on the commercial activity exception in the Act. If they can show that the instrumentality of the government engaged in a private activity and it has a direct effect on the U.S., the instrumentality cannot claim immunity under the Act. Business operations of foreign instrumentalities should carefully avoid the exceptions under the Act and develop proper procedures if a claim should arise by which they may not claim immunity.

² 28 U.S.C. § 1605.

³ 28 U.S.C. 1605(a)(2) reads "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

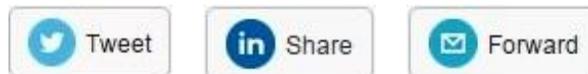
⁴ 28 USCS § 1605(a)(2); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1545, (11th Cir. Ga. 1993); *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1083 (9th Cir. Cal. 2001); *Aldy ex rel. Aldy v. Valmet Paper Mach.*, 74 F.3d 72, 75 (5th Cir. La. 1996).

⁵ See *Rote, supra*. The court noted that DGFM's military purpose related to the ammunition does not remove the commercial nature of its design and manufacture of ammunition.

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