PANEL DISCUSSION: MAROOTIAN V. NEW YORK LIFE INSURANCE COMPANY: LITIGATING ARMENIAN GENOCIDE INSURANCE CLAIMS*

Hon. Zaven V. Sinanian, Hon. Dickran M. Tevrizian, Richard G. Hovannisian & Michael J. Bazyler†

I. INTRODUCTION

JUDGE SINANIAN: Good afternoon. We are here for the panel entitled: "Marootian v. New York Life Insurance Company: Litigating Armenian Genocide Insurance Claims." *Marootian v. New York Life Insurance Company*[1] is the case at issue today, which was brought by the attorneys on behalf of the Armenian-American community concerning the recovery of insurance claims stemming from the loss of life and property during the Armenian Genocide. Today's discussion will proceed first with Professor Richard Hovannisian[2] who will give an introduction and historical perspective of the Armenian Genocide. He was going to be followed by Judge Snyder who, due to unforeseen circumstances, could not be here with us this afternoon. Judge Dickran Tevrizian will be filling in for her, ably I'm sure, as he was formerly a U.S. District Court judge. The final speaker will be Profes-

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† Judge Sinanian has been a judge on the Superior Court of California for Los Angeles County since June of 2002. Prior to his appointment, Judge Sinanian prepared the amicus curiae brief on behalf of the California Attorney General's office in support of the Armenian Genocide Victims Act of 2000. Judge Tevrizian's brief biography appears in Judge Sinanian's introduction.

1. Marootian v. N.Y. Life Ins. Co., No. CV-99-12073 CAS (MCx), 2001 U.S. Dist. LEXIS 22274 (C.D. Cal. Nov. 28, 2001).

2. Professor Richard Hovannisian's individual remarks have been omitted. His Q&A remarks appear later in this section, and his article, *The Armenian Genocide and the Ruse of Protective Dispossession*, appears later in this issue.

sor Michael Bazyler,[3] who will speak on the comparative perspectives of Holocaust cases and will comment on *Marootian* and the *Movsesian* case,[4] which is probably of greater precedential value in the context of the Armenian Genocide claims that we are discussing this afternoon.

Judge Snyder handled both the *Marootian* and *Movsesian* cases as a U.S. district court judge, and Judge Tevrizian was the settlement judge in the *Marootian* case. I will open today's discussion with this thought: There was no international apparatus for streamlining restitution and reparation of claims arising out of the Armenian Genocide, nor is there one today. The *Marootian* case attempted to change that in spite of the fact that the current Turkish government was not a party to the action. I think this is the premise that we'll start with.

Judge Tevrizian was nominated on November 7, 1985 and received his commission on December 17, 1985 to sit as the U.S. District Court Judge for the Central District of California. He retired from the bench in 2007. He's now currently with JAMS where he serves as a mediator and arbitrator on various matters. Prior to his service on the bench, Judge Tevrizian was an associate and later became a partner in the law firm, Kirtland and Packard, from 1966 until he was appointed to the California State Court bench in 1972. He was also a partner in the law firm Manatt Phelps Rothenberg & Tunney and Of-Counsel to Lewis Brisbois Bisgaard & Smith before his appointment to the federal bench.

He served in the California state courts first on the Los Angeles Municipal Court and then on the Superior Court before returning to private practice. In 1985, he became the first Armenian-American ever named to the federal bench. In 1987, he was named Trial Judge of the year by the California Trial Lawyers Association. Judge Tevrizian was also named the 1994-1995 Trial Jurist of the year by the Los Angeles County Bar Association. In 1999, he was awarded the Ellis Island Medal of Honor, an award that celebrates American citizens who have distinguished themselves within their ethnic group.

In 2005, Judge Tevrizian received the Emil Gumpert Award for his efforts in promoting alternative dispute resolution and received the 2005 Justice Armand Arabian Leaders in Public Service Award. Judge Tevrizian, as I indicated earlier, handled the mediation in the

3. Professor Michael Bazyler's individual remarks have been omitted. His Q&A remarks appears later in this section, and his co-authored article with Rajika Shah, *The Unfinished Business of the Armenian Genocide: Armenian Property Restitution in American Courts*, appears later in this issue.

4. Movsesian v. Victoria Versicherung AG, 670 F.3d 1067 (9th Cir. 2012).

Marootian case while serving on the federal bench. He will also address the case and the matters therein. Judge Tevrizian.

II. Panel Discussion

JUDGE TEVRIZIAN: Thank you. Genocides are not just limited to the Armenians and to the Jewish Holocaust. There are, at the present time, genocides going on in the Middle East, in Africa and in Asia. This matter is of paramount importance and not to be treated as a historical event.

With regard to the *Marootian* case the following is true. On September 18, 2000, California Senate Bill No. 1915 was signed into law by Governor Gray Davis.[5] This bill was entitled, *Armenian Genocide Victims Insurance Act*,[6] and it added section 354.4 to the California Code of Civil Procedure.[7] That section provided in relevant part, which I will paraphrase, that notwithstanding any other provision of law, any "Armenian Genocide victim," or heir or beneficiary of an Armenian Genocide victim, seeking benefits under the insurance policies issued or in effect between 1875 and 1923 may bring a legal action to recover on that claim in any court of competent jurisdiction in the State, which shall be deemed the proper forum for that action.[8]

The statute also provided that no action seeking to recover benefits under an insurance policy covered by section 354 would be dismissed for failing to comply with the applicable statute of limitations.[9] In enacting the section, the California legislature stated that California has an overwhelming public policy interest in ensuring that its residents and citizens, who are claiming entitlement to benefits under the policies issued to the Armenian Genocide victims, are treated reasonably and fairly, and that those legal obligations are honored.[10]

To that end, the California legislature declared its specific attempt to provide Armenian Genocide-era life insurance policy holders expeditious, inexpensive, and fair forum by allowing claims to be brought in California, irrespective of any contrary forum selection clauses or limitations period.[11] In the early to mid 2000s, two cases came before Judge Snyder raising questions as to whether section

5. S.B. 1915, 1999 Leg., Reg. Sess. (Cal. 2000).
6. *Id.*
7. Cal. Civ. Proc. Code § 354.4 (West 2016).
8. *Id.*
9. *Id.*
10. S.B. 1915, 1999 Leg., Reg. Sess. (Cal. 2000).
11. *Id.*

354.4 violated the Foreign Affairs Clause of the Constitution. The first of these cases was *Marootian v. New York Life Ins. Co*.[12]

By the way, one of the attorneys on the *Marootian* legal team, Vartkes Yeghiayan, is in the audience today. Vartkes was the one who put together the legal team for *Marootian*. He is an expert on international law and conversant in many languages. He did the "grunt work" of obtaining and translating voluminous documents in preparation for the case. He also had on that team an insurance specialist with an international reputation for successfully litigating cases against insurance companies, specifically involving the Holocaust. Vartkes entered into a joint effort with William Shernoff's firm. He also brought class action attorney Brian Kabateck who knew the "ins and outs" of how to get class certification, and later brought in trial attorney, Mark Geragos.

In *Marootian*, the beneficiaries of Armenian Genocide-era life insurance policies brought claims against New York Life Insurance Company.[13] The beneficiaries claimed that their predecessors in interest living in the Ottoman Empire purchased life insurance policies from New York Life and died during the period referred to as the Armenian Genocide.[14] The beneficiaries claim that for over 85 years, they sought, albeit without success, to obtain the right in these insurance benefits.[15]

Following the enactment of section 354.4, the beneficiaries brought claims in California seeking to recover the insurance benefits from New York Life Insurance. New York Life moved to dismiss the action for improper venue arguing that the life insurance policies contained forum selection clauses requiring that the claims be brought in the courts of either England or France.[16] The California federal court ultimately determined that the forum selection clauses were invalid under the precedent set forth in the Supreme Court case of *M/S Bremen v. Zapata Offshore Company*,[17] and another case called *Carnival Cruise Lines v. Shute*.[18]

However, in reaching this decision, the trial court also had the opportunity to consider the constitutionality of section 354.4.[19] In its

12. No. CV-99-12073 CAS (MCx), 2001 U.S. Dist. LEXIS 22274 (C.D. Cal. Dec. 3, 2001).
13. *Id.* at *2.
14. *Id.*
15. *Id.* at *4.
16. *Id.* at *8-9.
17. *Id.* at *10 (citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)).
18. *Id.* at *11 (citing Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991)).
19. *Marootian*, 2001 U.S. Dist. LEXIS 22274, at *29-53.

motion to dismiss, New York Life argued that section 354.4 was an unconstitutional invasion of the federal government's foreign affairs power because it adopts an official position on extremely sensitive foreign affairs issue, namely the recognition of the Armenian Genocide.[20]

Judge Snyder disagreed, reasoning that the purpose of section 354.4 was merely to provide a forum for beneficiaries of the Armenian Genocide-era life insurance policies to bring claims to recover.[21] To that end, she found that section 354.4 was not intended to offer any comment or condemnation of a foreign government, nor was it intended to interfere with the United States' relationship with a foreign government.[22] Judge Snyder also noted that none of the parties in *Marootian* was a foreign government, nor were any of the parties owned by a foreign government; rather, that the parties involved were simply comprised of an insurance carrier, the beneficiaries, and the heirs of the beneficiaries.[23]

Finally, and significantly, Judge Snyder found that New York Life failed to show how section 354.4 conflicted with any federal law or foreign policy.[24] Accordingly, she concluded that section 354.4 would likely have little to no impact on the foreign affairs of the United States government and therefore did not violate the Foreign Affairs Clause.[25]

After she made those rulings, the case was assigned to me for mediation. I was still a sitting judge at that time, and we mediated the case in July of 2004. I'm going to talk about the mediation later on, but before I do, I want to also give you the history and significance of another case pertinent to these matters.

The issue of section 354.4's constitutionality came before the court a second time in *Movsesian v. Victoria Versicherung, A.G.*[26] In that case, the plaintiffs were persons of Armenian descent, who claimed to be the rightful beneficiaries of life insurance policies issued during the Armenian Genocide.[27] The plaintiffs' claims would otherwise have been barred by the applicable statute limitations, so they

20. *Id.* at *32-33.
21. *Id.* at *49.
22. *Id.* at *39-40.
23. *Id.* at *36.
24. *Id.* at *39.
25. *Id.* at *40.
26. Movsesian v. Victoria Versicherung AG, 670 F.3d 1067 (9th Cir. 2012).
27. *Id.* at 1070.

relied on section 354.4 to bring their claims.[28] The insurers moved to dismiss the action arguing, among other things, that section 354.4 violated the Foreign Affairs Clause of the United States Constitution.[29] Once again Judge Snyder upheld section 354.4, finding that it did not violate the Foreign Affairs Clause.[30]

The insurers further argued that the executive branch of the federal government consistently expressed a policy against referring to the killing of Armenians in the Ottoman Empire between 1915 and 1923 as a "genocide."[31] For example, the insurers noted that under the administrations of both Bill Clinton and George W. Bush, the U.S. State Department repeatedly pressured Congress not to pass legislation officially recognizing the "Armenian Genocide."[32]

Thus, the insurers argued that section 354.4, which refers to the "Armenian Genocide" at least 12 times, threatened to undermine the United States foreign policy, and could antagonize the United States' relationships with Turkey and Armenia.[33] What was not argued in this case, and what the Ninth Circuit failed to take into account, was that Ronald Reagan, when he was President of the United States, acknowledged that there was indeed an Armenian Genocide.[34] This was conveniently or simply forgotten by the Ninth Circuit when they came down with their ultimate opinion in the *Movsesian* case.

Judge Snyder rejected the insurers' foreign policy arguments. She noted that 39 states, including California, issued statements formally recognizing the Armenian Genocide with no apparent response from the federal government.[35] Moreover, she found that there was no indication that the recognition of an Armenian Genocide by a majority of states had any actual impact on the United States' foreign policy.[36] In fact, neither the United States federal government nor Turkey expressed any opposition to section 354.4 when it was going through the California State Legislature.

Accordingly, Judge Snyder concluded that while the executive branch may prefer that Congress express no official national position

28. *See id.* at 1069.

29. *See* Order Granting in Part and Denying in Part Defendant Munich Re's Motion to Dismiss the Second Amended Complaint at 19, *Movsesian*, No. CV-03-09407 CAS (MCx) (C.D. Cal. June 7, 2007) [hereinafter Order Denying in Part Defendant's Motion to Dismiss].

30. *See id.* at 35.

31. *Id.* at 32.

32. *Id.* at 30.

33. *Id.* at 31.

34. Proclamation No. 4838, 3 C.F.R. 25 (1982).

35. Order Denying in Part Defendant's Motion to Dismiss, *supra* note 29, at 32.

36. *Id.* at 33.

on the recognition of an Armenian Genocide, the apparent lack of concern about state recognition of the Armenian Genocide suggested that no executive policy existed which would prevent California from doing so. Again, everyone forgot about President Reagan. He recognized the Armenian Genocide when he was a governor and again as President.[37]

Judge Snyder also found that section 354 was distinguishable from other statutes that the United States Supreme Court previously found to violate the Foreign Affairs Clause.[38] Now, Judge Snyder found that all three of the cases that were cited by the insurers were readily distinguishable.[39] The insurers appealed Judge Snyder's opinion to the Ninth Circuit, where the case had a complex, and I think convoluted, procedural history. The case was first heard by a panel consisting of Judges David Thompson, a Reagan appointee, Dorothy Nelson, and Harry Pregerson. In an opinion written by Judge Thompson and joined by Judge Nelson, the Ninth Circuit reversed Judge Snyder's finding that section 354 did not conflict with the foreign policy of the United States against providing official legislative recognition on the Armenian Genocide.[40]

Judge Thompson wrote in his majority opinion, "the conflict is clear on the face of the statute, by using the phrase "Armenian Genocide," California has defied the President's foreign policy preferences,"[41] again forgetting about what President Reagan said.

The plaintiffs then brought a petition for rehearing, which the Ninth Circuit granted. Upon rehearing the Ninth Circuit reversed course in an opinion. This time, the opinion was written by Judge Pregerson and was joined in by Judge Nelson.[42] Judge Nelson switched her vote and the Ninth Circuit affirmed the trial court, in which Judge Snyder was involved. Judge Pregerson concluded that there was no express federal policy forbidding states from using the term "Armenian Genocide."[43]

The insurers then brought petition for rehearing en banc with the Ninth Circuit, which was granted. On rehearing en banc, the Ninth Circuit again reversed and concluded that section 354.4 intruded on

37. Proclamation No. 4838, 3 C.F.R. 25 (1982).

38. Order Denying in Part Defendant's Motion to Dismiss, *supra* note 29, at 19-21, 27.

39. *See id.* at 32-33.

40. Movsesian v. Victoria Versicherung A.G, 578 F.3d 1052 at 1053, 1060 (9th Cir. 2009).

41. *Id.* at 1060.

42. *See* Movsesian v. Victoria Versicherung A.G., 629 F.3d 901, 903 (9th Cir. 2010).

43. *Id.* at 903.

the federal government's power to conduct foreign affairs.[44] Judge Graber, writing for the Ninth Circuit stated, "[s]ection 354.4 has more than some incidental or indirect effect on foreign affairs."[45] Further, the court stated:

> The statute expresses a distinct political point of view on a specific matter of foreign policy. It imposes the politically charged label of "genocide" on the actions of the Ottoman Empire (and, consequently, present-day Turkey) and expresses sympathy for "Armenian Genocide victim[s]." The law establishes a particular foreign policy for California—one that decries the actions of the Ottoman Empire and seeks to provide redress for "Armenian Genocide victim[s]" by subjecting foreign insurance companies to lawsuits in California.[46]

In June of 2013, the Supreme Court denied plaintiff's petition for certiorari and the case unfortunately came to an end.[47]

In its en banc opinion, the Ninth Circuit appeared to conclude that even if the insurance provisions of section 354 conflicted with the federal foreign policy, as the court noted, it does not appear that the federal government has any policy regarding the resolution of claims for insurance benefits arising from the era of the Armenian Genocide. Thus, unlike a case called *Garamendi,*[48] it does not appear that this is a case where California sought to use an "iron fist" where the federal government had "chosen to use kid gloves."[49]

Basically, the question really is, had the California legislature chosen a term other than Armenian Genocide, would the Ninth Circuit have found anything objectionable with the application of section 354 to the *Movsesian* case? That is the unanswered question that I think remains out there.

III. QUESTIONS & ANSWERS

JUDGE SINANIAN: Thank you very much. We will take a few questions. We are going to try to make this quick. I have a question here that is directed at Judge Tevrizian. I think it was with regard to the settlement negotiations in the *Marootian* case.[50] Is there anything

44. Movsesian v. Victoria Versicherung A.G., 670 F.3d 1067, 1076 (9th Cir. 2012).

45. *Id.* (citing Zschernig v. Miller, 389 U.S. 429, 434 (1968)).

46. *Id.* at 1076 (citing Zschernig v. Miller, 389 U.S. at 441 (1968)) (citations omitted).

47. Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft A.G., 133 S. Ct. 2795*, cert. denied*, 670 F.3d 1067.

48. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

49. *Id.* at 400.

50. Marootian v. N.Y. Life Ins. Co., No. CV-99-12073 CAS (MCx), 2001 U.S. Dist. LEXIS 22274, (C.D. Cal. Nov. 28, 2001).

you can address that is not part of the mediation privilege at this point?

JUDGE TEVRIZIAN: That is one of the things I was going to say. I am bound by this mediation privilege. I will talk about the process here. When I was selected as the settlement judge or mediator in that case, I was surprised because New York Life knew that I was the son of a survivor of the Genocide. My father came to this country in 1919, when he was 19 years of age. I was allowed to participate in the mediation that took a couple of sessions and where the case was finally settled. The problems that developed along the way were that most of the victims and policy holders were deceased. Their heirs are still out there. A lot of people's addresses and identities were lost. What was going to happen to the settlement proceeds or money? A common fund was set up and a procedure for claims to be made. Announcements were made to the Armenian diaspora all over the world.

It was a very hard case to administer. There was a cy pres set up for the funds that were not exhausted by the claims. Judge Snyder approved of the cy pres concept and money was spent on humanitarian and charitable efforts within the Armenian community. Eventually, the case was concluded. It was a very difficult case in the beginning because the insurance company did not want to recognize the Armenian Genocide or acknowledge that it was responsible in any way.

Another factor that was very difficult in the case is the fact that the life insurance policies at hand were not large policies. These were not million dollar policies. They were very small policies, one thousand, five thousand, ten thousand, and those were the limits. There were real serious questions as to whether or not the policies should be adjusted for the cost of living. There were questions about interest on the policies, but all of that was mediated and resolved.

I remember my grandmother and she was a survivor too. When she was living in Los Angeles, I remember that once a month, the representative from New York Life would come to her house and collect twenty dollars or fifty dollars and that custom from the old country carried over to this country with regard to New York Life, because the policy holders had trust and confidence in the New York Life Insurance Company. I believe it was a remarkable settlement and re-

markable result that took place in the *Marootian* case.[51] Unfortunately, it was not so remarkable in the *Movsesian* case.[52]

JUDGE SINANIAN: Thank you. This question is directed to Professor Hovannisian. These cases were brought by policy holders to try and collect insurance policies held by victims, what implications did they have or do they have on the Armenian-American?

RICHARD HOVANNISIAN: I think that the compensation involved in these cases gives the community significant satisfaction as an expression of validation of the immeasurable suffering and losses as a result of the Armenian Genocide. There is a feeling in the Armenian community that it does not possess the necessary political influence to achieve worldwide recognition and restitution in the face of state denial and perceived state interests of various governments. Therefore, the life insurance cases afford a symbolic affirmation of the suffering and irreparable losses of the Armenian people. I believe that for almost all parties to the class action lawsuits, this aspect is far more important than achieving any personal enrichment or personal aggrandizement. While the amount of restitution remains minimal, it represents for the community an important statement relating to the still-outstanding crime against the Armenian people.

There remains among Armenians a strong sense of great disadvantage against the powerful forces relentlessly attempting to suppress memory. The situation is different from Holocaust restitution, in which not only is there a large corpus of properly-funded legal scholars and experts who achieve impressive results through legal and extralegal means, but there are also governments and legislatures involved. These bodies are able to influence parties to reach settlements. If, for example, the State of California, makes it known that it will suspend trade or investment transactions with a foreign government or particular institution, the potential losses for those bodies are likely to make them far more amenable to reaching settlements involving compensation and restitution to the injured parties. This critical impetus is generally absent in the Armenian case, and because the United States government withholds official reaffirmation of its recognition of the Armenian Genocide, the opposing side is even able to argue that such potential legislation is contrary to the policies and positions of the federal government. The case of the life insurance poli-

51. *See id.*

52. *See* Movsesian v. Victoria Versicherung A.G., 670 F.3d 1067 (9th Cir. 2012).

cies nonetheless may be regarded as an important precedent and opening.

There will come a time, I believe, when Armenians who still possess property deeds or other entitlement documents will be able to seek restitution or compensation for their losses, even though the Turkish government has enacted multiple laws and regulations nullifying their validity and declaring the lands and goods seized without compensation to be "abandoned properties." Again, those still in possession of property deeds would represent a very small fraction of those who were dispossessed, but the symbolic value of the related affirmation and validation would be great. I think that this may be a viable avenue for future legal recourse.

JUDGE SINANIAN: Thank you. This question is for Professor Bazyler. What risk is there in having California legislate another statute to make it foreign policy neutral? To elaborate, would a statute, not using the language of Armenian Genocide but, for example, including those who died in the Ottoman Empire in this time of year (in neutral language), be in any way successful at this point in time with the Ninth Circuit?

MICHAEL BAZYLER: I thought, as Judge Tevrizian, that the en banc panel had just incorrectly decided that case. Now, they may just look at this and say, well, even that somehow surreptitiously impacted our foreign policy. As the judges on this panel know, you can always find a reason to rule a certain way. This was a commercial case and to somehow say that if you say this "G-word," all of a sudden everything somehow impacts foreign policy.[53] I just cannot understand that. How the en banc panel came up with that decision to me is strange. Procedurally, I want to bring in another hero of mine and his name is Benjamin Ferencz. He is ninety-five years old and the only living prosecutor from the Nuremberg trials.[54] This is what he taught me: "Never give up," these are his three wise words. That is what he taught me.

JUDGE SINANIAN: Okay. Thank you. I will conclude by quoting Stuart Eizenstat, the former US Ambassador to the European Union and a crucial member of the Holocaust restitution movement in the United States. He said, "US courts are not the best places to

53. *See* Movsesian v. Victoria Versicherung A.G., 629 F.3d 901, 903 (9th Cir. 2010).

54. Emma Green, *The Last Man at Nuremberg*, THE ATLANTIC (May 9, 2014), http://www.theatlantic.com/international/archive/2014/05/the-last-man-at-nuremberg/361968/

resolve profound historical and political questions."[55] I think that is basically the understanding that the Armenians have with regard to the *Movsesian* case. As much as we like to feel encouraged about this litigation, ultimately the *Movsesian* case, was dramatically disappointing.

Thank you very much to the panelists.

55. STUART E. EIZENSTAT, IMPERFECT JUSTICE LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II, at 341 (2003).