

## Commentary

### Dan Popeo: Time to de-escalate America's legal system

Dan Popeo, The Examiner

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**WASHINGTON** - Big profits from America's capitalism enrich all of our lives, whether they come through the United Way or from the exceptional corporate philanthropy of Warren Buffett or Bill Gates. If everyone benefits from free enterprise activity, why does so much of America's economy live in a constant state of legal and regulatory anxiety?

A number of high-profile studies have recently considered this and other questions in the context of growing concerns over the competitiveness of America in the global market. Noted economists, elected officials and business leaders as diverse as New York City Mayor Michael Bloomberg, U.S. Sen. Charles Schumer, and the Chamber of Commerce all agree with Washington Legal Foundation that immediate changes are needed to the regulatory status quo.

Real reform should proceed with one fundamental principle in mind — that businesses and their employees deserve a transparent and consistently applied set of rules which clearly defines what is, and is not, lawful. American companies instead face an opaque legal system enforced by lawyers and regulators who seem to view free enterprise as a problem to be solved.

A drastic expansion of federal control over our lives has spawned hundred of laws and more than 12,000 regulations that enforcement officials can interpret and enforce criminally against any legitimate commercial activity. One misstep while navigating this gauntlet of vague and complex laws and regulations can land a business person in jail.

Often, government can issue an indictment or get a conviction without ever having to prove its target intended to break the law. In business-related cases, criminal charges used to be a last resort.

Now, overly aggressive prosecutors view investigations and indictments as headline-grabbing ways to raise government revenue. Confronted by superior firepower and draconian sentences, most white collar crime targets cave in, irrespective of wrongdoing. All this further fuels federal enforcers to push the proverbial envelope.

On top of the risks of criminal punishment, anyone running or working in a business must also face the crapshoot that epitomizes America's arbitrary civil justice system. A company or entrepreneur's success in America can rise or fall on the whim of one judge or lay jury willing to embrace a novel legal theory or impose bankrupting punitive damages.

Plaintiffs' lawyers seek to regulate business and consumer conduct through their lawsuits, while reaping millions in fees. With the support of special interest activists and sympathetic state attorneys general, trial lawyers are currently suing to impose unnecessary warnings on FDA-approved drugs; dictate what we choose to eat and drink; judicially rewrite insurance contracts; and open America's courts to foreigners supposedly harmed overseas.

Our legal and regulatory system is creating unpredictable risks that are fueling a flight of capital investment

and impairing innovation. Fortunately, we don't have to wait for politicians, as much reform can be achieved without them.

Regulators can write clearer rules, take their cost-benefit analysis duties more seriously, and offer more assistance with regulatory compliance. Prosecutors must use their enormous discretion more wisely, and stop playing a game of criminal "gotcha" with businesses.

They should also target bad actors, rather than imputing their actions to criminally sanction an entire company. And federal enforcers must stop trying to coerce "cooperation" from businesses by encouraging them to waive critical legal protections like their attorney-client privilege.

Judges can also make a serious dent in litigation abuse. Federal Judge Janis Graham Jack courageously exposed rampant fraud in a massive class-action lawsuit, and now other judges are looking more closely at other types of manufactured litigation.

Another federal judge, Lewis Kaplan, recently found the Department of Justice's "cooperation" tactics unconstitutional. Judges have the ability to reduce outrageous attorneys' fees, banish junk science-peddling experts and dismiss frivolous suits. They should use these inherent powers to help restore credibility to our rule of law.

No other industrialized nation has a business regulation environment that punishes wealth creation and profit quite like ours.

The New York Times recently reported that China has approved its first law to explicitly protect private property and build a new secure legal foundation for Chinese entrepreneurs and their middle class.

Meanwhile in America, our legal system seems to only create jobs for lawyers, accountants, and bureaucrats, while scaring away the next Gates or Buffett.

What's wrong with this picture?

*Dan Popeo is chairman and general counsel of the [Washington Legal Foundation](#).*

*Examiner*