

Commentary

Daniel Popeo: Trial lawyers turning alien law against U.S. firms

Daniel Popeo, The Examiner

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WASHINGTON - Just when you thought America's courts couldn't get any more clogged, along comes the litigation industry with yet another novel approach to manufacturing legal fees. American plaintiffs' lawyers have gone global.

Well, sort of — rather than take their litigation tactics overseas, these lawyers have brought overseas controversies to U.S. courts. Suits are now being filed featuring foreign plaintiffs, foreign defendants and alleged injuries that occurred entirely outside U.S. borders. This new brand of mass tort litigation not only needlessly burdens our courts, but far worse, it encourages unelected judges to usurp foreign-policy making authority.

The weapon of choice in these cases is an obscure 218-year-old, 32-word law known as the Alien Tort Statute. The law explicitly allowed aliens to sue for a civil wrong, or a "tort," "committed in violation of the law of nations, or of a U.S. treaty." Congress adopted the ATS primarily to provide access to federal court for a redress of piracy, violations of safe conduct and assaults upon foreign ambassadors.

For nearly two centuries, the ATS lay fallow until 1980 when a federal appeals court, with little historical analysis of its original purpose, concluded that the law provides a private right to sue for violations of international law.

After that decision, ATS filings exploded. Until the mid-1990s, most ATS plaintiffs were human rights activists suing foreign individuals or foreign governments. The factually sympathetic cases advanced the law in a pro-plaintiff direction. Eventually activists began suing private companies based on an unprecedented vicarious liability theory — because oil companies benefited from the protection of foreign soldiers or companies did business in apartheid-era South Africa, they had "aided and abetted" state actors' alleged ATS violations.

A suit against scores of U.S. companies for lawfully doing business in South Africa is still pending in a New York federal court. And just last week, activists filed an ATS suit against Yahoo alleging that its compliance with Chinese law abetted a human rights violation.

Once the focus shifted to deep-pocket defendants, plaintiffs' lawyers took notice, and began to probe the limits of the ATS through more lawsuits. In 2004, the U.S. Supreme Court finally took up the issue of ATS liability. In *Sosa v. Alvarez-Machain*, the court stated that the law only gave federal courts jurisdiction over a very narrow set of cases involving aliens.

The court wrote strongly about its concern over the "collateral consequences" of ATS suits, especially how they could intrude on U.S. diplomacy. The court's *Sosa* opinion unfortunately left the "door ajar" to even more ATS suits; however, it instructed lower courts to conduct "vigilant doorkeeping," against intrusion on the conduct of U.S. foreign policy.

With the door ajar, ATS lawsuits continued to proliferate. Some ATS suits have been dismissed on the

grounds that they interfere with international relations. Other courts, however, have waved aside concerns of intrusion upon foreign-policy making and allowed ATS suits against corporations accused of vicarious violations of international law to proceed.

This lack of closure has attracted a new cadre of contingent fee lawyers, veterans of the tobacco and asbestos liability wars, to further test the limits of post-Sosa ATS liability. A leading ATS trial lawyer has proclaimed: "Sosa is the absolute beginning of the fight over the [ATS]. ... We're going to fight for our lives."

What he really meant to say, though, is that they will fight for the money — the prospect of millions in attorneys' fees. Cases are pending where classes of plaintiffs from countries or regions as remote as the Horn of Africa or Asia are suing "classes" of deep-pocketed defendants, also often unnamed, numbering up to 500 or more.

One pending suit, filed by prominent U.S. plaintiffs' lawyers on behalf of unnamed foreign plaintiffs, is targeted at, respectively, the ruler and minister of finance of Dubai, sued in their private capacity. The alleged injury occurred entirely outside the U.S.

The Middle East certainly provides many deep-pocket defendants, but it is also where some of America's most serious foreign policy and national security challenges have arisen. That, of course, doesn't seem to trouble the trial lawyers. As one lawyer recently put it, "If we left justice to the U.S. government, when it has so many commercial and other interests, what action would be taken?"

There's scant hope that the legislative branch will step in and end this intrusion on its foreign policy powers, so we must rely upon federal courts to do far more "vigilant doorkeeping" of our Constitution's separation of powers. Judges must actively eliminate cases from their dockets where the suits' only significant connection to the U.S. is the residence of the plaintiffs' lawyer bringing it.

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