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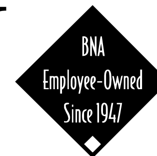
CLASS ACTION LITIGATION



REPORT

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ALIEN TORT CLAIMS

Anticipating the next wave of class action litigation is important for defense counsel and their clients. Attorneys Daniel P. Shapiro and David J. Chizewer point out that successful predictions allow firms to take preventative action, or at least understand their risk.

Observing that many class actions have involved seldom-used statutes and unpopular conduct, the authors suggest that suits by foreign residents brought under the Alien Tort Claims Act may well be the next big thing. Congress or the courts may eventually refine this law, they say, but in the meantime it is likely to become a significant issue in class actions.

International Class Actions: Predicting the Next Wave of Class Litigation

BY DANIEL P. SHAPIRO AND DAVID J. CHIZEWER

It is well reported that the number of class actions filed in state and federal courts throughout the United States has experienced annual double-digit increases over the past decade. Over the past five years, taking the consumer finance arena as an example, class actions addressing mortgage lending and foreclosure practices, yield spread premiums, and debt collection were filed by the dozens rather than as a suit here and there.

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More generally, asbestos, breast implant, tobacco litigation, handgun suits, and now claims against purveyors of fatty foods have also appeared. We are left to speculate whether Kraft Foods' (owned by Philip Morris) decision to take much of the fat out of its offerings is an effort to cater to the evolving American palate or a defensive litigation strategy, or perhaps both. One of the challenges to the class action defense bar posed by this steady increase in class litigation is anticipating the area of focus for the next wave of class action filings.

Successful prediction provides defense counsel a chance to assist clients with prophylactic measures, or,

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at least, to provide clients with an analysis of the risks associated with particular conduct.

Past experience tells us that consumer, product liability, and securities fraud claims will account for a significant percentage of the new class actions filed each year. But defense lawyers have no special skill in predicting which products will malfunction or which companies will find themselves in the cross hairs of the plaintiffs' class action bar. There is a class action paradigm, however, that may allow us to predict where otherwise unanticipated class actions may soon appear.

Paradigm for Predicting Class Actions. That paradigm depends upon the presence of three factors. The first is a statute that is either new, seldom-used, or ambiguous and that can be used to target a broad subject matter. Past examples of such statutes would be the Racketeer Influenced and Corrupt Organizations Act (RICO), or the various state unfair and deceptive practices acts. These statutes are broad enough in their terms to be pressed into service by creative lawyers to address issues in a way that may not have been contemplated by their drafters.

The second factor for this predictive paradigm is highly unpopular conduct that society has not been able to cure, or even effectively address, through non-judicial means. Examples of such conduct may include gun violence, smoking, and the wide service gaps in education and health care between rich and poor.

The third necessary element of the paradigm is the presence of economic motivation for lawyers to pursue such claims on behalf of a group of plaintiffs, ordinarily on a contingent fee basis.

Using this paradigm, we predict a proliferation of a certain type of international class action brought by a class of foreign citizens against multinational corporations who are subject to jurisdiction in the United States. How does the specter of international class actions fit within the paradigm? First, the new or seldom used statute at issue is the Alien Tort Claims Act (ATCA). Second, the unpopular conduct includes the alleged exploitation by large multinational corporations of citizens in less developed countries. Third, the subject conduct occurs on a substantial scale, making the damages, and therefore the fees sought, great.

Suit by Sudan Residents Against Canadian Firm. A relatively recent decision by the United States District Court for the Southern District of New York in *The Presbyterian Church of Sudan v. Talisman Energy Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y 2003), provides a case in point as to how the paradigm leads to class litigation. In *Talisman*, current and former residents of the Republic of the Sudan brought a class action under the ATCA, alleging that a Canadian energy company collaborated with the Sudanese government in administering its policy of ethnically cleansing (perhaps the most dangerous euphemism of our time) civilian populations to facilitate oil exploration. Some background about the case and the history of the ATCA explains how claims by a class of *Sudan* residents against *a Canadian* energy company arising out of activities *in Sudan* wound up in a United States District Court.

The fact is that such claims involve a statute with very little jurisprudence behind it, large corporations and large sums of money, and the additional feature of placing plaintiffs' counsel on the side of the angels.

Sudan is a large African country roughly a quarter of the geographic size of the United States. Its current population is approximately 37 million people, of which 70 percent are Sunni Muslim, a quarter practice indigenous religions, and 5 percent are Christian. Most Muslims, who are predominantly of Arabic ethnicity, live in the north of the country; most non-Muslims, who are predominantly of African ethnicity, live in the south. The north-south conflict that has wracked Sudan for years has played out predominantly along these religious and ethnic lines. 244 F. Supp 2d. at 296.

The southern portion of Sudan is home to valuable petroleum resources. The oil deposits in these areas, however, are of a heavy and viscous nature requiring sophisticated Western methods for extraction and processing. Consequently, the Sudanese government granted oil concessions to foreign oil companies. The other factor complicating oil exploration and extraction is the fact that the oil-rich areas lie in the south which had been outside of the government's control since 1982 by virtue of the civil war. Indeed, Chevron's exploration and extraction efforts came to an end in 1984 after several workers were killed. Thereafter, Chevron sold its Sudan oil concession to what is now known as Talisman, the Canadian energy company that is the defendant in the action. *Id*. at 299.

Alien Tort Claims Act. According to the plaintiffs, Talisman conspired with the Sudanese government to commit a wide range of atrocities against local populations to maximize the security and profitability of the oil installations. The alleged atrocities included torture, slavery, genocide and extra judicial killings. Plaintiffs sought relief against Talisman for these atrocities under the Alien Tort Claims Act. *Id*. at 326-329.

The ATCA is a one-sentence act which states:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.
>
> 28 U. S.C. 1350.

The statute was passed by the first Congress as part of the Judiciary Act of 1789. Despite the fact that the ATCA has existed for over two hundred years, little is known of the framers' intentions in adopting it—the legislative history of the Judiciary Act does not refer to Section 1350. *Id*. at 303. Moreover, the phrase "the law of nations" does not refer to any particular set of laws, and its interpretation has been left to the courts.

Judge Allen G. Schwartz's decision in *Talisman* exhibited little hesitancy in determining that the atrocities alleged by plaintiffs violated "the law of nations" and that the court had subject matter jurisdiction under the

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ATCA. Moreover, the court asserted personal jurisdiction over Talisman based primarily on the fact that Talisman is listed on the New York Stock Exchange, and that two of its 100 percent-owned subsidiaries conduct significant operations in New York. *Id.* at 321-331. Finally, in determining that Canada was not an adequate forum for this lawsuit, the court noted that ''Canada does not have a well-developed class action procedure.'' *Id.* at 337 f.n. 39.

Based on these findings and legal rulings, the Court denied Talisman's motion to dismiss. Similar ATCA cases have been filed in New York and other jurisdictions across the country with varying degrees of success in alleging other violations of ''the law of nations,'' including environmental damage and race discrimination.

Courts Have 'Enormous Discretion.' Though some legal scholars have criticized what is characterized as the imperialistic nature of the courts' interpretation of ATCA (See, e.g., Bork, Robert H., ''Judicial Imperialism,'' *Wall Street Journal* (June 17, 2003)), the fact is that such claims involve a statute with very little jurisprudence behind it (leaving enormous discretion to the courts), large corporations and large sums of money, or at least the risk of exposure to substantial liability, and the additional feature of placing plaintiffs' counsel—who drive these suits—on the side of the angels.

There are good reasons to believe that such suits will not be permitted to proliferate indefinitely. It cannot be desirable to leave the work of the United States Department of State and the design and implementation of the foreign policy of the country, even in small measure, to federal district court judges.

The potential for great financial rewards, however, and the opportunity to impose Western values on what appear to be clear injustices calling for remediation, are, we believe, temptations too great to be ignored or resisted. We anticipate that ATCA may one day be refined by the courts or rewritten by the Congress, but not until it has been put to sufficient use to have become a meaningful issue worthy of such attention—and that means a new type of class action between now and then.