

Court Refuses To Permit Plaintiffs To Pursue the “New” Cause of Action under Section 1605A of the FSIA

January 25, 2012 by [Louis M. Solomon](#)

[Avinesh Kumar v. Republic of Sudan](#), Civil Action no. 2:10cv171 (E.D. Vir. 2011), presents an interesting case of judicial resistance to the resurrection of prior claims in the context of an international litigation, even where Congress has sought to enlarge plaintiffs’ rights arguably to embrace such resuscitation.

In earlier litigation, the Court addressed the terrorist bombing of the American navy vessel U.S.S. Cole on October 12, 2000. The Court found that “Sudan had actively provided Al Queda with material support”, that the support was “critical” to carrying out the attack, and that the material support “led to the murders of the seventeen American servicemen and women”. The Court also entered judgment in favor of the plaintiffs for \$7,956,344.

While an appeal was pending from the judgment (which also dismissed claims for intentional infliction of emotional distress), Congress enacted Section 1605A of the Foreign Sovereign Immunities Act, which “creates a new cause of action against state sponsors of terrorism” and expressly allows recovery for “solartium, pain and suffering, and punitive damages”, unlike the Death on the High Seas Act, which the Court had earlier found provided the only remedy to the plaintiffs. The Court of Appeals remanded the appeal to the District Court to determine the effect, if any, of the enactment of Section 1605A. Other procedural issues aside, the Court was finally faced with a new suit by 59 (of 61) plaintiffs who were also plaintiffs in the prior suit. Sudan refused to defend the second suit, and the question before the Court was whether a default judgment was warranted.

The Court stated as a threshold question whether the new action could be characterized as a “Related Action” or as an entirely new action under Section 1605A. (We have discussed the intricacies of this issue in earlier posts addressing Section 1605A.) The Court ruled that, however characterized, the new claims were barred by *res judicata*. The Court distinguished Chief Judge Lamberth’s opinion in *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31 (D.D.C. 2009), which held that Section 1605A, having created a new cause of action, was not susceptible to a *res judicata* analysis. In important language, the Court stated:

the Court does not find that Congress’ enactment of the NDAA permits the Rux Plaintiffs [from the earlier case] to bring a second independent action based on the same terrorist incident. As a general rule, changes in the law do not overcome the effects of *res judicata*. Some courts have suggested that there is an exception to

this rule when the change in the law involves the creation of a new statutory cause of action. The Court views the weight of these precedents as doubtful, however, in light of the now-prevailing transactional approach to *res judicata*.

Even laying this point to the side, permitting the Rux Plaintiffs to bring a new cause of action in this case would **violate the constitutional principles** underpinning the Supreme Court's opinion in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 241 (1995). Plaut stands for the proposition that Congress may not deprive "judicial judgments of the conclusive effect that they had when they were announced." *Id.* at 228. The Court sees no relevant difference between ordering the courts to reopen final judgments, as in Plaut, and permitting plaintiffs to reopen prior judgments through the assertion of a newly-minted cause of action, as in the present case.

Fifty-nine of the Plaintiffs in this case not only obtained a substantial prior judgment in their favor, they also sought and obtained certification of said judgment from this Court. Each Plaintiff thereafter collected the judgment in full from the Defendant. Nonetheless, Plaintiffs now seek further remedies against the Defendant, via Congressional policy. To be sure, Congress can alter the prospective effect of judicial rulings in a variety of ways, including by enacting legislation creating new causes of action. **But where, as here, the newly-enacted legislation is a deliberate effort to change the outcome in cases that have already been fully decided before an Article III tribunal, Congress transgresses the important limits imposed by our Constitution's separation of powers.** (emphasis supplied).

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