

2020

Smoke Screens: An Initial Analysis of the Coronavirus Lawsuits in the United States Against China and the World Health Organization

Ana Santos Rutschman
Saint Louis University School of Law

Robert Gatter
Saint Louis University School of Law

Follow this and additional works at: <https://scholarship.law.slu.edu/faculty>



Part of the [Civil Law Commons](#), [Comparative and Foreign Law Commons](#), [Health Law and Policy Commons](#), and the [Information Literacy Commons](#)

Recommended Citation

Ana Santos Rutschman & Robert Gatter. Smoke Screens: An Initial Analysis of the Coronavirus Lawsuits in the United States Against China and the World Health Organization. Protego Press (April 22, 2020)

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarship Commons. For more information, please contact ingah.daviscrawford@slu.edu.

SMOKE SCREENS:
AN INITIAL ANALYSIS OF THE CORONAVIRUS LAWSUITS IN THE UNITED STATES AGAINST
CHINA AND THE WORLD HEALTH ORGANIZATION

Ana Santos Rutschman* & Robert Gatter†

In this short essay we provide a preliminary analysis of the lawsuits filed by Missouri against China, and New York against the World Health Organization over the COVID-19 pandemic. We also situate the lawsuits against the expanding coronavirus-related misinformation “epidemic.”

In mid-March 2020, three plaintiffs filed a class action complaint¹ in Florida, seeking “damages suffered as a result of the coronavirus pandemic.” In mid-April, a different set of three plaintiffs filed a class action complaint² in New York against the World Health Organization (WHO), also seeking damages for “injury, damage and loss” caused by COVID-19. And on April

* Assistant Professor of Law, Saint Louis University School of Law, Center for Health Law Studies.

† Professor of Law, Saint Louis University School of Law, Center for Health Law Studies.

¹ *Logan Alters et al. V. People’s Republic of China*,
<https://images.law.com/contrib/content/uploads/documents/392/85094/Coronavirus-China-class-action.pdf>

² Jonathan Stempel & Jan Wolfe, *Suburban NYC County Residents Sue WHO Over Coronavirus Pandemic Response*, REUTERS (Apr. 20, 2020), <https://www.reuters.com/article/us-health-coronavirus-westchester-lawsui/suburban-new-york-city-county-residents-sue-who-over-coronavirus-pandemic-response-idUSKBN2222P1>

21 Missouri Attorney General Eric Schmitt initiated a lawsuit³ against China, Chinese government-run entities (including the Wuhan Institute of Virology) and the Chinese Communist Party, claiming that Chinese authorities had “deceived the public” and likewise seeking – among other things – monetary compensation for the impact of COVID-19 in Missouri.

While unusual – and, as we will argue, deeply misguided – this wave of lawsuits is not unexpected. Here we explain first what is at stake in these lawsuits, and then how these unusual moves both on the part of citizens and of government representatives, fit into the larger pattern of the United States response to the COVID-19 pandemic – and why they are dangerous for our domestic stability, international relations and public health. In addition to misguided legal strategy, the suits are symptomatic of how certain government representatives – at both the federal and state level – are riding the wave of misinformation surrounding the COVID-19 outbreak, and how misinformation is being instrumentalized in attempts to justify and shift blame for the belated response to the pandemic across the United States.

We focus primarily on the Missouri case, which is relevant on multiple levels. First, a state suing a foreign government raises serious federalism questions given that the federal government is responsible for our relationship with China. Second, a suit by a state raises concerns that the state is spending its resources unwisely during the pandemic by pursuing an extraordinarily unlikely set of claims when both the Attorney General’s Office and the federal judiciary could spend its time on matters more closely related to the pandemic and its effect on Missourians. Third,

³ Frank Morris, Missouri Sues China, *Communist Party over the Coronavirus Pandemic*, NPR (Apr. 21, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/21/840550059/missouri-sues-china-communist-party-over-the-coronavirus-pandemic>

a suit by the state of Missouri, as we explain below, constitutes an attempt to pin blame on China and is concerning because it distracts from errors made by the federal government and some states (including Missouri) in preparing for the pandemic and responding appropriately to information that was available. And fourth, the Missouri suit makes recurring use of debunked information, contributing not only to the spread and crystallization of misinformation about the Chinese and WHO responses to COVID-19, but also to the instrumentalization of misinformation in judicial and political pursuits.

On the legal side of things, the most pressing question at this initial stage is whether the state of Missouri can even sue China. This remains highly dubious under the Foreign Sovereignty Immunities Act (FSIA),⁴ which was enacted in 1976 to codify significant restrictions on the ability of the United States to sue foreign states and governments. The FSIA is a complex law with several exceptions,⁵ but its guiding principle is clear:⁶ unless one of these exceptions applies, foreign states and governments cannot be sued. As experts⁷ on the FSIA have explained, the legislative intent behind the Act was “to promote the functioning of all governments by protecting a state from the burden of defending law suits abroad which are based on its public acts.” If this appears to be at odds with extra-legal notions of responsibility, liability and comity, consider that

⁴ Foreign Sovereignty Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d) and 1602–1611 <https://uscode.house.gov/view.xhtml?path=/prelim@title28/part4/chapter97&edition=prelim>

⁵ U.S. DEPT. STATE, *Foreign Sovereign Immunities Act*, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Service-of-Process/Foreign-Sovereign-Immunities-Act.html>

⁶ See generally FED. JUD. CTR., *The Foreign Sovereign Immunities Act: A Guide for Judges* (2013), <https://www.fjc.gov/sites/default/files/2014/FSIAGuide2013.pdf>

⁷ See Joseph M. Terry, *Jurisdictional Discovery Under the Foreign Sovereign Immunities Act*, 66 U. CHI. L. REV. 1029 (1999).

there are other avenues for dialogue and reparations between sovereign states – namely policy and diplomacy.

Under this framework, the next question becomes: do the facts alleged in the Missouri lawsuit fit under any of the FSIA exceptions? Well, the complaint invokes the “commercial exception,”⁸ which extinguishes foreign immunity when the action performed by a foreign state or its representatives consists of a commercial activity either performed in, or having an impact on, the United States. Would the (again, alleged) release of a virus constitute a “commercial activity” for purposes of the Act? There is no precedent establishing it would. The commercial exception normally relates to situations in which a sovereign state is acting not in an exercise of sovereignty, but as a commercial actor. Take the case of a state entering into a contract to buy steel or manufacturing equipment, for instance. The allegedly wrongful actions by China include working in a lab with the virus, suppressing information about the disease both domestically and internationally, failing to quarantine early in the epidemic, failing to allow United States and WHO researchers into the country to assess the situation until too late, permitting too many travelers in and out of Wuhan for too long, failing to prohibit travel during the new year or to prohibit large gatherings until too late, and hoarding personal protective equipment. Although each of these has economic ripple effects, they are not inherently commercial activities, and each seems consistent with governmental decision making in the course of governing.

⁸ See generally Amelia L. McCarthy, *The Commercial Activity Exception - Justice Demands Congress Define a Line in the Shifting Sands of Sovereign Immunity*, 77 MARQ. L. REV. 893 (1994).

Alternatively, the complaint invokes a exception based on tort law,⁹ which extinguishes immunity if an action of a foreign state causes “personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission.” Here, while we know that the legislature intended to create a broad tort-based category, the practice by courts has been to interpret the provision narrowly.¹⁰ Courts have allowed for wrongful death actions,¹¹ for example, but never in the context of exposure to infectious disease pathogens – and crucially, in the case of COVID-19, the facts – as currently established – in no way indicate that the novel coronavirus was released from a lab and negligently spread to the United States (which in itself, even if true, would be a difficult claim to bring under the tortious FSIA exception). The complaint admits that “this paragraph shall not apply to— (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.” China did release information to the WHO, took measures to impose quarantine, to stop travel, to keep or share supplies. Because the timing for each of these decisions is discretionary, they fall outside of the tort exception.

Now let us turn to the problem of misinformation. The complaint, as framed by Missouri Attorney General Schmitt, is rooted in inaccurate representations and factual misconstructions. Here we think that the complaint should speak for itself: “The virus unleashed by the Communist Party of China and the Chinese government has left no community in the world untouched.” The sources listed by Attorney General Schmitt? Fox News. Times three. The week prior to the filing

⁹ See Judi L. Abbott, *The Noncommercial Torts Exception to the Foreign Sovereign Immunities Act*, 9 FORDHAM INT’L L. J. (1985).

¹⁰ *Id.*, *ib.*

¹¹ See e.g. *Kline v. Republic of El Salvador*, 603 F. Supp. 1313 (D.D.C. 1985).

of the Missouri lawsuit, Fox News repeatedly circulated stories about sources which had purportedly claimed or implied that the novel coronavirus had been man-made in a Chinese laboratory. This type of claim was repeatedly debunked¹² by experts at public health-oriented organizations, including Dr. Anthony Fauci¹³ – which is to say, the sources with the actual ability and credibility to speak on this matter. The Fox News pieces selected by Attorney General Schmitt were published on April 15, 17 and 19. Tellingly, on April 17 Fox News published another piece contradicting¹⁴ its own reports, which is not mentioned in the Missouri complaint.

This brings us to yet another point about the Missouri case. Reliance on unreliable sources is also symptomatic of a larger trend that has characterized the response of the United States to the pandemic – the attempt to shift attention from what was done belatedly at both federal and state levels, paired with the attempt to assign blame to foreign entities for the proportions of the pandemic in America. Reliance on misinformation sources exacerbates the risk that by making inaccurate representations and then blending them in with hyperbolic Monday-morning quarterbacking, these lawsuits create boogey men where none really exists. In fact, if the allegations (apart from the claim that China deliberately unleashed the virus on the world) are taken at face value, then the United States (along with Italy and other countries) – as well as the

¹² See e.g. Kim Hjelmgaard, *WHO Says Coronavirus Came from an Animal and Was Not Made in a Lab*, U.S.A. TODAY (Apr. 21, 2020), <https://www.usatoday.com/story/news/world/2020/04/21/coronavirus-who-says-evidence-shows-covid-19-not-made-lab/2995236001/>

¹³ See e.g. John Haltiwanger, *Dr. Fauci Throws Cold Water on Conspiracy Theory that Coronavirus Was Created in a Chinese Lab*, BUS. INSIDER (Apr. 18, 2020), <https://www.businessinsider.com/fauci-throws-cold-water-conspiracy-theory-coronavirus-escaped-chinese-lab-2020-4>

¹⁴ Brie Stiemson, *WHO Found no Evidence Coronavirus Started in Lab*, China says, FOX NEWS (Apr. 17, 2020), <https://www.foxnews.com/politics/w-h-o-has-said-there-is-no-evidence-coronavirus-started-in-wuhan-lab-chinas-foreign-ministry-says>

state of Missouri among other states – are equally as guilty of a poor response to a quickly progressing public health crisis. Governments across the world and throughout the United States have been slow to share information with the public; many governors were reluctant to close schools and businesses; and many governments attempted to avoid ordering the spending and working public to stay at home. The Missouri government, for instance, fits all these categories. At their heart, the combined effects of misinformation and hyperbole are distractions from the similarities among governments in how poorly prepared and slow to respond they can be.

In addition to the technical and procedural aspects of the suit, the move by the state of Missouri is ill-advised for four policy reasons. First, we have a state that is now interfering with the United States-China relationship, a relationship that is important and delicate, and in the process the state ends up suing our biggest lender. Second, Missouri is also being hypocritical to criticize China for being slow to react to the pandemic when Missouri's governor failed to use the state's power to close all schools until local school boards had all done so, and was slow to close businesses until well over 90 percent of the population was under a local stay-at-home order. Third, state resources, including those of Attorney General's office, should be devoted exclusively to matters with a reasonable chance of helping to either prevent the spread of the disease or ease the suffering associated with the pandemic. As such, this lawsuit is wasting precious resources. And fourth, the state of Missouri is adding its voice and resources to the spread of misinformation. The trickle-down effects of misinformation permeating facially authoritative acts such as a lawsuit filed by a state Attorney General will be felt in the short and long terms, as they thicken the fog around facts and contribute to the normalization of misinformation.

Given the current environment, it is not surprising at all that the WHO is also being sued in federal court in the United States for allegedly having failed to properly respond to the pandemic, yet another embodiment of the instrumentalization of misinformation. In the interest of full disclosure, one of us (Rutschman) has worked as a consultant for the WHO during the Ebola and Zika outbreaks. Both of us – scholars in the public health field who recognize the role and importance of the WHO in pandemic preparedness and response – also recognize that the WHO has deserved some share of criticism for parts of its response to past public health crises. For instance, we agree with experts who criticized¹⁵ the WHO for taking too long to make an official statement on the severity and seriousness of the 2014-16 Ebola outbreak. That being said, the fact that – like practically every other international organization active today – the WHO does not have an unblemished record, can in no way justify the instrumentalization of legal resources to shift domestic blame for poor responses to COVID-19.

In *Kling v. World Health Organization*, three plaintiffs initiated a putative class action on behalf of 756,000 residents in Westchester County, an area in the state of New York that has been severely affected¹⁶ by COVID-19. The lawsuit claims that the WHO’s response to the pandemic has caused “injury, damage and loss” to Westchester County residents translating into “incalculable” damages. While the complaint does not name China as a defendant, it echoes the claims made explicit in the Missouri lawsuit: “The Chinese government and the WHO intentionally misled the international community, including the named Plaintiffs, about the

¹⁵ See e.g. Sarah Boseley, *Experts Criticise WHO Delay in Sounding Alarm Over Ebola Outbreak*, GUARDIAN (Nov. 22, 2015), <https://www.theguardian.com/world/2015/nov/22/experts-criticise-world-health-organisation-who-delay-ebola-outbreak>

¹⁶ WESTCHESTER GOV., CORONAVIRUS DISEASE (COVID-19), <https://health.westchestergov.com/2019-novel-coronavirus>

coronavirus and its devastating medical and economic effects.” The complaint goes on to state that “The WHO mishandled and mismanaged the response to the discovery of the coronavirus and upon information and belief, engaged in a cover-up of the COVID- 19 pandemic in China.”

Unlike China and other foreign countries, the WHO has a lesser degree of immunity from lawsuits under the International Organizations Immunities Act.¹⁷ While the D.C. Circuit had established that international organizations like the WHO enjoyed absolute immunity under the Act,¹⁸ in 2019 the Supreme Court in *Jam v. International Finance Corporation*¹⁹ ruled that international organizations enjoy a narrower form of immunity – one that mimics the immunity of foreign governments. In practice, this means that it is still fairly hard to sue the WHO in federal court in the United States, and that the New York lawsuit is unlikely to succeed. But this does not mean that these lawsuits are innocuous, or even that some courts would not entertain the idea of allowing the suit to proceed through its early stages to make a political point about WHO’s ineffectiveness. Consider the ongoing judicial battle²⁰ in Texas with regard to abortion during the COVID-19 pandemic and the instrumentalization of the individual and collective hardships created by a pandemic as tool to further ideological pursuits.

While we expect to see each of these lawsuits dismissed, do not pass them off as much ado about nothing. Both the Missouri lawsuit targeting China (and its predecessor in Florida) and the

¹⁷ International Organizations Immunities Act, 22 U.S.C. § 288, <https://uscode.house.gov/view.xhtml?path=/prelim@title22/chapter7/subchapter18&edition=prelim>

¹⁸ See *Jam v. Int’l Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017).

¹⁹ *Jam v. Int’l Fin. Corp.*, 586 US __ (2019).

²⁰ See e.g. Sarah Maccammon, *Federal Appeals Court Reinstates Texas Abortion Ban Instituted During COVID-19 Crisis*, NPR (Apr. 10, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/10/832242841/federal-appeals-court-reinstates-texas-abortion-ban>.

lawsuit targeting the WHO constitute worrisome distortions of the role of law and litigation in our legal system, utilizing them as policy and political weapons and as conduits for misinformation. Already, this wave of lawsuits is a grotesque product of the demonization of the WHO – which President Trump has spearheaded both verbally and by defunding the organization²¹ – and the instrumentalization of China as an excuse for the delayed and poorly executed response to COVID-19 in the United States at the federal level (and, in some cases, at state level as well). In both cases, the use of seemingly legitimate legal tools to further misinformation narratives amounts to nothing more than the creation and maintenance of smoke screens to distract constituencies from the true source of many of the problems plaguing the response to the pandemic in the United States.

Let us be clear. We are not saying China is free of blame in this pandemic. Early, decisive action in Wuhan would have saved lives in China and worldwide as would faster and more complete reporting to WHO. But the vast majority of governments share blame for wishful thinking and similarly slow and incomplete responses. Deciding which countries deserve the greatest blame and what the consequences are for their missteps are matters best left to international diplomacy, and not to civil litigation. Weaponizing the law and spreading misinformation to declare a villain and a victim of a global pandemic distorts the truth that all countries were ill-prepared and slow to react, and all countries are paying a substantial price as a result.

²¹ See e.g. *Coronavirus Updates: Trump Halts U.S. Funding of World Health Organization*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/coronavirus-updates.html>