

CORPORATE COUNSEL

Dire Straits in the Federal Courts: 'Get Your Money for Nothin' and Your Chicks for Free'

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Raymond Stauffer went shopping one day and wound up suing Brooks Brothers Inc. for tens of millions of dollars because the bow tie he bought had an expired patent number on it.

Stauffer brought his case under a long overlooked 1870 federal statute — recently discovered by creative plaintiffs' lawyers — that makes it a "crime" to mark an unpatented product with a patent number. The statute allows any person (known as a "relator") to enforce the statute for the federal government, and provides that any recovery — of up to \$500 per item so marked — is shared equally between the relator and the government.

Recently, the U.S. Court of Appeals for the Federal Circuit ruled that Mr. Stauffer had "standing" to assert his suit, even though neither he nor the government suffered any actual injury from Brooks Brothers' alleged violation of the statute. This decision, which emboldens plaintiffs' lawyers on the hunt for deep pockets in cases where no one has actually been injured, is a case study in judicial error, executive myopia, and legislative abdication.

Under Article III of the U.S. Constitution, a federal court only has jurisdiction over a "case or controversy." For a "case or controversy" to exist, a plaintiff must have suffered "injury in fact." Absent any injury in fact personal to the plaintiff, a plaintiff has no standing, and the case must be dismissed.

Not so for the Federal Circuit, which reasoned that because violation of the patent marking statute injures the government's sovereign interests, that injury could supply Mr. Stauffer's standing, even though he suffered no injury of any sort and the government itself suffered no financial injury.

In the annals of American constitutional law, this decision is unprecedented: The Supreme Court has never recognized that a defendant's alleged violation of the law, standing alone, can confer standing upon an uninjured private litigant to sue upon that violation. Under the Federal Circuit's logic,



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Congress could outsource all criminal and civil law enforcement to private bounty hunters like Mr. Stauffer, and dispense with local United States Attorneys.

Article II, Section 3 of the Constitution, however, states categorically that the "Executive" — not Congress, not the judiciary, and certainly not roving private litigants — "shall take Care that the Laws be faithfully executed."

Unfortunately, this "Executive" made matters worse, with the Justice Department intervening in the Brooks Brothers case in support of Mr. Stauffer's standing.

Why?

Apparently the Justice Department was concerned that any limitation upon patent marking suits might have ramifications for enforcement of the False Claims Act, a key weapon in rooting out fraud against the government. But this overlooks a crucial difference between the typical False Claims Act suit and the typical patent marking suit.

In the case of the former, the government is alleged to have suffered actual financial injury, which the relator seeks to recoup while sharing in the recovery. In the latter, any injury to the government is at most a technical violation of the law that no U.S. Attorney would ever waste federal resources to prosecute.

It is difficult to see any valid interest of the Justice Department to deputize the plaintiffs'

bar to shake down companies for technical violations of patent law that injure no one and that the department itself would never bother to prosecute.

Predictably, the Brooks Brothers decision has further swollen what was already a rising tide of opportunistic patent marking suits, from which businesses are seeking relief. They asked Congress to restrict private enforcement of the statute to competitive injury, that is, to those cases where the relator has suffered actual injury.

No reasonable person could dispute that the statute should be so amended, but Congress adjourned without acting, and there is no serious prospect that the issue will be taken up in the post-election lame duck session.

The Supreme Court may yet review and overturn the Brooks Brothers decision — as it has so many other Federal Circuit decisions in the last several years. But unless and until it does, American businesses will divert millions of dollars better spent on productive investment, expansion, and hiring in the midst of a deep recession to defend against this wasteful litigation spree loosed by the Federal Circuit, enabled by the Justice Department, and tolerated by a Congress indifferent to uninjured opportunists and their lawyers seeking money for nothing and given standing for free.

Dire straits, indeed.

Mr. Baker is a partner at McDermott Will & Emery in Washington who filed an amicus curiae brief in support of Brooks Brothers. He previously served in the Justice Department and as counsel to the Senate Judiciary Committee. His law firm represents defendants sued in patent marking suits.