The Latest On Tort Liability In Abu Ghraib Torture Case

Law360, New York (October 24, 2016, 12:22 PM EDT) -- The Iraq War is still being fought, but in the federal courts rather than on foreign battlefields. On Oct. 21, 2016, a panel of the U.S. Court of Appeals for the Fourth Circuit issued what is probably the most refined and nuanced opinion of any federal court on the question of whether the political question doctrine bars adjudication of suits seeking to impose tort liability on civilian contractors that assist the U.S. military carry out war-zone operations. That opinion, authored by Circuit Judge Barbara Milano Keenan in Al Shimari v. CACI Premier Technology Inc., No. 15-1831, is the latest in a succession of opinions rendered by the Fourth Circuit during the past five years in tort litigation brought by Iraqi nationals who allege that they were abused by CACI interrogators while detained by the U.S. military at the notorious Abu Ghraib prison near Baghdad during the outset of Operation Iraqi Freedom in 2003-2004.

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Hundreds of thousands of civilian contractor personnel assisted the U.S. military within the Iraq war zone during Operation Iraqi Freedom by providing critical support services such as engineering and construction, operation and maintenance of forward operating bases, transportation of fuel and other supplies, information technology, and as is the case in Al Shimari, interrogation assistance. See generally Lane v.Halliburton, 529 F.3d 548, 554 (5th Cir. 2008) (today's all-volunteer military "finds the use of civilian contractors in support roles to be an essential component of a successful war-time mission").

Congress has not waived sovereign immunity for claims against the United States "arising out of the combatant activities of the military ... during time of war." 28 U.S.C. § 2680(j). As a result, in the post-9/11 world, war-zone contractors that provide logistical and other support services to the U.S. military have been targeted as defendants in numerous personal injury and wrongful death suits brought by or on behalf of civilians, military personnel, and foreign nationals. Contractors have sought dismissal of such suits on political question, federal preemption, workers' compensation, and other grounds. Because the U.S. Supreme Courtthus far has declined to hear any of these "battlefield contractor" tort cases, the jurisprudence on war-zone contractors' jurisdictional and immunity defenses has continued to evolve and percolate in the lower courts.

The political question doctrine has been the war-zone contractors' principal constitutionally based defense in private-party tort litigation. Under the political question doctrine, federal courts lack subject-matter jurisdiction over suits that would require adjudication of nonjusticiable "political" questions — questions that are constitutionally committed to the federal government's political branches, namely Congress and the executive branch, or for which there are no judicially manageable standards. See generally Baker v. Carr, 369 U.S. 186, 211 (1962) (articulating six general factors for identifying political questions). In Taylor v. Kellogg Brown & Root Services Inc., 658 F.3d 402 (4th Cir. 2011), the court of appeals

distilled the six Baker factors into two factors for determining whether the political question doctrine bars a negligence suit against a war-zone contractor. See Al Shimari, op. at 15 (explaining that under Taylor, the court asks whether the contractor was under the direct control of the military, and whether the merits of the plaintiff's claim would require the court to question, actual, sensitive military judgments).

On remand from the Fourth Circuit, a Virginia federal district court applied Taylor and dismissed Al Shimari on political question grounds. But in its latest Al Shimari opinion, the court of appeals has vacated and remanded for further consideration of the applicable political question principles.

More specifically, the court of appeals concluded that as to the first Taylor factor, the district court "erred in its analysis by failing to determine whether the military exercised actual control over any of CACI's alleged conduct." Id. at 5. In reaching this conclusion, the court distinguished between "formal control" (e.g., the military was in charge of the official command structure at Abu Ghraib) and "actual control" (i.e., whether the military actually exercised control over the CACI's interrogators' activities). Id. at 18. The Fourth Circuit held in Al Shimari that this distinction is important because "when a contractor engages in a lawful action under the actual control of the military, we will consider the contractor's action to be a 'de facto military decision[]' shielded from judicial review under the political question doctrine." Id. at 21 (quoting Taylor, 658 F.3d at 410). The court emphasized that the contractor's alleged tortious acts must have been not only "committed under actual control of the military," but also "not unlawful." Ibid. According to the court, because "the military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity ... when a contractor has engaged in unlawful conduct, irrespective of the nature of control exercised by the military, the contractor cannot claim protection under the political question doctrine." Ibid.

As to the second Taylor factor — "whether a decision on the merits of a claim would require the court to 'question actual, sensitive judgments made by the military'" — the Al Shimari panel held that "the district court erred in failing to draw a distinction between unlawful conduct and discretionary acts that were not unlawful when committed." Id. at 21, 22. The court of appeals indicated that if a plaintiff's claims "rest on allegations of unlawful conduct in violation of settled international law or criminal law then applicable ... those claims fall outside the protection of the political question doctrine." Id. at 22-23. But the court also addressed what it described as a "grey area," where there is an "absence of clear norms of international law or applicable criminal law." Id. at 27. The court held that such gray-area conduct is a "protected area of discretion under the political question doctrine" provided that it "occurred under the actual control of the military or involved sensitive military judgments, and was not unlawful when committed." Id. at 25; see also id. at 33 (Floyd, J., concurring) (asserting that "although the reasonableness of military conduct may not be justiciable, the lawfulness of that conduct assuredly is").

It remains to be seen whether the district court, applying this latest Al Shimari opinion from the Fourth Circuit, again holds that the political question doctrine renders the Iraqi nationals' suit nonjusticiable. If the district court so rules, it seems likely that this almost decade-long Abu Ghraib contract-interrogator litigation will make its way back to the Fourth Circuit for a fourth time.

The broader significance of Al Shimari for government contractors that assist the U.S. military in overseas hot zones is that, as other circuits also have held, the political question doctrine does bar certain tort suits arising out of war-zone services. But at least within the Fourth Circuit, the political question doctrine applies only if it can be demonstrated that

there was actual military control over the defendant contractor's alleged tortious conduct, or that the trial court would have to second-guess actual, sensitive military judgments in order to adjudicate the merits of the plaintiff's claim. Developing jurisdictional evidence to satisfy this test in support of a Rule 12(b)(1) motion to dismiss can be a formidable, as well as necessary, challenge.

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DISCLOSURE: Ebner filed an amicus brief in Al Shimari on behalf of the Professional Services Council and the Coalition For Government Procurement. He also briefed and argued the seminal Taylor war-zone contractor case in the Fourth Circuit.

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