Insight

IN-DEPTH DISCUSSION

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California Laws Are Being Used to Advance Human Rights Claims Based on Global Supply Chain Activities

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Recent class actions have claimed that companies have violated California consumer fraud and unfair competition laws resulting from alleged forced labor in their global supply chains. These state law claims argue that companies are liable for allegedly misrepresenting in various corporate declarations their efforts to eradicate forced labor from their global supply chains. Plaintiffs have argued that corporate statements referring to international standards, such as the U.N. Guiding Principles on Business and Human Rights (the "UN Guiding Principles") and International Labour Organization (the "ILO") Conventions, contribute to the companies' duties to disclose the use of any forced labor in their supply chains.

The California Class Actions

In August and September of 2015, six class action cases were brought in California federal courts against companies for their purported failure to disclose alleged forced labor in their supply chains based in Thailand and West Africa. Each lawsuit alleges violations of California's consumer protection and unfair competition laws.[1]

These class action complaints contend that the respective companies failed in their duties to disclose the use of forced labor or the "likelihood of forced labor" in their supply chains. Plaintiffs assert that these duties arose from the companies' superior knowledge of their own supply chains and the companies' representations that they did not tolerate the use of forced labor by their suppliers. The sources of these representations include the companies' supplier codes of conduct, publicly proclaimed corporate business principles, corporate social responsibility reports, disclosures on company websites pursuant to the California Transparency in Supply Chains Act (the "California Supply Chain Act")[2] and, in three cases, the industry's public commitments, to which the defendant-companies are signatories.

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1 The specific California laws under which these claims were brought are: the California Unfair Competition Law (Cal. Bus. & Prof. Code Sec. 17200 et. seq.); the Consumers' Legal Remedies Act (Cal. Civ. Code Sec. 1750 *et. seq.*); and the False Advertising Law (Cal. Bus. & Prof. Code Sec. 17500 et. seq.).

2 For an in-depth discussion of the California Supply Chain Act, *see* John C. Kloosterman, *California Supply Chain Law Affects Large Retailers and Manufacturers Doing Business in California*, Littler Insight (Dec. 2, 2011).

Attempting to Tie in International Instruments

By referencing these corporate statements as bases for their consumer protection claims, the plaintiffs in these cases have brought to bear a wide range of international instruments on forced labor. For example, the plaintiffs in two of the cases brought against the same company partly based their claims on the company's corporate business principles, which refer to the UN Guiding Principles, which in turn emphasize the corporate responsibility to respect labor rights. The plaintiffs in these cases also reference the company's supplier code of conduct, which sets company expectations on the prohibition of child labor "in accordance with ILO Minimum Age Convention No. 138." Similarly, the plaintiffs in another case partly based their claims on the company's Corporate Business Principles, which include a statement that the company "fully support[s] the United Nations Global Compact's guiding principles on human rights and labour," and the company's supplier code, which strictly prohibits the use of child labor "in line with ILO Convention 138 on the Minimum Age, and Convention 182 on the Elimination of the Worst Forms of Child Labour." These plaintiffs allege that these international standards to which the companies have publicly committed contribute to the established "public policies" against the used of forced labor, and to the companies' duties to disclose their alleged use of forced labor.

While five of the complaints appear to follow a similar "cookie-cutter" format, one is notably different. In this complaint, the plaintiffs not only based their consumer protection claims on the company's public statements on eradicating forced labor from its supply chains, but also alleged direct violations of the federal Trafficking Victims Protection Act and its reauthorizing acts, the California Supply Chain Act[3] and other California laws aimed at combating forced labor, as well as "international conventions," including ILO Convention No. 29 on forced labor, and the Universal Declaration of Human Rights, as support for their unfair competition claim against the company. In the other five complaints, the unfair competition claims were premised on violations of the consumer protection laws, which in turn alleged the companies had falsely misrepresented the absence of forced labor in their supply chains. Thus, this particular complaint shows that plaintiffs are attempting to use these California consumer protection and unfair competition laws to allege direct violations of international instruments that do not independently have the force of binding law – for example, the UN Guiding Principles are voluntary principles, not law, and ILO Conventions are ratified by member states, not the private sector.[4]

What About Kiobel?

These plaintiffs' use of international standards as bases for their consumer protection claims is interesting in light of the U.S. Supreme Court's recent guidance on the jurisdictional scope of the Alien Tort Claims Act (the "ATCA"), which plaintiffs have attempted to use in U.S. courts against multinational corporations accused of engaging in or condoning human rights atrocities in foreign jurisdictions.[5] In *Kiobel v. Royal Dutch Petroleum Company*, the Supreme Court held that the ATCA does not apply to employment practices conducted overseas.

Some of the cases discussed above are similar to the claims brought under the ATCA in California's federal courts by plaintiffs who alleged that the company, along with others, had "aided and abetted" slavery through their pursuit of low-cost cocoa along the Ivory Coast. In 2014, the Ninth Circuit appeared to revive the ATCA claims involving the alleged use of child slaves in the Ivory Coast. However, in September 2015, the companies filed a petition for a writ of certiorari with the U.S. Supreme Court asking the Court to reverse the Ninth Circuit's decision on the grounds that *inter alia*, it contravenes *Kiobel*.

3 A recent Delaware case shows that plaintiffs are attempting to seek causes of actions based on California Supply Chain Act disclosures beyond consumer protection actions. One court tested whether Supply Chain Act disclosures could be used as a basis for a stockholder to inspect the company's documents under Delaware law. The stockholder claimed the company was aware that child labor could have been used by its cocoa bean suppliers in West Africa and that the company's disclosures were misleading. However, the court held that the Supply Chain Act "does not require that a company take particular, or even any, action to address illegal labor within its supply chain" and the stockholder's "philosophical disagreements with the effectiveness of [the company's] supplier code of conduct" does not violate California law. Accordingly, *inter alia*, because the stockholder failed to demonstrate any basis to infer illegal conduct, the court dismissed for want of a proper purpose the stockholder's demand to inspect the company's records.

4 Interestingly, while the cases refer to breaches of ILO Convention Nos 29, 138 and 182, the United States has never ratified Convention No 29 or Convention No 138.

5 See *Kiobel v. Royal Dutch Petroleum Co.* 133 S. Ct. 1659 (2013).

These California Class Actions are Part of a Wider Effort to Scrutinize Global Supply Chain Violations

State law claims alleging forced labor violations emerge at a time when plaintiffs and governments have renewed efforts to hold companies accountable for supply chain violations. For example, non-Canadian workers have now repeatedly brought suit in Canadian courts for human rights violations allegedly committed by entities in the employers' supply chains, resting their negligence claims on a theory that international norms such as the UN Guiding Principles define a standard of care that, when violated, constitutes actionable negligence.[6] While the plaintiffs in the earlier Canadian cases only based their negligence arguments on companies' express pronouncements on ending forced labor in their supply chains, more recently, plaintiffs have argued that international standards such as the UN Guiding Principles establish a duty of care whether or not the companies have explicitly adopted them. Thus, as in one of the complaints discussed above, plaintiffs are looking to hold companies liable for international standards that those companies have not necessarily expressly adopted.

In California, the State's Attorney General recently published guidance on complying with the Supply Chain Act. The Attorney General also sent letters to companies covered by the Supply Chain Act that were not adequately disclosing their efforts to eradicate slavery and human trafficking from their direct supply chains.[7] The letters asked each company to respond within 30 days with either an explanation as to why the Supply Chain Act does not apply to them, or a web link to the company's disclosure. So far, the Attorney General has not brought enforcement proceedings against any company for not complying with the Supply Chain Act.

In addition, the California Supply Chain Act has served as guidance for a bill in the U.S. House of Representatives entitled the "Business Supply Chain Transparency on Trafficking and Slavery Act of 2015" (H.R. 3226). H.R. 3226 would require publicly-traded companies with over $100 million in annual worldwide gross receipts to disclose on their website and report yearly to the Securities and Exchange Commission their efforts to eradicate slavery and human trafficking from their supply chains.[8] Regardless of whether this federal bill will become law, other states may adopt the California model. Indeed, even the United Kingdom has modeled its recent Modern Slavery Act after the California Supply Chain Act.[9] Finally, amendments to the Federal Acquisition Regulation (FAR) aimed at eliminating substandard labor conditions within government contractors' supply chains went into effect on March 2, 2015, and now place requirements on government contractors and subcontractors as part of an effort to curb human trafficking.[10]

Next Steps

These developments in California and globally emphasize the critical need for employers to properly manage their supply chains. Doing so is a complex, culture-specific and risk-specific exercise, and to that end, employers should consult experienced employment counsel.

The courts in which the six California class actions have been filed have not yet tested the validity of the plaintiffs' claims. Littler will monitor these cases and report on any developments.

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6 For more information on these Canadian cases, see John Kloosterman, Trent Sutton, Sari Springer and Lavanga Wijekoon, *In Canada, Foreign Workers Seek to Use International Norms as the Standard of Care in Negligence Claims Against Multinationals Operating Overseas,* Littler Insight (Sept. 16, 2015).

7 California Department of Justice, sample letter re: The State of California's Transparency in Supply Chains Act, April 1, 2015, available at *https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/letter.pdf.*

8 For more information on H.R. 3226, *see* Michael Congiu, John Kloosterman, Stefan Marculewicz and Mark Eskenazi, *House Bill Would Require Public Disclosure of Company Policies to Combat Supply Chain Trafficking*, Littler Insight (Aug. 4, 2015).

9 For more information on the U.K. law *see* Tahl Tyson, *United Kingdom: New Law to Combat Supply Chain Slavery and Human Trafficking*, Littler ASAP (July 14, 2015).

10 For more information on these FAR requirements, *see* Elizabeth A. Lalik and Katherine A. Fearn, *Anti-Trafficking Regulations Impose New Obligations on All Federal Contractors*, Littler Insight (Apr. 10, 2015).