Insight

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Advancing Human Rights Claims Based on Global Supply Chain Activities: Recent Developments in California and Canada

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Courts in California and Canada have emerged as testing grounds for advancing claims of forced labor in global supply chains. The plaintiffs' approach is to make companies more accountable to "soft law" norms like the UN Guiding Principles on Business and Human Rights (the "UN Guiding Principles").

For now, the California cases appear to have run their course as a result of the companies' successful efforts to dismiss those actions. However, the Canadian cases are progressing, with two recent decisions strongly signaling Canadian courts' willingness to allow non-Canadians to pursue money damages based on Canadian companies' alleged human rights violations overseas.

The California Cases Are Stalled – For Now

In August and September 2015, consumers brought six class actions in California federal courts against companies based on their purported failure to disclose alleged forced labor in their supply chains in Thailand and West Africa.[1] The legal claims in these cases were not grounded in the alleged labor violations themselves, but rather in the defendant companies' purported failure to disclose to California consumers the use of forced labor or the "likelihood of forced labor" in supply chains. The plaintiffs argued that the companies' various corporate statements, such as supplier codes of conduct, should have included these disclosures,

1 *Wirth v. Mars, Inc.*, No. 15-cv-1470, 2016 U.S. Dist. LEXIS 14552 (C.D. Cal.); *Sud v. Costco Wholesale Corp.*, No. 15-cv-03783 (N.D. Cal.); *Barber v. Nestle USA, Inc.*, 154 F. Supp. 3d 954 (C.D. Cal.); *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016 (N.D. Cal.); *Dana v. The Hershey Co.*, 2016 U.S. Dist. LEXIS 41594, No. 15-cv-04453 (N.D. Cal.); *McCoy v. Nestle USA, Inc.*, 2016 U.S. Dist. LEXIS 41601, No. 15-cv-04451 (N.D. Cal.). For an in-depth discussion of these cases, see Stefan Marculewicz, Michael Congiu, John Kloosterman, and Lavanga Wijekoon, *California Laws Are Being Used to Advance Human Rights Claims Based on Global Supply Chain Activities.* Littler Insight (Oct. 14, 2015).

especially since those corporate statements refer to such norms as the UN Guiding Principles, which emphasize the corporate duty to respect labor rights, and laws such as International Labour Organization ("ILO") conventions on child labor.

California courts, however, have consistently rejected each of these six consumer protection-based cases by granting the respective defendant-companies' motions to dismiss. The last of the six cases – *Sud v. Costco*, described in detail below – was dismissed in January 2017, thus reinforcing the position that these claims are not viable.

In August 2015, consumers filed a putative class action against Costco Wholesale Corporation, as well as multiple third-party suppliers, over the sale of shrimp farmed in Thailand and other Southeast Asian countries. The complaint alleged that Costco had a duty to disclose that the shrimp it sold was farmed in a manner that implicated human rights violations. Specifically, the plaintiffs alleged that the Thai farmers who raised the shrimp (which were ultimately sold to Costco for sale to consumers) fed them fishmeal made from fish caught on ships that used forced labor from slavery and human trafficking. Thus, plaintiffs contended, by failing to inform consumers about this alleged link to rights violations in Thailand, Costco had violated California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act.[2]

On January 24, 2017, largely following the rationale of other courts that have dismissed the five related cases, the *Sud* court dismissed the complaint on the grounds that Costco had no duty to disclose the information at issue.[3] In doing so, the court determined that the plaintiffs could not pursue claims against Costco based on the company's public statements that it prohibits slavery and human trafficking among its suppliers because, crucially, the plaintiffs had not alleged that they read or relied on those statements when they brought shrimp from Costco. As such, there was no evidence of reliance – a required element of the consumer protection claims under discussion.

Next, the court held that Costco had no duty to disclose the alleged labor violations at issue because this type of duty arises only when the information addresses a safety risk to the consumer or where the information discloses a "product defect" – neither of which were true with the shrimp at issue. Further, the court opined that the "duty to disclose does not extend to situations where, as here, information may persuade a customer to make different purchasing decisions." Moreover, the court found that it was "sound policy" to limit the kinds of information manufacturers or sellers must disclose, "given the difficulty of anticipating exactly what information some customers might find material to their purchasing decisions and wish to see on product labels."

Thus, with the dismissal of *Sud*, it appears that California's courts have currently closed the door on this consumer protection-based approach to supply chain accountability litigation. Nonetheless, several of the plaintiffs in these cases have filed appeals, and it is possible that the Ninth Circuit may breathe new life into this line of cases.

The Canadian Cases Are Progressing

Over the past several years, non-Canadian plaintiffs have filed multiple civil actions in Canada against multinational companies that are based or incorporated in Canada on the theory that international norms (such as the UN Guiding Principles) form a standard of care that, when violated, constitutes actionable negligence. Recent decisions in two of these Canadian cases confirm Canadian courts' willingness to entertain these claims.

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2 Cal. Bus. & Prof. Code §§ 17200, *et seq.*; Cal. Bus. & Prof. Code §§ 17500, *et seq.*; Cal. Civ. Code §§ 1750, *et seq.*

3 *Sud v. Costco Wholesale Corp.*, No. 15-cv-03783 at Dkt. No. 93 (N.D. Cal.).

First, in *Araya v. Nevsun Resources Ltd.*, a group of Eritreans sued Nevsun Resources Ltd. – a British Columbia company – over forced labor, slavery, and torture allegations involving its subsidiary operating company.[4] Shortly thereafter, Nevsun applied to the court for an order staying the Canadian proceeding, arguing that Eritrea was the more appropriate forum; Nevsun also sought an order striking claims that Nevsun had violated customary international law, arguing that those claims are not cognizable under Canadian law.

In October 2016, the trial court ruled in favor of the plaintiffs on these two important issues. First, after an extensive investigation of Eritrea's legal system and government, the court found that Nevsun had not proven that Eritrea was the "more appropriate forum." In reaching this decision, the court considered evidence regarding practical and structural impediments to a just resolution of the matter in Eritrea – including systemic weaknesses in the Eritrean judicial system, resistance from the Eritrean military, and the fact that Eritrea's government viewed the plaintiffs as traitors. Further, the court concluded that "there [was] a real risk to the plaintiffs of an unfair trial occurring in Eritrea."

Second, the court refused to strike the claims based on purported violations of customary international law. Because Canadian courts have yet to fully consider whether international norms can give rise to private causes of actions against private corporate actors, the court declined to dismiss the plaintiffs' claims at the early stage. Instead, the court found that the plaintiffs' customary international law claims "raise arguable, difficult and important points of law and should proceed to trial so that they can be considered in their proper factual and legal context."

A few months after the *Nevsun* decision, in January 2017, the Court of Appeal for British Columbia reached a similar conclusion with respect to a case brought by Guatemalan plaintiffs against another Canadian mining company.

In *Garcia v. Tahoe Resources Inc.*, seven Guatemalan plaintiffs sued a British Columbia mining company, Tahoe Resources Inc., over actions by Tahoe's private security personnel at the Escobal mine in southeast Guatemala.[5] The plaintiffs were members of a community living near the mine and, in 2013, were protesting outside of the mine's gates when private security personnel employed by Tahoe allegedly opened fire on the protesters. The plaintiffs argued that Tahoe's security manager expressly or implicitly authorized the use of excessive force or, at the very least, was negligent in failing to stop it. The plaintiffs also argued that the company owed a duty of care based on the fact that it knew that its subsidiary's security personnel failed to adhere to internationally accepted standards on the use of security personnel, including those standards in the UN Guiding Principles, to which the company had publicly committed.

In 2014, Tahoe applied for an order to stay the case, arguing Guatemala was the more appropriate forum. Although the plaintiffs presented evidence that Guatemala's justice system was corrupt, in the end, the trial court concluded that "Guatemala was clearly the more appropriate forum for adjudication of the dispute" and, secondarily, that Guatemala's courts were "capable of providing justice."

However, on January 26, 2017, the Court of Appeal overruled the lower court's decision and lifted the stay. After admitting some new evidence, the appellate court reconsidered whether Guatemala was the more appropriate forum and, based primarily on the following three factors, determined that it was not. First, the limitations period of the plaintiffs' claims had already expired under Guatemala law, and the criminal proceeding (which plaintiffs could have joined) had stalled after Tahoe's former security manager had fled the jurisdiction. Second, the civil discovery procedures under Guatemalan law were limited and cumbersome

4 2016 BCSC 1856 (Sup. Ct. British Columbia Oct. 06, 2016). The courts of British Columbia had presumptive jurisdiction over the case because of Nevsun's status as a British Columbia company. *See id.* at ¶ 226

5 *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39 (Ct. App. British Columbia Jan. 26, 2017).

and would likely have placed the plaintiffs at a significant disadvantage in proving their claims. Lastly, Guatemala's justice system was too weak and corrupt to offer the plaintiffs a fair trial against a corporation.

In *Nevsun and Garcia*, Canadian courts have signaled a willingness to permit non-Canadian plaintiffs to pursue monetary damages against Canadian-based multinational companies based on violations that allegedly occurred on foreign soil. What's more, the *Nevsun* opinion suggests that Canadian law could allow foreign plaintiffs to pursue private rights of action against Canadian companies based on violations of customary international law, rather than a violation of a specifically Canadian statute or common law rule. Lastly, the forum analysis articulated by *Garcia* appears to be more friendly to foreign litigants than the overruled analysis used by the lower court, particularly if the litigants would otherwise be forced to pursue claims in a suspect judicial system.

Global Developments Indicate a Move to Make International Norms Binding Law

Although the California consumer protection cases may have run their course, unless revived by the Ninth Circuit, the Canadian cases suggest that it is increasingly important that multinational companies monitor their supply chains, or they could face litigation at home over alleged malfeasance.

Indeed, these developments take on added importance as the global community focuses attention on the accountability of multinationals for their supply chains, and adopts as binding law some of the international norms the plaintiffs in the above cases relied upon. For example, the UN Human Rights Council's Open-Ended Intergovernmental Working Group (OEIWG) has been negotiating a multi-lateral treaty that makes the UN Guiding Principles binding law. Moreover, an ever-increasing number of countries have been adopting "national action plans" to implement the UN Guiding Principles, which include introducing and adopting legislation that binds those countries' companies to certain of those UN Guiding Principles.[6]

Plaintiffs will likely be heartened by these developments and in particular, the Canadian cases discussed above, and rely on them to further transform "soft law" into "hard law" in support of their efforts to impose international norms such as the UN Guiding Principles as a standard of care for multinationals operating overseas.

6 *See* The U.S. Issues a National Action Plan on Responsible Business Conduct, Littler Insight (Jan. 17, 2017); *see also* Proposed French Law Would Impose New Due Diligence Obligations on Certain Employers and Their Supply Chains, Littler Insight (Dec. 12, 2016).