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In yet another attempt to litigate alleged human rights abuses occurring abroad in U.S. courts, the Southern District of New York recently dismissed a case involving alleged union-related human rights abuses in Guatemala under the doctrine of *forum non conveniens*.

## New York Federal Court Rejects Attempt to Litigate Alleged Human Rights Abuses in the U.S.

By Eric A. Savage and Michael Congiu

In what continues to be a flurry of activity in U.S. federal courts involving allegations of human rights abuses abroad, the Southern District of New York, in *Palacios v. Coca-Cola Co., Inc.*, No. 10-03120(RJS) (Nov. 19, 2010), recently dismissed a federal lawsuit brought by a group of Guatemalan nationals in connection with their union activities in Guatemala.

In *Palacios*, Guatemalan nationals alleged that Coca-Cola Company, Inc. was complicit in the death threats, murder and rape resulting from plaintiffs' union involvement at a Coca-Cola-affiliated processing plant in Guatemala City, Guatemala. Significantly, the complaint included a consumer fraud claim under New York's General Business Law section 349, which prohibits deceptive acts and practices in the conduct of any business in New York. The plaintiffs claimed that Coca-Cola fraudulently misrepresented to New York consumers – through its published "Workplace Rights" standards – that its affiliated bottlers "comply with internationally-recognized human rights standards, the laws of the countries where [Coca-Cola] operates, and the policies and directives of [Coca-Cola]." Surprisingly absent from the complaint was any claim under the Alien Tort Claims Act (ATCA), a federal statute commonly used by non-U.S. plaintiffs seeking damages in U.S. courts for violations of international law.<sup>1</sup>

After carefully considering the facts and circumstances at issue, the court dismissed the complaint under the doctrine of *forum non conveniens* (FNC). However, the court reserved the right to "reconsider [its] holding" in the event that the plaintiffs were required to return to Guatemala to prosecute their claims, or if the case was dismissed by Guatemala's highest court under a Guatemalan law, which arguably divested Guatemalan courts of jurisdiction based on the plaintiffs having filed suit in the United States.

### The *Palacios* Case

Like many of these federal lawsuits involving human rights violations, the allegations in *Palacios*, if true, paint a difficult picture. The plaintiffs alleged that their own lives, as well as those of members of their families, were put in jeopardy because of their union involvement. One group of plaintiffs – led by Guatemalan union leader Jose Alberto

Vicente Chavez – alleged that their family was attacked at a local bus station in Guatemala leading to the murder of Chavez’s son and the rape of his daughter.

The plaintiffs used these alleged events to assert violations of New York State common law and, alternatively, Guatemala law for various torts including, among others, claims for wrongful death, intentional infliction of emotional distress, negligent infliction of emotional distress, assault and battery.

### ***The Court’s Analysis***

After removing the case from state to federal court, Coca-Cola moved to dismiss the complaint under the doctrine of *forum non conveniens*. The court granted Coca-Cola’s motion and dismissed the complaint. In doing so, it summarized the three-part test for resolving motions to dismiss under FNC as follows:

At step one, a court determines the degree of deference properly accorded the plaintiff’s choice of forum. At step two, it considers whether the alternative forum proposed by the defendants is adequate to adjudicate the parties’ dispute. Finally, at step three, a court balances the private and public interests implicated in the choice of forum.

Although the court determined that a “meaningful but intermediate measure of deference” should be afforded to plaintiffs’ choice of forum in light of the reality that some, but not all, plaintiffs were U.S. residents, the court’s decision largely hinged on whether Guatemala was an adequate alternative forum for plaintiffs to pursue their claims. In determining that Guatemala was an adequate alternative forum, the court examined whether Guatemala’s Defense of Procedural Rights of Nationals and Residents (“Defense Law”) divested Guatemalan courts of jurisdiction to hear plaintiffs’ claims in light of plaintiffs filing their lawsuit in the United States.

The parties offered conflicting expert opinions on this issue, and the court ultimately concluded that the question as to the Guatemalan courts’ jurisdiction was unresolved. However, the court then determined that the issue was not dispositive of the FNC analysis given the court’s willingness to reconsider its holding in the event Guatemala’s highest court affirmed the dismissal of plaintiffs’ claims in Guatemala under the Defense Law. Additionally, the court rejected the plaintiffs’ argument that they would not have any available remedy under Guatemalan law. On this topic, the court was persuaded by the fact that several of the plaintiffs had successfully proceeded in Guatemalan court to redress some of the same injuries alleged in their U.S. lawsuit. Indeed, several of the alleged assailants were convicted on charges of murder, rape and aggravated robbery in Guatemala.

The court rejected plaintiffs’ argument that their consumer fraud claim supported pursuing their claims in federal court. Although the court acknowledged that a similar claim or remedy was not available under Guatemalan law, it viewed plaintiffs’ attempt to include their consumer fraud claim as a misguided attempt to avoid litigating their claims in Guatemalan court. The court reasoned as follows:

In this case, Plaintiffs are Guatemalan labor activists, not New York consumers allegedly injured by deceptive Coca-Cola statements and advertising. To assert consumer fraud under these facts seems a transparent attempt to bootstrap a foreign claim into the New York court system. The Court finds such “creative pleading” unpersuasive.

Finally, the court rejected plaintiffs’ argument that Guatemala was an inadequate forum that lacked “an independent and functioning legal system.” Citing considerations of comity, the court refused to assess the quality of Guatemala’s judicial system even though the plaintiffs offered State Department and other publications suggesting the existence of corruption and violent crime associated with the Guatemalan judicial system. Instead, the court determined that there was insufficient evidence demonstrating the requisite systemic failings of Guatemala’s judiciary, and wrote that every other court that had assessed Guatemala’s judicial system had found it to be an adequate alternative to the U.S. judicial system.<sup>2</sup>

Nevertheless, the court was mindful of the problems that might befall the plaintiffs residing in New York should they need to appear in Guatemala to prosecute their claims in that country, and reserved the right to reconsider its holding should those plaintiffs be required to return to Guatemala.

## Looking Forward

Companies with foreign operations in the developing world can use this decision as additional authority to confront lawsuits in the United States alleging human rights abuses occurring abroad. With the plaintiffs' bar becoming increasingly active and creative in this area, the existence of additional useful authority for multinational companies is welcome. Indeed, the court's rejection of the plaintiffs' attempt to use a consumer fraud claim based on an employer's corporate code – rather than the ATCA – may deter further attempts to position human rights litigation in this manner.

Although a full understanding of the plaintiffs' litigation strategy is impossible, the omission of ATCA claims – requiring a significantly high threshold of misconduct and typically with some accompanying state action – is telling. Only time will tell whether there will be a shift by the plaintiffs' bar away from use of the ATCA given the largely unsuccessful efforts plaintiffs have made in pursuit of those claims in U.S. courts, but the *Palacios* case may be an indication of such a trend.

Although the use of FNC is not a novel device for confronting claims alleging foreign human rights abuses,<sup>3</sup> the *Palacios* decision is an excellent example of a court exhaustively assessing the FNC doctrine under circumstances that often accompany such claims – provocative factual allegations occurring in a country where the plaintiffs question their ability to receive justice. Although it is unclear whether the court's qualification of its holding on the safety interests of certain plaintiffs portends a new trend, the case remains valuable guidance in this developing area of the law.

Additionally, and in light of plaintiffs' attempt to use the employer's published "Workplace Standards" to support their claims, multinational corporations should use this decision as a vehicle either to revisit existing codes of conduct or to inform the creation of new codes. Many employers' codes of conduct are broad, and are used to protect a company's brand and positively influence change in developing countries. The decision highlights the difficulties associated with drafting corporate codes of conduct to avoid claims that the company is violating its own policy. Although such claims are often more damaging from a public-relations perspective than from a legal standpoint, the *Palacios* decision may forecast further efforts towards using these codes of conduct as swords in litigation.

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Eric A. Savage is a Shareholder in Littler's Newark office, and Michael Congiu is an Associate in the Chicago office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Savage at esavage@littler.com, or Mr. Congiu at mcongiu@littler.com.

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<sup>1</sup> For additional information on recent ATCA cases, see Littler's ASAPs, *The Continued Viability of the Alien Tort Claims Act and the Torture Victim Protection Act* (January 2009), available at <http://www.littler.com/PressPublications/Lists/ASAPs/DispASAPs.aspx?List=edb4a871%2D9e73%2D4eae%2Dbf81%2D3d045b6ede6d&ID=1320>, and *Corporate Liability for Human Rights Abuses Goes on Trial* (July 2007), available at <http://www.littler.com/PressPublications/Lists/ASAPs/DispASAPs.aspx?List=edb4a871%2D9e73%2D4eae%2Dbf81%2D3d045b6ede6d&ID=1003>.

<sup>2</sup> The court cited the following cases: *Aldana v. Del Monte*, 578 F.3d 1283, 1291 (11th Cir. 2009) (dismissing for FNC even though all plaintiffs were United States residents); *Lisa, S.A. v. Gutierrez Mayorga*, 240 Fed. App'x 822, 824 (11th Cir. 2007) (*per curiam*) (upholding district court's determination that Guatemala was an adequate forum and noting that "every court to address the issue has reached the same conclusion"); *Polanco v. H.B. Fuller Co.*, 941 F. Supp. 1512, 1527 (D. Minn. 1996) ("Guatemala provides an adequate remedy for plaintiff's claims."); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1361 (S.D. Tex. 1995) ("[P]laintiffs will not be treated unfairly or deprived of all remedies in the courts of Guatemala.").

<sup>3</sup> *Aldana v. Del Monte*, 578 F.3d 1283, 1291 (11th Cir. 2009) (dismissing for FNC where all plaintiffs were United States residents); *Abdullahi v. Pfizer*, 77 Fed. App'x. 48 (2d Cir. 2003) (unpublished) (vacating a dismissal of a suit brought by plaintiffs alleging that Pfizer conducted an unethical pharmaceutical trial on Nigerian children and remanding to district court to ascertain whether Nigerian courts can provide a sufficiently trustworthy alternate forum).