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Ninth Circuit Case Portends Implications for Alien Tort Claims Act Liability Throughout Corporate Supply Chains

By Michael Congiu and Stefan Marculewicz

The U.S. Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum*¹ upholding the dismissal of an Alien Tort Claims Act (ATCA) suit, left a great deal unanswered. The *Kiobel* decision did, however, limit the potential for future ATCA claims by applying a strong presumption against that statute's extraterritorial application. There have since been some mixed appellate court decisions regarding the statute's extraterritorial application,² but a recent decision by the U.S. Court of Appeals for the Ninth Circuit may reflect a greater willingness by certain federal courts to accept ATCA suits against corporate defendants. In *Doe v. Nestle USA, Inc. et al.*, the appellate court reversed the trial court's decision to grant the corporate defendants' motions to dismiss the plaintiffs' ATCA claims, gave the plaintiffs the opportunity to re-plead their complaint in light of the presumption against the ATCA's overseas application, and rather broadly construed still unresolved issues of corporate and "aiding and abetting" liability.

To that latter point, the *Doe* court determined that allegations that the defendants wanted to be profitable, combined with allegations that they knew that child slavery was occurring among their suppliers but nonetheless continued to use those suppliers because of their desire to be profitable, was sufficient to establish the "aiding and abetting" of child slavery under the ATCA. Under the *Doe* majority's reasoning, as the dissent pointed out, most companies with a supply chain member engaging in allegedly "known" violations of international law would come under ATCA scrutiny because companies are generally designed to be profitable.

It is hard to know the exact impact of the *Doe* decision, particularly in light of the reality that plaintiffs will still need to re-plead to avoid a dismissal based on the ATCA's strong presumption against extraterritorial application. Nevertheless, the decision may provoke new suits against corporate defendants and may very well add another layer of credible legal risk related to companies' supply chains.

1 133 S.Ct. 1659 (2013).

2 *Compare Al Shimari v. CACI Premier Tech., Inc.*, 2014 WL 2922840, at * 12 (4th Cir. June 30, 2014) (finding that presumption against extraterritoriality was overcome where, in part, managers in the United States gave tacit approval for, and attempted to cover up and also encouraged, alleged human rights abuses) with *Cardona v. Chiquita Brands Int'l*, Case No. 12-14898 (11th Cir. July 24, 2014) (affirming dismissal of ATCA claims after applying *Kiobel's* presumption against the ATCA's extraterritorial application).

ATCA Background

For the last 25 years, the ATCA has been regularly used to sue multinational corporations (and other entities) for alleged human rights violations abroad. The statute reads, in full, “[t]he district courts shall have original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”³

The cases against corporations, and most cases for that matter, have raised a broad variety of legal issues—including diplomatic and comity-related doctrines, *forum non conveniens*, the meaning of the “law of nations,” and whether and how a corporate entity can be held liable under international law. The Supreme Court first spoke on the ATCA in *Sosa v. Alvarez Machain*,⁴ but largely side-stepped the issue of corporate liability and focused, instead, on determining what kind of claim constituted a violation of the law of nations. The Supreme Court next had its chance in 2013 in *Kiobel*. The U.S. Court of Appeals for the Second Circuit, in a divided opinion, determined that corporations could not be held liable under the statute because the relevant and agreed-upon sources of international law do not apply to corporations. The Supreme Court agreed to review whether corporate liability was available under the ATCA—a then and still hotly debated topic—but reversed course after oral argument and requested briefing on whether the statute could be applied extraterritorially. The Supreme Court affirmed the Second Circuit’s decision, and dismissed the case, finding that the claims could not overcome the presumption against extraterritoriality because the ATCA is silent about its territorial application and because, in the *Kiobel* matter, all the “relevant conduct occurred outside the United States.” The decision did not address the corporate liability issue and left much unclear—including the circumstances where an ATCA claim could overcome the presumption against extraterritorial application.

The Doe Case

The case was initially filed almost a decade ago in the U.S. District Court for the Central District of California. The plaintiffs were allegedly child slaves forced to harvest cocoa in the Ivory Coast, and filed claims against several corporate defendants alleging that they all “aided and abetted” the commission of child slavery in the Ivory Coast through their financial and “technical” assistance of the farms where the slavery had allegedly occurred. Ultimately, in 2010, the district court granted the defendants’ motion to dismiss the claims. In an exhaustive opinion, the court determined that corporations could not be held liable under international law. Rather than amend their complaint, an option they were expressly given, the plaintiffs appealed to the Ninth Circuit. As their appeal was pending, the *Kiobel* decision was published.

The Ninth Circuit, in *Doe*, took on three major issues. The first was whether a corporation could be held liable under the ATCA. This is still the subject of significant debate, but the Ninth Circuit ruled that something like slavery—or other *jus cogens* norms as they are called—can support an ATCA claim against *anybody*, including corporations.

The second issue was whether and how a corporation could be held liable for “aiding and abetting” under the ATCA. This area of the law is a hornet’s nest of disagreement, but the Ninth Circuit took a broad view of what constitutes sufficient “aiding and abetting.” There are two components, according to the Ninth Circuit. The first, or *mens rea* component, requires some finding (at least) that the “aider and abetter” acts with “knowledge that its acts would facilitate the commission of an underlying offense.” The Ninth Circuit, notably, did not decide whether this so-called “knowledge” standard was sufficient, and also described the more stringent “purpose” standard requiring that an aider and abetter complete some act for the *purpose* of facilitating the underlying offense. Despite this, the Ninth Circuit determined that the following *allegations* satisfied this more stringent “purpose” standard:

Driven by the goal to reduce costs in any way possible, the defendants allegedly supported the use of child slavery, the cheapest form of labor available. These allegations explain how the use of child slavery benefitted the defendants and furthered their operational goals in the Ivory Coast, and therefore, the allegations support the inference that the defendants acted with the purpose to facilitate child slavery.

The court was also moved by two additional allegations: (1) that the companies, through their market share, had the power to stop or limit the use of child slavery by their suppliers and did not; and (2) the companies lobbied against federal legislation to create “slave free” chocolate certifications. The court gave relatively short shrift to the second, or *actus reas* component. The court agreed that the actual aiding and abetting

3 28 U.S.C. § 1350.

4 542 U.S. 692 (2004).

must be “substantial” but declined to adopt any standard regarding whether this assistance needs to be directed specifically to the commission of the crime. The *Doe* court instead gave the plaintiffs leave to re-plead and noted that the law, while unclear, may not require that a company “specifically direct” money towards a crime to be an ATCA aider or abetter.

Finally, and on the third issue, the Ninth Circuit allowed plaintiffs leave to re-plead in light of *Kiobel*'s presumption against ATCA extraterritorially.

Potential Ramifications

The touchstone theory in the *Doe* case is that the companies allegedly: (a) knew child slavery was happening at supplier cocoa farms; and (b) supported the farms by buying their cocoa and otherwise providing “technical” support—agricultural and regarding what the court called “appropriate labor practices.” The Ninth Circuit inferred that by using these cheaper farms as suppliers—and not some other (presumably more expensive) farms—the companies acted with the “purpose” of facilitating child slavery even though the companies had no intention of enslaving children. The dissenting opinion urged that the “purpose” of making money is much different than the purpose of enslaving children, and argued that any company with a supply chain member engaging in allegedly “known” violations of international law would come under ATCA scrutiny because every company is designed to be profitable.

The theory is presumably limited to the worst forms of human rights abuses. The *Doe* case, however, may open new doors for the prospect of ATCA liability for “aiding and abetting” against corporate defendants.

The *Doe* case raises issues within the framework established by the United Nations Guiding Principles on Business and Human Rights, particularly where human rights due diligence is concerned. Under the Guiding Principles, companies should be engaged in enough due diligence to know about the potential adverse human rights impact of their operations. A successful and robust supply chain management program—including robust supplier codes of conduct, contractual requirements with suppliers that certain activities are not and will not take place, and audits and other validators for suppliers—may cover most of this vulnerability. However, in light of the *Doe* decision, such programs may be used as a sword for allegations that corporate defendants either knew or should have known about adverse human rights impacts and failed to act appropriately.

The *Doe* decision implicates a great number of thorny legal and other issues. Companies should take care to address these issues with relevant internal stakeholders and, as appropriate, with experienced legal counsel.

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