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Kiobel: The Supreme Court Redefines Alien Tort Statute Litigation - What's Left?

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Defending Against Alien Tort Statute Cases Post-*Kiobel*: What Are the Key Defenses?

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"Defending Against Alien Tort Statute Cases Post-*Kiobel*: What are the key defenses?"

In only the second Alien Tort Statute ("ATS") case heard by the United States Supreme Court, the court further limited the viability of ATS suits against corporations in U.S. courts through its decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013). In *Kiobel*, the Court rejected the ATS claims brought by twelve Nigerian nationals residing in the United States against certain Dutch, British and Nigerian oil companies because of the presumption against extraterritorial application of statutes. Although the Supreme Court did not categorically slam the door shut on ATS cases against corporations, *Kiobel* is without a doubt a landmark victory for corporate defendants, imposing significant hurdles on plaintiffs seeking to litigate human rights claims against corporations in U.S. courts. Defendants already and do deploy a wide arsenal of defenses in ATS cases, and with *Kiobel*, plaintiffs face an even more uphill climb in ATS litigation.

1. Extraterritoriality

The Supreme Court's decision in *Kiobel* has closed the doors of federal courts to "foreign-cubed" ATS cases where the plaintiff, defendant and situs of the violations are all foreign. Indeed, soon after the Supreme Court issued its decision, the District Court for the District of Columbia dismissed a foreign-cubed ATS case between African and Turkish telecommunications companies in *Turkcell İletişim Hizmetleri A.Ş. v. MTN Group, Ltd.*, Case No. 1:12-cv-00479-RBW (D.D.C.).

Plaintiffs in the long-running case of *Sarei v. Rio Tinto PLC* have also sought to voluntarily dismiss their ATS claims after the Supreme Court on April 22, 2013, granted *certiorari*, vacated the Ninth Circuit's judgment and remanded the case for further consideration in light of *Kiobel*. In that case, citizens of Papua New Guinea alleged that a British and Australian corporation aided and abetted the actions of the government of Papua New Guinea during a civil war in which the government purportedly committed violations of international law. Dismissals of similar foreign-cubed ATS cases are likely in the coming months. *See, e.g., Murillo v. Bain*, Civil Action No. H-11-2373, 2013 WL 1718915 (S.D. Tex. Apr. 19, 2013) (dismissing ATS and TVPA claims arising out of actions by the Honduran army).

Kiobel, however, did leave a number of questions unanswered – including chiefly, under what circumstances the presumption against the extraterritorial presumption of the ATS may be overcome. The majority opinion penned by Chief Justice Roberts held that "even where the [ATS] claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 133 S.Ct. at 1669. The three separate concurring opinions by Justices Kennedy, Alito and Breyer likewise make clear that the Court's ruling has not necessarily slammed the door shut on ATS suits against corporations. What types of ATS cases survive the holding in *Kiobel* will certainly be the subject of future litigation. Indeed, the precise contours of the extraterritorial principle as applied in the ATS context will be, and is already the subject of motion practice in a number of active ATS suits. S*ee Al Shimari v. CACI Premier Tech. Corp.*, Case No. 1:08-cv-00827-GBL-JFA (E.D. VA.).

In light of *Kiobel*, plaintiffs' lawyers could also more carefully craft ATS claims to withstand the presumption against extraterritoriality. In *Ahmad v. Found. for Int'l Research and Education d/b/a Christian Friends of Israeli Cmtys.*, Case No. 1:13-cv-003376-JMF (S.D. N.Y. May 17, 2013), plaintiffs alleged that the defendants which were charities in the United States, collected donations and provided material support to Israeli citizens who purportedly illegally built settlements in Palestinian territory. The plaintiffs specifically alleged in the complaint that "[a]ll of the Defendants' activities t[ook] place in the United States and thereby fall within the recent holding under the ATS by the U.S. Supreme Court …" That assertion seems to be squarely addressed at what is now an oft-cited paragraph in *Kiobel* where the Supreme Court noted that on the facts of the case, "all the relevant conduct took place outside the United States." *Kiobel*, 133 S.Ct. at 1669. To distinguish their cases from *Kiobel*, plaintiffs would now allege that at least some of the relevant conduct occurred in the United States.

But what types of ATS cases are more likely to survive post-*Kiobel*? One class of ATS cases that may survive are those that are directed against U.S. corporations and where some of the acts alleged to have violated international law occurred in the United States. Those cases do not implicate the same foreign relations concerns that arise when U.S. courts exercise jurisdiction over foreign corporations for acts occurring entirely overseas. And U.S. courts would be less wary of passing judgment on corporations based in the United States that are, to begin with, already subject to U.S. laws.

2. The *Sosa* standard

The Supreme Court's first ATS decision, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), continues to be a significant restraint on ATS litigation. Although the Court characterized the ATS as a jurisdictional statute, it held that federal courts could hear claims in a narrow set of violations of the law of nations recognized under federal common law. *Id*. at 713, 724. *Sosa* was not an invitation for U.S. courts to open their doors to any conceivable international law violation in ATS cases. Rather, the purported violation must be of an international legal norm that is "specific, universal, and obligatory." *Id.* at 732 (citing *In re Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994).

Thus, a classic line of defense that is available to defendants is that the ATS claim is based on a purported international law violation that does not satisfy the *Sosa* standard. Indeed, in *Sosa*, the Supreme Court rejected the ATS claim based on arbitrary detention because the customary international rule on which the claim was based on was simply "an aspiration that exceeds any binding customary rule having the specificity [the Court] require[s]." *Sosa*, 542 U.S. at 738. In other words, international norms that have not crystallized into a specific, universal, obligatory international rule cannot form the basis of an ATS claim. Those norms could range from corporate best practices in the area of labor to non-binding recommendations from an international organization. ATS claims based on similar types of aspirational norms could be defeated in a motion to dismiss.

3. Corporate liability

In *Kiobel*, the Supreme Court originally granted *certiorari* on the question of whether corporations could be held liable for purported violations of international law. The Supreme

Court did not issue any specific holding on the corporate liability question after deciding the case on extraterritoriality grounds. In declining to rule on corporate liability, the Supreme Court let stand the Second Circuit's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) that corporations could not be held liable under the ATS.[1] The Second Circuit thus continues to be an inhospitable forum for ATS suits against corporations, although suits against individual corporate officers may go forward in that circuit and other jurisdictions.

The Second Circuit's holding however, is an outlier, and corporations should be wary of being sued in jurisdictions that have opened the door to ATS litigation against corporations. Four other circuit courts have in fact allowed ATS suits against corporations. *See Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) *cert. granted, judgment vacated by Rio Tinto, PLC v. Sarei*, No. 11-649, 2013 WL 1704704 (April 22, 2013)).

In the Second Circuit, as well as in other circuits however, individual corporate officers may continue to be sued under the ATS. *See Kiobel*, 621 F.3d at 149. Although not directed at the corporations themselves, those suits may nonetheless expose corporations to the same negative media coverage as well as possible discovery in U.S. courts. Individual corporate officers may likewise be sued under the Torture Victim Protection Act of 1991 ("TVPA"), a statute under which plaintiffs typically bring causes of action in addition to ATS claims. In a case heard by the Supreme Court together with *Kiobel*, the Court held that only natural persons can be sued under the TVPA. *Mohamad v. Palestinian Auth.*, 132 S.Ct. 1702 (2012).

4. Aiding and abetting

Most ATS cases against corporations are based on theories of secondary liability – that is that the corporation has aided and abetted an alleged international law violation, usually by a government entity or agent. However, courts have adopted diverging standards for aiding and abetting liability, and litigating an ATS claim in a court that has adopted the more stringent "purpose" standard could prove fatal to ATS claims.

Second Circuit case-law on aiding and abetting liability is unfriendly terrain to plaintiffs in the ATS arena. In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the Second Circuit held that a defendant may be held liable for aiding and abetting a violation of international law if the defendant provides practical assistance to the principal violator. The assistance should also have a substantial effect on the perpetration of the violation and the defendant must provide the assistance with the purpose of facilitating the commission of the violation. 582 F.3d 244, 258 (2d Cir. 2009) (citing *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 276 (2d Cir. 2007)), *cert. denied*, 131 S.Ct. 79 (2010). In *Talisman*, the plaintiffs alleged that a Canadian oil corporation aided and abetted purported international law violations by Sudanese security forces that terrorized and expelled civilian populations in Southern Sudan. A number of employees, including the CEO, appeared to be aware of the military activities, some of which were staged from facilities that were constructed and used by Talisman. However, the district and circuit

[1] Plaintiffs could of course argue that the Supreme Court has implicitly decided that corporations can be held liable under the ATS.

court's embrace of the more stringent "purpose" standard of aiding and abetting proved fatal to the ATS claims. *See also Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011) (adopting *means rea* standard of "purpose" for aiding and abetting under the ATS) (citing *Talisman*, 582 F.3d at 529).

This is in contrast to other courts that have adopted the more lenient "knowledge" standard for accessorial aiding and abetting liability. Although the case was vacated and settled, *Doe I v. Unocal* remains an important case because of its embrace of the "knowledge" standard. 395 F.3d 932 (9th Cir. 2002) *vacated by* 395 F.3d 978 (9th Cir. 2003). In *Unocal*, plaintiffs who were Burmese villagers alleged that Unocal was an accomplice to the rape, murder and torture of villagers purportedly perpetrated by the Myanmar military. The plaintiffs also alleged that Unocal gave practical assistance to the Myanmar military which it hired to provide security along an oil pipeline route, and that Unocal had used photos, surveys and maps during its meetings with the military to show them areas where security was needed. The Ninth Circuit held that actual or constructive knowledge was sufficient to impute aiding and abetting liability, and that if the defendant knows that "one of a number of crimes will probably be committed and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime." *Id*. at 956 (internal quotations omitted) (quoting *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 246 (Dec. 10, 1998); *see also Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1356 (N.D. Ga. 2002) (*mens rea* for aiding and abetting liability is knowledge); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005) (adopting "knowledge" standard for aiding and abetting liability); *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 WL 2455752, *4 (N.D. Cal. Aug. 22, 2006) (plaintiff must prove that defendant knew that the principal violator intended to commit the violation).

Whether an ATS claim would go beyond the motion to dismiss stage thus can also hinge on what standard for aiding and abetting the forum court has adopted. Whether the "knowledge" or "purpose" standard applies could very well be the next ATS question that could go before the Supreme Court.

5. Pleading standards post-*Twombly* and *Iqbal*

The more stringent pleading standards in federal courts could also be problematic to ATS claims. In *Ashcroft v. Iqbal*, the Supreme Court held that "only a complaint that states a plausible claim for relief survives a motion to dismiss." 556 U.S. 662, 679 (2009) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007)). Previously, the more liberal notice standards allowed parties recourse to discovery to fully develop their claims. But in light of *Iqbal*, plaintiffs in ATS cases must satisfy a more stringent test for the sufficiency of a complaint.

The plaintiffs in *Sinaltrainal v. Coca-Cola Co.* failed to satisfy that more stringent pleading standard. 578 F.3d 1252 (11th Cir. 2009), *abrogated on other grounds by Mohamad v. Palestinian Authority*, 132 S.Ct. 1702 (2012). In that case, plaintiffs from Colombia alleged that their employers – two bottling companies in Colombia – collaborated with Colombian paramilitary forces that purportedly engaged in systematic intimidation, kidnapping, detention, torture, and murder of Colombia trade unionists. The Eleventh Circuit upheld the lower court's dismissal of the ATS claims based on the stricter pleading standards in *Iqbal* and *Twombly*. The court rejected what it found to be the plaintiffs' vague and conclusory allegations as well as

formulaic recitations on which they based their ATS allegations. According to the court, the plaintiffs had simply failed to allege sufficient facts to nudge the ATS claims from conceivable to plausible. *Id*. at 1266-70.

To satisfy *Kiobel*, plaintiffs' lawyers could now draft complaints alleging that at least some or all of the relevant acts giving rise to the international law violation occurred in the United States. As a result, there could be a proliferation of complaints like the one in the *Ahmad* case filed in May 2013 in the Southern District of New York where plaintiffs allege that all of the defendants' actions occurred in the United States. However, ATS cases must not only satisfy *Kiobel*, but also the pleading requirements set out in *Twombly* and *Iqbal*. Mere recitation and incantation of formulaic assertions or bald, conclusory generalizations are insufficient and should be targeted in a motion to dismiss.

6. Forum non conveniens

Many ATS defendants also rely on the principle of *forum non conveniens* as a defense. This conflict of law principle allows a court to dismiss a case because there is a more adequate and convenient forum that would better ensure the attainment of the goals of justice. In determining whether dismissing a case for an alternative forum is appropriate, courts (1) analyze whether there is an adequate alternative forum available; and (2) balance a series of factors including the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 477 (2d Cir. 2002) (citing *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000) and *Irragori v. United Techs. Corp.*, 274 F.3d 65, 73 (2d Cir. 2001)).

The private interest factors that courts weigh in *forum non conveniens* analysis include relative ease of access to sources of proof, compulsory process for unwilling witnesses, and other factors that make resolution of the case easy, expeditious and inexpensive. *Aguinda*, 303 F.3d at 479 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). The public interest factors include administrative difficulties arising from court congestion, unfairness of imposing jury duty on a community with no relation to the litigation, the interest of having localized controversies decided at home and avoiding difficulties in conflict of laws and the application of foreign law. *Id*. at 480 (citing *Gilbert*, 330 U.S. at 508-09)). In *Aguinda*, all the plaintiffs and members of the putative class were in Ecuador. The alleged injuries resulting from environmental pollution also occurred in Ecuador and Peru where the relevant medical and property records were located. Finally, the defendant consented to jurisdiction in both Peru and Ecuador.

Because of the negative publicity, brand damage and pressures towards settlement inflicted against defendants, ATS cases continue to be a risk to corporations. The unsettled questions left after *Kiobel* would likely spur continued ATS litigation in federal courts. Even so, *Kiobel* should serve as a significant restraint on ATS cases, and combined with an arsenal of other defenses, ATS cases are likely to remain difficult cases in which plaintiffs prevail. As a result, ATS litigation will continue to be an uphill battle for most plaintiffs.

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