

## CROSS-BORDER LITIGATION SERIES

### Two Federal Appeals Courts Weigh in on Corporate Liability under the ATCA

The question of corporate liability under the Alien Tort Claims Act ("ATCA") continues to divide US federal courts, increasing the likelihood that the US Supreme Court addresses the issue in the near future.

Under the ATCA, foreign plaintiffs have filed US claims against multinational corporations for allegedly aiding and abetting human rights violations by foreign governments outside the United States. In September 2010, the US Court of Appeals for the Second Circuit held in *Kiobel v. Royal Dutch Petroleum* ("*Kiobel*") that corporations are not liable under the ATCA, pointing towards greater restriction of these types of lawsuits. However, two federal appeals courts recently ruled that corporations can be held liable under the ATCA, creating a deep split in authority. The US Supreme Court will need to intervene to determine whether the controversial practice of suing corporations for money damages for alleged overseas human rights violations will remain viable.

#### ***Doe v. Exxon Mobil Corp.*: DC Circuit Holds that the ATCA Grants Jurisdiction Over Corporations**

On July 8, 2011, the US Court of Appeals for the District of Columbia Circuit held in a 2-1 decision, contrary to the Second Circuit's decision in *Kiobel*, that a court may exercise jurisdiction over corporations under the ATCA. In *Doe v. Exxon Mobil Corp.*, 09-7125, 2011 WL 2652384 (D.C. Cir. July 8, 2011) ("*Exxon*"), Indonesian villagers from the Aceh territory alleged that Exxon's security forces were comprised of members of the Indonesian military who committed human rights abuses against villagers in Aceh, including genocide, extrajudicial killing, torture and crimes against humanity. The villagers alleged that Exxon or its agents had the authority to control and direct these forces and provided material and logistical support to them, and claimed that Exxon violated the ATCA, the Torture Victim Protection Act ("TVPA"), and committed various common law torts. The district court dismissed the claims for a variety of reasons, including that US court review would be an impermissible intrusion into Indonesian internal affairs. The plaintiffs appealed.

The ATCA states in relevant part that US courts have jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. In a 112-page opinion, the DC Circuit concluded that whether corporations could be held liable under this provision is not determined by the law of nations, but rather is addressed by federal common law. The court concluded that federal common law supports corporate liability under the ATCA for torts committed by a corporation's agents.

The court also issued an important ruling on aiding and abetting liability, holding that a company may be liable for aiding and abetting human rights violations committed by foreign governments if it acted with the knowledge that its actions would assist the perpetrator in the commission of the crime. This standard conflicts with a substantially more rigorous Second Circuit standard, which requires (1) practical assistance having a substantial effect on the perpetration of the crime, and (2) the provision of such assistance with the purpose of

#### Key Issues

*Doe v. Exxon Mobil Corp.*

*Flomo v. Firestone Natural Rubber Co.*

#### Implications of the Rulings

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facilitating the crime. *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2d Cir. 2009).

Judge Kavanaugh dissented from the DC Circuit's decision, arguing that the ATCA does not apply to conduct in foreign nations under the presumption against extraterritoriality, which provides that courts should not interpret federal statutes to have extraterritorial effect if the statutes are not clear. He also agreed with the Second Circuit's analysis in *Kiobel* that corporate liability is not a recognized norm of customary international law and therefore an action cannot be brought against a corporation under the ATCA.

### ***Flomo v. Firestone Natural Rubber Co.***

Days after *Exxon* issued, the US Court of Appeals for the Seventh Circuit held in *Flomo v. Firestone Natural Rubber Co.*, No. 10-3675, 2011 WL 2675924 (7th Cir. July 11, 2011) ("*Flomo*") that corporations can be held liable under the ATCA. The *Flomo* plaintiffs had appealed a district court decision dismissing their allegations that Firestone used and encouraged hazardous child labor on a rubber plantation in Liberia in violation of customary international law.

Calling the *Kiobel* decision an "outlier," the court dismissed Firestone's arguments that corporations may not be held liable under the ATCA. Adopting reasoning similar to that in *Exxon*, the court underscored "the distinction between a principle of [customary international law], which is a matter of substance, and the means of enforcing it, which is a matter of procedure or remedy" governed by federal common law. The court concluded that federal common law permits US courts to address corporate violations of customary international law. The Seventh Circuit, however, affirmed the district court's judgment on other grounds, finding that employing child labor is not a violation of customary international law actionable under the ATCA.

### **Implications of the Rulings**

These two recent decisions deepen the conflict in the US courts of appeals regarding the controversial practice of suing corporations for committing or aiding and abetting international human rights violations. Because the decisions were reached by the regional federal appeals courts, they are binding only on federal courts in the District of Columbia and the Seventh Circuit (which comprises the states of Illinois, Indiana, and Wisconsin). They also are subject to further appeal to the full circuit courts and/or to the US Supreme Court. Moreover, the plaintiffs in *Kiobel* filed a petition in June 2011 seeking the US Supreme Court's review of their case, which is still pending.

Given the conflict in the circuits and the importance of the issue, Supreme Court-watchers expect the Court to grant review in one of these cases on the question of corporate liability, and potentially in *Exxon* on the question of the standard for aiding and abetting liability. If the Supreme Court does grant review, oral argument and a decision could come during the coming Term. The Term begins in October 2011, with opinions issuing through June 2012.

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