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**Corporate Liability Under the Alien Tort Claims Act**

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In the last decade, a veritable "who's who" of international businesses, including Pfizer, Caterpillar, DaimlerChrysler, Texaco, UBS, Yahoo, Coca-Cola, Nestle, Bridgestone/Firestone, Chiquita, Chevron, Gap and Exxon, have been sued in federal court under the United States' 215-year-old Alien Tort Statute, also known as the Alien Tort Claims Act (ATS or ATCA).

On Oct. 12, 2007, the 2nd U.S. Circuit Court of Appeals reaffirmed this expansive trend, holding that corporations may be held liable for aiding and abetting a third party's human rights violations abroad under this long dormant statute. *Khulumani v. Barclay Nat. Bank Ltd.*, Case. Nos. 05 Civ. 2141/2326, 2007 WL 2985101 (2nd Cir. 2007). Just prior to *Khulumani*, U.S. District Judge Nina Gershon in the Eastern District of New York upheld aiding and abetting liability under the ATS for a bank pro viding deposit and transfer services to Hamas and a network of purported suicide bombers. *Almog v. Arab Bank*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).

The *Khulumani* opinion's recognition of aiding and abetting liability for corporations under the ATS was, however, counterbalanced by the 2nd Circuit's acknowledgment of the manner in which "prudential" doctrines, such as political question, international comity, exhaustion of local remedies, act of state and forum non conveniens, can be used as a means of early termination for ATS claims. These early stage prudential bars have developed in part because of an increased recognition of the burdens and limitations attendant to litigating wholly foreign ATS claims involving politicized foreign disputes, non-U.S. parties, and arcane issues of foreign and substantive law in federal court. The *Khulumani* court held that analysis of such prudential concerns that favor dismissal of an otherwise competent complaint should be analyzed separately from whether a claim first exists under the ATS.

In light of the growing number of ATS cases, the *Khulumani* court's instruction arrives at a critical time. Notably, in July of this year, an Alabama jury became the first ever to consider aiding and abetting claims against a corporation under the ATS. Following a two- week trial, the jury in *Romero v. Drummond Co.*, Case No. 03 Civ. 0575 (N.D. Ala.) rejected plaintiffs' claims, finding that there was insufficient evidence to hold the defendant, a mining company, liable for aiding and abetting the alleged assassination and torture of union leaders by paramilitary groups.

The lengthy and ultimately unsuccessful *Drummond* litigation lends credence to the prudential bars erected by a number of recent federal courts in the Southern Districts of New York and Florida. These decisions, and the *Drummond* verdict and its consequences, are discussed below.

**CORPORATE DEFENDANTS**

The vast majority of new ATS suits against corporations attempt to impose vicarious liability on a parent entity, often headquartered in the United States, for alleged misconduct committed overseas by a foreign government, subsidiary or purported business partner or agent.

The frequency of ATS suits in recent years has dramatically increased, in part, because of the U.S. Supreme Court's unanimous decision upholding ATS jurisdiction over international tort violations in *Sosa v. Alvarez-Machain*, 542 US 692 (2004). In *Sosa*, the Court validated foreign plaintiffs' limited ability to sue under the ATS in U.S. courts for claims alleging violations of "the law of nations," which the Court characterized as including violations of "specific, universal, and obligatory" international norms. A precise standard it is not, leaving lit igants and the courts to shape its practical application in real cases. Id. at 697.

Businesses and human rights activists have tracked the post-*Sosa* ATS proliferation with interest. Particularly those multinational corporations with well-known global brands are often highly sensitive to public reaction to the inflammatory allegations in many ATS filings regarding the alleged acts of foreign subsidiaries or joint venture partners. These same corporations are facing ATS allegations concerning their relationships with foreign governments and the details of their government contracts. Indeed, the U.S. personal injury trial bar, has brought its resources to these cases and has joined with the international human rights bar in crafting ATS complaints.

**DiFFICULTIES DURING 'DRUMMOND' TRIAL**

Despite the up-tick in ATS filings, success against corporate defendants has continued to prove difficult. Not a single ATS judgment has ever been rendered aga inst a corporate entity or its officers. Despite this seemingly dismal track record, ATS claims against corporations are seldom dismissed outright, and the inherent legal and factual complexities of such cases result in drawn-out proceedings lasting years and, in some instances, decades.[FOOTNOTE 1] During this process, corporate defendants suffer prolonged public relations indignities and the courts endure countless rounds of motion practice, amended pleadings, court hearings and appeal.

As illustrated in the *Drummond* case, even once plaintiffs reach trial, pragmatic issues involving the trial of purported international jus cogens crimes create significant obstacles for the parties and judicial system. In *Drummond*, these practical issues ultimately proved insurmountable to plaintiffs' case. The litigation involved a series of ATS complaints filed in 2002, 2003 and 2004 by a Colombian trade union and several Colombian nationals against A labama-based Drummond Co. (Drummond) and its Colombian subsidiary. Plaintiffs alleged that leaders of the union, which represented Drummond's mining employees, had been murdered and/or tortured by the AUC, a rightist Colombian paramilitary group that has been designated as a terrorist organization by the U.S. government. Plaintiffs claimed that Drummond's Colombian subsidiary and its senior executives and security manager knowingly hired and paid members of the AUC to help police Drummond's mining compound, and to intimidate, and in several instances, kill and torture, representatives of the union.

Drummond denied these allegations, and after five-plus years of motion practice and amended complaints, the trial began in mid-July 2007. During the case-in-chief, plaintiffs were unable to procure testimony from a number of Colombian witnesses, including from alleged former

members of the AUC with purported first-hand knowledge of Drummond's connections to the AUC. Letter s rogatory and other requests to depose the witnesses in Colombia or bring them to Alabama were either rejected or not processed in time for trial, despite efforts by members of the U.S. Congress to intervene on plaintiffs' behalf.

Ultimately, plaintiffs' witnesses were unable to draw a sufficient connection between defendants and the AUC or the anti-union atrocities alleged in plaintiffs' opening statements. After a short deliberation, the jury returned a complete verdict for Drummond.

Plaintiffs have appealed to the U.S. Court of Appeals for the 11th Circuit, contesting the trial court's refusal to allow out-of-court, nondeposition testimony of former paramilitary members into the record. Whatever the result of that appeal, which will involve a number of issues of first impression, it will not resolve the inherent difficulty that parties face in litigating ATS suits in the United States.

**RECENT JUDICIAL APPROACHES**

In light of the consid erable efforts expended for (relatively) meager results, courts have increased their scrutiny of ATS claims at the outset, often opting to dismiss in favor of another forum or subjecting allegations of corporate derivative liability to heightened scrutiny. Courts likewise have begun to inquire whether plaintiffs should first seek to exhaust local remedies before migrating their claims to the United States.[FOOTNOTE 2]

These prudential concerns are initially found in the *Sosa* decision itself, which admonished judges to restrict the expansion of ATS litigation, opining that federal courts lack any "congressional mandate to seek out and define new and debatable violations of the law of nations." 542 U.S. at 703. ATS decisions often include explicit consideration of foreign policy concerns and solicitation of executive branch opinion. According to *Sosa*, the effects of ATS claims on foreign policy interests can, by themselves, give "reason f or a high bar to new private causes of action for violating international law." Id. See also, id. at n. 21 (noting that courts may wish to consider additional factors before proceeding with an ATS suit, including whether: (i) the claimant had exhausted remedies available in the domestic legal system, (ii) the case interfered with the policies and interests of the domestic country, and (iii) the case interfered with foreign policy).

*Khulumani* also addressed district courts' applications of the prudential concerns set forth in *Sosa.* Specifically, *Khulumani* held that it was "error for the district court to consider [the political question doctrine and other prudential doctrines] in the context of deciding preliminarily whether it had jurisdiction" under the ATS. Id. at * 3, n.12. Accordingly, the U.S. Court of Appeals for the 2nd Circuit remanded to the district court for a full analysis of the applicable prudential considerations, including concerns that the trial court originally had expressed regarding the litigation's potential interference with South Africa's ongoing reparations process. *Khulumani's* emphasis on decoupling the prudential inquiry from the jurisdictional inquiry supports the approach taken by several recent district courts in dismissing questionable ATS suits at the pleading stage.

**'TUREDI V. COCA-COLA'**

In *Turedi v. The Coca-Cola Co.*, 460 F. Supp. 2d 507 (S.D.N.Y. 2006), union members once employed by an independent Coca-Cola bottler in Turkey brought suit in federal district court in New York, alleging that Coca-Cola and its bottler were liable for alleged abuses suffered by plaintiffs at the hands of the Turkish police during a riot at the bottler's facility near Istanbul. In November 2006, the district court dismissed the claims on forum non conveniens grounds. The court found that there was an available and adequate alternative forum where the dispute could be adjudicated, namely, Turkey. The court also found that, on balance, the links with the plaintiff's chosen forum were minimal compared with the contact of the controversy with plaintiffs' home jurisdiction, and that the central dispute concerned Turkey more than the United States; thus, the balance of private and public interest factors central to the forum non conveniens analysis weighed heavily in favor of dismissal.

In another recent case, *Do Rosario Veiga v. World Meteorological Organisation*, 486 F.Supp.2d 297 (S.D.N.Y. 2007), plaintiff filed suit in New York for employment discrimination and unlawful retaliation against her former employer under the ATS after she was dismissed from her job as chief auditor with the World Meteorological Organisation. As in *Turedi*, the court dismissed the suit on grounds of forum non conveniens, holding that public an d private interests favored plaintiff's home jurisdiction in Switzerland. Id. at 299.

Critically, the court noted that "where the circumstances indicate that the parties and material events bear no bona fide connection to the United States, or that in relation to the core operative facts in dispute the parties and events at best have only marginal links to the plaintiff's chosen venue, that choice of forum is not entitled to special deference, in particular where the claimants are all foreign residents." Id. at 303. The court specifically said that these prudential concerns were not "mitigated by [plaintiff's] assertion of claims under international law." Id., citing *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 553 (S.D.N.Y. 2001) off's, 303 F.3d 470 (2d Cir. 2002) ("The United States ... has no special public intere st, under the [ATS] or otherwise, in providing a forum for plaintiffs pursuing an international law action ... that plaintiffs can adequately pursue in the place where the violation actually occurred.").

Courts have also enforced a rigorous heightened pleading standard and closely scrutinized pleadings that allege vicariously liability for third-party misconduct. For example, in a series of cases against The Coca-Cola Co. (TCCC), a Colombian bottler of Coca-Cola products, and related defendants, plaintiffs alleged that the defendants had aided and abetted paramilitary actions taken in Colombia against labor union members.

In March 2003, the district court dismissed with prejudice all claims against TCCC, holding that the company's relationship with its Colombian bottlers was insufficient to expose TCCC to liability for alleged wrongdoing in Colombia. *Sinaltrainal v. The Coca-Cola Company,* 256 F.Supp.2d 1345 (S.D. Fl. 2003). Then, in September 2006, the district court dismissed with prejudice all claims against the remaining defendants on subject matter jurisdiction grounds, adopting defendants' argument that a heightened pleading standard should be applied to allegations of conspiracy or vicarious liability under the ATS. The court noted that under the ATS, at the pleading stage, the court "must engage in a searching review, particularly with

regard to allegations concerning conspiracy or joint action that purport to establish that Defendants acted under the color of official authority." *In re Sinaltrainal*, 474 F.Supp.2d 1273 (S.D. Fla. 2006). Accordingly, based on a close review of the pleadings, the court concluded that plaintiffs had failed to meet their burden of alleging that any specific defendant employee or agent was connected to the paramilitary offenses at issue.

Further highlighting courts' growing attention to pretrial disposition of ATS cases, several ATS cases also have been dismissed for lack o f personal jurisdiction. See, e.g., *Doe v. Al Maktoum*, 2007 WL 2209258 (S.D. Fla. July 30, 2007) (dismissing for lack of personal jurisdiction); *Bauman v. Daimlerchrysler AG*, 2007 WL 486389 (N.D. Cal. Feb. 12, 2007) (same, following jurisdictional discovery).

**CONCLUSION**

Courts have struggled to articulate consistent jurisdictional parameters in response to ATS suits, but a few patterns are emerging. In particular, district courts in the 2nd and 11th circuits appear to be favoring the use of prudential screening techniques, e.g., forum non conveniens, political question, exhaustion and comity, to avoid the ultimate difficulties faced by parties and judicial system in these cases. Meanwhile, the number of ATS suits against corporate defendants continues to rise, perhaps intimating another Supreme Court showdown over the ATS's applicability to aiding and abetting allegations against corporate defendants.

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**::::FOOTNOTES:::::**

FN1 See "Protection and Money: U.S. Companies, Their Employees, and Violence in Colombia: J. Hearing Before the Subcomm. on Int'l Orgs., Human Rights, and Oversight of the H. Comm. on Foreign Affairs, et al.," 110th Cong. 62 (Jun. 28, 2007) (testimony of Daniel Kovalik, Assoc. Gen. Counsel, United Steelworkers) ("The problem with the Alien Tort Claims Act ... is that it is incredibly costly and takes a long time to complete. We filed this [*Drummond*] lawsuit now 5 years ago; it is just now going to trial. Others have sat for almost 10 years. It is not an efficient way to get these companies to stop if they are doing it or to prevent them from engaging in this kind of conduct.").

FN2 On Oct. 11, 2007, the 9th U.S. Circuit Court of Appeals held en banc argument regarding this question, viz, whether the ATS should include a prudential exhaustion doctrine, in an appeal from the dismissal of a corporate ATS suit. *Sarei v. Rio Tinto*, Case No. 02-56256 (9th Cir.).