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DC and Seventh Circuits Split from Second Circuit: Allow for Corporate Liability Under Alien Tort Statute

SANDER BAK

This article describes two recent decisions from appellate courts that allow for corporate liability under the Alien Tort Statute. These decisions conflict with a Second Circuit decision, setting the stage for possible Supreme Court review.

In *Kiobel v. Royal Dutch Petroleum Co.*, the Second Circuit held last year that the jurisdiction granted by the Alien Tort Statute (“ATS”)¹ does not extend to civil actions against corporations.² Two recent decisions from appellate courts outside the Second Circuit have reached the opposite conclusion, thus possibly setting up this issue for determination by the Supreme Court.

On July 8, 2011, a panel of the District of Columbia Circuit ruled 2-1 in *Doe VIII v. Exxon Mobil Corp.*³ that the jurisdiction granted by the ATS extends to corporations and other non-natural person entities. Three days later, on July 11, 2011, the Seventh Circuit similarly held, unanimously, in *Flomo v. Firestone Nat. Rubber Co., LLC*⁴ that the ATS allows for corporate liability as a matter of customary international law.

The immediate implication of the *Exxon* and *Flomo* decisions is that

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corporate defendants may be sued in the Seventh and District of Columbia Circuits pursuant to the ATS. While *Kiobel* remains good law in the Second Circuit, the magnitude of the *Exxon* and *Flomo* decisions, and their split from the Second Circuit on whether corporate liability is available as a matter of customary international law under the ATS, make it likely that the Supreme Court will grant certiorari regarding this issue in the near future.

The *Exxon* decision also concluded that the *mens rea* required for aiding and abetting liability under the ATS is a knowledge standard. This interpretation is at odds with the Second Circuit's decision in *Presbyterian Church of Sudan v. Talisman*, which held that aiding and abetting liability is available under the ATS, but only where *mens rea* meets the purposeful standard.⁵ *Exxon* thus makes the District of Columbia Circuit far more favorable to plaintiffs suing under the ATS, unless and until the Supreme Court decides the culpability question and harmonizes the standard.

BACKGROUND

Exxon was filed in 2001 by plaintiffs from the Aceh province of Indonesia, against Exxon Mobil Corporation ("Exxon"). Exxon had operated a natural gas extraction facility in Aceh in 2000 – 2001. The Exxon security detail for the Aceh facility was comprised of members of the Indonesian military. Plaintiffs alleged that Exxon aided and abetted these military members in committing atrocities against Aceh residents, including "genocide, extrajudicial killing, torture, crimes against humanity, sexual violence, and kidnapping... as part of a systematic campaign of extermination of the people of Aceh."⁶ Plaintiffs charged that the Indonesian security forces' actions could be attributed to Exxon because Exxon had the authority to control and direct the soldiers' actions and was aware that such atrocities were taking place.⁷

The District of Columbia district court dismissed the statutory claims under the ATS on the basis that aiding and abetting was not actionable under the ATS, that such an inquiry would be an impermissible intrusion into Indonesian affairs, and that sexual violence was not a violation of the law of nations.⁸ The plaintiffs appealed the dismissal of the ATS claims based

on prohibitions of extrajudicial killing, torture, and prolonged arbitrary detention. Exxon raised the issue of corporate liability under the ATS for the first time on appeal.⁹

Flomo was filed in 2005 by plaintiffs from Liberia against Firestone Natural Rubber Company, LLC (“Firestone”) and various Firestone affiliates and officers.¹⁰ Firestone operated an 118,000-acre rubber plantation in Liberia through a subsidiary, and employed approximately 6,500 employees who lived on the plantation with their families. Plaintiffs alleged that Firestone indirectly used “hazardous child labor in violation of customary international law.”¹¹ While there was no claim that Firestone directly employed children, plaintiffs charged that Firestone set daily quotas that were difficult to meet, thus forcing the employees to “dragoon their wives or children into helping them.”¹²

The district court granted summary judgment in favor of all the defendants, and the plaintiffs appealed only the judgment in favor of Firestone.

ANALYSIS

Corporate Liability: The *Exxon* and *Flomo* Courts’ Reasoning

In *Exxon*, the court reversed the dismissal of the ATS claims brought against Exxon. In looking at the corporate liability question, Judge Rogers’ majority opinion drew a distinction between substance and procedure. Judge Rogers found that while the tortious conduct that is actionable under the ATS should be determined by the norms of customary international law, whether or not a corporation is immune is not part of that substantive question.¹³ To determine whether or not the ATS provided for corporate immunity, Judge Rogers instead looked to the purpose of the ATS — to avoid foreign conflict — and noted that there should be no reason to legislate against only individuals and not corporations performing acts inciting conflict.¹⁴

In rejecting the idea of corporate immunity, Judge Rogers’ opinion also looks to the historical context of the ATS, indicating that the Congress that passed the ATS would have known that corporate liability in tort was an accepted principle in United States law at the time.¹⁵ The majority also supports the position for corporate liability under the ATS by looking to “international treaties that explicitly state that juridical entities should be

liable for violations of the law of nations.”¹⁶

In the *Flomo* case, Judge Posner, writing for a unanimous court, affirmed the grant of summary judgment to defendants after deciding two issues: whether a corporate defendant could be liable under the ATS, and whether Firestone violated customary international law. The court answered the first question in the affirmative, but the second in the negative. In holding that a business entity can be liable under the ATS, the court characterized the Second Circuit’s decision in *Kiobel* as an outlier,¹⁷ and refuted the factual premise of the majority opinion in *Kiobel*—that corporations have never been prosecuted in international law.¹⁸ In rejecting *Kiobel*’s rationale, the court noted that there was a lack of compelling reason why corporations had seldom been prosecuted civilly for violating customary international law, but for the desire to limit liability to truly “abhorrent conduct” punishable under criminal law.¹⁹ In holding that corporate liability is actionable under the ATS, the *Flomo* court discounted the historical difference between civil and criminal actions against corporations, noting that customary international legal principles were relevant only as to the substance, rather than the procedural remedy.²⁰

Flomo, however, did not decide how far corporate vicarious liability extends under the ATS for violations of customary international law. Because the plaintiffs conceded that corporate liability was limited to cases where “violations are directed, encouraged, or condoned at the corporate defendant’s decisionmaking level,”²¹ the Seventh Circuit allowed for corporate liability only when the corporate defendant’s management has actively participated in the tortious decision-making process.

The Requisite *Mens Rea* for Aiding and Abetting Liability Under the ATS

Judge Rogers’ majority opinion in *Exxon* also noted that the ATS provides only jurisdiction, but that “Congress ... directed that the courts derive the rule of law from the law of nations, and *that* law extends responsibility for conduct violating its norms to aiders and abettors.”²² The court held that the knowledge standard is sufficient to satisfy the *mens rea* requirement for aiding and abetting liability. This is a less exacting test than the *mens rea* standard in the Second Circuit, which held in *Talisman* that there

is no aiding and abetting liability under the ATS and that the scienter standard “is purpose rather than knowledge alone.”²³

To arrive at this conclusion, Judge Rogers looked to the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the Nuremberg trials as authoritative sources of customary international law, and found that they both allowed for the knowledge standard to satisfy culpability requirements for aiding and abetting liability.²⁴

CONCLUSION

The immediate effect of the *Exxon* and *Flomo* decisions is to avail plaintiffs of two more jurisdictions where ATS suits against corporations can be filed. The *Exxon* decision, moreover, allows for the more liberal standard of knowledge, rather than purposeful intent, to satisfy the scienter requirement for ATS liability. Given the significant split in interpretations, the Supreme Court may soon grant certiorari in an ATS action to clarify these issues.

NOTES

¹ 28 U.S.C. §1350.

² See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (holding that only individuals and not corporations could be liable under the Alien Tort Statute).

³ *Doe VIII v. Exxon Mobil Corp.*, No. 09-7125, 2011 WL 2652384 (D.C. Cir. Jul. 8, 2011).

⁴ *Flomo v. Firestone Nat. Rubber Co.*, No. 10-3675, 2011 WL 2675924 (7th Cir. Jul. 11, 2011).

⁵ See 582 F.3d 244, 259 (2d Cir. 2009).

⁶ *Exxon*, 2011 WL 2652384, at * 1 (internal quotations omitted).

⁷ See *id.* at * 2 (citing plaintiff complaints).

⁸ *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24.

⁹ See *Exxon*, 2011 WL 2652384, at * 20.

¹⁰ See *Flomo*, 2011 WL 2675924, at * 1, 9.

¹¹ *Id.* at * 1.

¹² *Id.* at * 9.

¹³ See *Exxon*, 2011 WL 2652384, at * 23 (“[T]he fact that the law of nations provides no private right of action to sue *corporations* addresses the wrong question and does not demonstrate that corporations are immune from liability under the ATS.”) (emphasis added).

¹⁴ See *id.* at * 27 (drawing from history that purpose of ATS was to avoid foreign entanglement).

¹⁵ See *id.* at 28.

¹⁶ *Id.* at 29.

¹⁷ See *id.* at * 3 (stating that all but one of the precedent cases at the circuit court level hold that corporate liability is possible under the Alien Tort Statute).

¹⁸ See *id.* at * 3 (noting allied forces had dissolved German corporations after the Second World War).

¹⁹ *Id.* at * 4.

²⁰ See *id.* at * 5 (stating that a history of criminal sanctions against corporations in customary international law is sufficient to satisfy the substantive requirement that corporate civil liability is allowed under the ATS).

²¹ *Id.* at * 6.

²² *Id.* at * 11 (emphasis added).

²³ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009).

²⁴ See *Exxon*, 2011 WL 2652384, at * 16, 19. These sources of customary international law are contrasted with the Rome Statute creating the International Criminal Court, which the *Talisman* court looked to in determining culpability requirements for aiding and abetting liability. See *id.* at * 18 (noting that Rome Statute is seen as a treaty and not customary international law).