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## FOURTH CIRCUIT ALIGNS WITH SECOND CIRCUIT: “PURPOSEFUL” STANDARD OF *MENS REA* REQUIRED UNDER ALIEN TORT STATUTE

In a decision issued last week, the Fourth Circuit Court of Appeals chimed in on the evolving dialogue in the federal appellate courts regarding the scope of a corporation’s aiding and abetting liability under the Alien Tort Statute (“ATS”).<sup>1</sup> In *Aziz et al. v. Alcolac, Inc. et al.*,<sup>2</sup> the Fourth Circuit held that the ATS imposes liability for aiding and abetting violations of international law only if the attendant conduct is “purposeful”. This ruling aligns the Fourth Circuit with recent rulings in the Second Circuit, but splits with authority in the District of Columbia Circuit.

As we previously reported in a series of client alerts,<sup>3</sup> a circuit split exists on two key issues regarding liability under the ATS: first, whether the jurisdiction of the ATS is limited to claims against natural persons or extends to corporations; and second, what standard of *mens rea* is required to find ATS liability.

In October 2009, the Second Circuit in *Presbyterian Church of Sudan v. Talisman*<sup>4</sup> held that plaintiffs bringing claims against a corporation under the ATS must allege that the company acted with the “purpose” of facilitating violations of international law – “knowledge” alone was held insufficient. Less than a year later, the Second Circuit ruled in *Kiobel v. Royal Dutch Petroleum Co.*<sup>5</sup> that the jurisdiction granted by the ATS extends only to civil actions against individuals, not to actions against corporations. Then, just two months ago, the District of Columbia Circuit in *Doe VIII v. Exxon Mobil Corp.*<sup>6</sup> and the Seventh Circuit in *Flomo v. Firestone Nat. Rubber Co., LLC*<sup>7</sup> reached the opposite conclusion

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<sup>1</sup> 28 U.S.C. § 1350.

<sup>2</sup> 1:09-cv-00869-MJG (4th Cir. Sept. 19, 2011).

<sup>3</sup> See “No Liability for Violations of International Law Unless Aid Was Purposeful, Second Circuit Rules in Case Brought Under Alien Tort Statute” (October 13, 2009); “Second Circuit Rejects Corporate Liability Under the Alien Tort Statute” (September 22, 2010); “Second Circuit Denies Rehearing in *Kiobel*: Confirms That the Circuit Does Not Recognize Corporate Liability Under the Alien Tort Statute” (February 10, 2011); and “DC and Seventh Circuits Split From Second Circuit: Allow for Corporate Liability Under Alien Tort Statute” (July 29, 2011).

<sup>4</sup> 582 F.3d 244, 258-59 (2d Cir. 2009).

<sup>5</sup> 621 F.3d 111 (2d Cir. 2010).

<sup>6</sup> No. 09-7125, 2011 WL 2652384 (D.C. Cir. July 8, 2011).

<sup>7</sup> No. 10-3675, 2011 WL 2675924 (7th Cir. July 11, 2011).

September 28, 2011

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finding that corporate liability is available under the ATS. The *Exxon* court also held that the *mens rea* required for aiding and abetting liability is the lower “knowledge” standard rather than the *Talisman* “purposeful” standard.

These splits among several federal courts of appeal make it likely that in the near future the Supreme Court will grant certiorari in an ATS case that presents these issues.

### **Background of *Aziz et al. v. Alcolac, Inc. et al.***

*Aziz* was filed as a class action in 2009 by individuals of Kurdish descent alleging violations of the ATS and Torture Victim Protection Act (“TVPA”)<sup>8</sup> against corporate defendant Alcolac, Inc. (“Alcolac”), the Republic of Iraq, and additional corporate defendants. During Iraq’s armed conflict with Iran in the 1980s, it was widely reported that Iraq engaged in large-scale use of mustard gas and other chemical weapons against Iran, and simultaneously launched chemical weapon attacks against the Kurds in northern Iraq. Plaintiffs alleged that Alcolac, a chemical manufacturer then a subsidiary of a British conglomerate, sold thiodiglycol (“TDG”) to Saddam Hussein’s Iraqi regime, even though the company allegedly knew that TDG would be used to manufacture mustard gas.<sup>9</sup> Alcolac moved to dismiss on the grounds that the TVPA did not permit corporate liability, and that the plaintiffs failed to plead the appropriate *mens rea* to state a claim under the ATS. The district court granted Alcolac’s motion to dismiss in June 2010 and the plaintiffs appealed.

### **Analysis**

#### *Claims under the TVPA*

The district court ruled that the TVPA provides for recovery only against “individuals”. The appellate court agreed, applying the common meaning of the term “individual” to preclude corporate liability under the TVPA. The district court’s dismissal of the appellants’ TVPA claims was affirmed.

#### *Claims under the ATS*

The appellate court next turned to the district court’s dismissal of the appellants’ ATS claims. Alcolac argued that the ATS bars the appellants from seeking relief on an aiding and abetting theory because such a claim is not recognized under international law. It also argued that the appellants did not allege facts sufficient to show that Alcolac acted with the “purpose” of facilitating genocide against the Kurds.<sup>10</sup>

The district court had presumed that aiding and abetting liability is permitted under the ATS, but the appellate court, as part of its *de novo* review, analyzed the issue and concluded that the ATS permits aiding and abetting liability. The appellate court discussed the Supreme Court’s decision in *Central Bank of Denver v. First Interstate Bank of Denver*,<sup>11</sup> which ruled that aiding and abetting liability is not permitted in civil cases except where expressly authorized. It reasoned, however, that the *Central* decision did not preclude aiding and abetting liability under the ATS, as Congress gave explicit authority to federal courts to hear claims under the ATS “committed in violation of the law of nations.”<sup>12</sup>

The appellate court then affirmed the district court’s ruling on the applicable *mens rea* standard, adopting the

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<sup>8</sup> Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350, note).

<sup>9</sup> 1:09-cv-00869-MJG, Slip Op. 2-3 (4th Cir. Sept. 19, 2011).

<sup>10</sup> On appeal, Alcolac also argued that corporations cannot be sued under the ATS. However, because this argument was not raised at the district court level, the appellate court declined to rule on it. *Aziz*, 1:09-cv-00869-MJG, Slip Op. at 11, n. 6.

<sup>11</sup> 511 U.S. 164 (1994).

<sup>12</sup> *Aziz*, 1:09-cv-00869-MJG, Slip Op. at 14.

September 28, 2011

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Second Circuit’s *Talisman* analysis as the law of the Fourth Circuit.<sup>13</sup> The appellate court noted that the *Talisman* panel was persuaded by Judge Katzmann’s concurring opinion in *Khulumani v. Barclay Nat’l Bank Ltd.*,<sup>14</sup> which held that that “a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime and (2) does so with the purpose of facilitating the commission of that crime.”<sup>15</sup>

In following Judge Katzmann’s reasoning, and by extension, *Talisman*’s, the Fourth Circuit rejected the appellants’ argument to adopt the holding reached in *Exxon*, which defined the scope of aiding and abetting liability to reach those who provided “knowing” assistance that had a substantial effect on the commission of an international crime. The basis for the *Exxon* court’s conclusion was that the decisions of the International Criminal Tribunal for the Former Yugoslavia (“ITCY”) and the International Criminal Tribunal for Rwanda (“ICTR”) (providing a “knowing” standard) were more authoritative than the Rome Statute (providing for a “purposeful” standard). The *Exxon* court found that the ITCY and ICTR decisions were “international tribunals mandated by their charter to apply only customary international law.”<sup>16</sup>

Instead, the Fourth Circuit agreed with the Second Circuit that applicable law required courts to look to the “law of nations” to determine the reach of the ATS. In contrast with the *Exxon* court, it adopted Judge Katzmann’s conclusion that the Rome Statute’s status as a treaty “cuts in favor of accepting its *mens rea* standard as authoritative for purposes of aiding and abetting liability”, constituting a “source of the law of nations” more authoritative than ICTY and ICTR tribunals.<sup>17</sup> The *Aziz* decision found that the specific intent *mens rea* standard for accessorial liability explicitly embodied in the Rome Statute is most consistent with norms of international law and is the only standard that has gained the “requisite acceptance among civilized nations for application in an action under the ATS.”<sup>18</sup> It held that, in contrast, no consensus exists for imposing liability on those who knowingly, but not purposefully, aid and abet a violation of international law.<sup>19</sup>

## Conclusion

The “purposeful” *mens rea* requirement articulated by *Aziz* raises the pleading bar for ATS claims in the Fourth Circuit. On a larger scale, the *Aziz* decision deepens the divide between the circuits on the dual issues of the requisite *mens rea* and corporate liability under the ATS, making it likely that the Supreme Court will review this issue in the near future.

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<sup>13</sup> The district court had accepted the Second Circuit’s analysis in *Talisman*, and, finding that the plaintiffs’ Amended Complaint failed to plead facts sufficient to establish that Alcolac sold TDG with the purpose of facilitating genocide, dismissed the ATS claims. *Id.* at 18.

<sup>14</sup> 504 F.3d 254, 323-24, 337 (2d Cir. 2007).

<sup>15</sup> *Aziz*, 1:09-cv-00869-MJG, Slip Op. at 15, citing *Talisman*, 582 F.3d at 258 (quoting *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring)).

<sup>16</sup> *Id.* at 17, citing 2001 WL 2652384, at \*16.

<sup>17</sup> *Id.* at 21.

<sup>18</sup> *Id.* at 23, citing 582 F.3d at 259.

<sup>19</sup> The Fourth Circuit also noted that the appellants’ allegation that Alcolac placed TDG “into the stream of international commerce with the purpose of facilitating the use of said chemicals in the manufacture of chemical weapons to be used, among other things, against the Kurdish population in northern Iraq” was nothing more than a legal conclusion not entitled to the assumption of truth under *Ashcroft v. Iqbal*, 129 S.Ct. at 1950 (2009).

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