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The Supreme Court Confronts Controversies Overseas, But Will Congress Have the Final Word?

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The proper role of US courts in policing conduct abroad is commanding the Supreme Court's attention and may soon command that of Congress. Since 1789, the Alien Torts Claims Act ("ATCA") has long conferred jurisdiction upon federal courts to entertain suits "by an alien" for an alleged tort "committed in violation of the law of nations or a treaty of the United States." Beginning around 1980, the ATCA became a focal point of controversy as non-US citizens increasingly asserted ATCA claims in federal courts arising from alleged wrongs committed outside the United States. Seldom has the Supreme Court weighed in about that controversy. It is now positioned to do so, however, in what could be a landmark decision.

In February, the Supreme Court heard oral argument in *Kiobel v. Royal Dutch Petroleum Co.* on the question whether corporations (as opposed to individuals) can be liable under the ATCA for alleged wrongdoing committed in foreign countries against foreign nationals. Arguing on the side of the defendant was Kathleen Sullivan, a name partner at Quinn Emanuel Urquhart & Sullivan, LLP, former Dean of Stanford Law School, and renowned appellate advocate and constitutional scholar. Less than a week after hearing the argument, the Supreme Court issued an extraordinary order setting re-argument for next term. The Supreme Court moved beyond the exposure faced specifically by corporations and asked the parties to address a broader question: "Whether and under what circumstances the [ATCA] allows courts to recognize a cause of action for violations of the laws of nations occurring within the territory of a sovereign other than the United States." Thus, the Supreme Court will now consider the fundamental question whether US courts should be sitting in judgment of alleged violations of international law committed in other countries.

The Court last ordered re-argument in this fashion three years ago, in *Citizens United v. FEC*. That case yielded a blockbuster ruling favoring corporations' first-amendment rights in the face of campaign-finance restrictions. It remains to be seen whether *Kiobel* will yield a ruling of similar significance.

Looking Around the Corner. Wherever the Supreme Court comes down, there will be winners and losers. If the Court limits ATCA lawsuits, supporters of opening up the US legal system to foreign plaintiffs will go to Congress to amend the statute to provide for more expansive jurisdiction. Opponents will attempt to counter those efforts. Should the Supreme Court instead permit ATCA lawsuits for foreign torts, opponents of such suits might well ask Congress to limit the law's application to overseas torts, with corresponding resistance mounted by supporters of expansive jurisdiction. Either way, the debate is unlikely to end with the Supreme Court's decision, and Congress may have the final word. Q

When in Rome...(U.S Law Still Applies): Lessons of Wal-Mart, News Corp. & the Foreign Corrupt Practices Act

The old DC adage, never do anything you wouldn't want to see reported on the front page of the New York Times, must have taken on a very personal meaning to the senior management and directors of Wal-Mart and News Corp. Both companies have become targets of criminal investigations of possible violations of the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78dd-1 *et seq.*, only to see the allegations of misconduct splashed across the front pages of the Old Gray Lady. The FCPA, which prohibits US companies and even foreign companies with substantial ties to the US from bribing foreign government officials to win or keep business overseas, has been around since the late 1970's but was only sparingly invoked until about a decade ago, when the US Department of Justice (DoJ) and the Securities & Exchange Commission (SEC) dusted off the statute and began bringing major cases against multinationals for alleged wrongdoing around the globe. For DoJ and the SEC, enforcement of the FCPA has been a huge success story, leading to billions of dollars in fines against companies and stiff jail terms for executives who orchestrated the bribery schemes.

News stories this past April broke allegations that executives at Wal-Mart de Mexico, the largest foreign subsidiary of US-based Wal-Mart Stores, Inc., had bribed Mexican officials to secure construction permits. In a similar vein, News Corp., already reeling from the hacking scandal that last year toppled the company's UK-based tabloid News of the World, has come under criminal investigation, as announced by DoJ, based on bribes allegedly paid to UK police and military in exchange for tips.

Press coverage of the Wal-Mart and News Corp episodes has focused less on the bribery allegations themselves than on the initial steps senior management and board directors took to investigate internally upon first learning of the allegations. In both instances, the early investigation, and senior management and the board's roles in them, has come under withering criticism from many corners, with some going so far as to suggest perceived defeciencies in the early investigations may be grounds for charges of obstruction of justice.

In the face of this external scrutiny, companies should be focusing on how they conduct their own internal scrutiny. Although diligent internal investigation will not necessarily inoculate a company against liability under the FCPA, it can help reduce the likelihood of an actual prosecution and mitigate any penalties. Conversely, a fumbled internal inquiry can raise the stakes and the risk to the company and its executives and board members considerably. In Wal-Mart's case, for instance, the New York Times has reported that a former executive of Wal-Mart de Mexico advised Wal-Mart's US management in 2005 that executives at the subsidiary had been systematically bribing Mexican officials to win construction permits in Mexico. Also according to the New York Times, the ensuing internal investigation turned up suspect payments in excess of $24 million and indications of concealment, but abruptly ceased without meaningful follow up or disclosure to the authorities. Then, some years later, in December 2011, Wal-Mart notified the Justice Department that it was conducting an internal investigation of possible FCPA violations by Wal-Mart de Mexico. The New York Times suggested that this notification to DoJ was prompted only by the Times itself approaching Wal-Mart about the allegations. When the company disclosed its ongoing inquiries in its SEC filings, its shares took a serious hit.

The allegations against Wal-Mart may very well prove unfounded and the company and the people caught up in the controversy are not only entitled to the presumption of innocence but deserve the public's reservation of judgment—after all, it would not be the first time, nor would it be the last, that salacious allegations of misconduct in the press turn out to be little more than a mix of rumor, conjecture and misstatements. Whatever the truth of the current reports concerning Wal-Mart or future reports about other companies, the reality is that companies have a very limited window in which to investigate properly, rectify, and self-report possible violations of the FCPA before risks and penalties escalate.

Of course, Wal-Mart and News Corp. are but two of the countless companies facing potential FCPA exposure. DoJ and the SEC now have units specially dedicated to FCPA cases and the Justice Department is getting more investigative support from the Federal Bureau of Investigation. Last year, FCPA enforcement actions reached 48, the second-highest level in the 34-year history of the Act, down from an unprecedented 74 actions in 2010.

Several business groups, including the US Chamber of Commerce, are rightly questioning whether the FCPA is too vague in certain respects and too unforgiving in others. These groups are seeking greater guidance from DoJ and the SEC to help companies comply and get credit for self-disclosures, and have even asked Congress to intervene. One idea is to codify into law credit for prompt discovery, proper internal investigation and disclosure to the authorities. DoJ and the SEC tell companies that they will receive credit for thorough internal investigations and prompt and accurate self-disclosures. Nonetheless, it is not unusual for companies to question what benefit they

have actually received when law enforcement chooses to impose a harsh fine and threaten jail time for some executives in the wake of a self-report. Codifying the benefits of self-disclosure—rather than leaving them purely to the discretion of prosecutors—would help encourage companies to detect and report problems they find, secure in the knowledge that they will receive appropriate credit from law enforcement for doing the right thing.

Unless and until Congress finally acts, companies should be organizing their legislative strategies even while implementing internal protocols and, as and if issues arise, conducting thorough, professional internal investigations that will help mitigate their risk in the meantime. Q

The Cuts Are Coming, Payments May Not Be: How Defense Contractors Can Prepare

Government contractors are facing a year of unprecedented uncertainty. Three things contribute to this: (1) reduced funding requested by the Pentagon; (2) the prospect of sequestration (the automatic cuts triggered when a congressional committee could not agree on deficit reduction); and (3) the prospect that the government will hit the debt ceiling late this year. This article discusses each of the three and suggests some proactive steps that defense contractors can take to protect themselves.

The Pentagon's Lower Budget Request. In February, the Pentagon unveiled a 2013 budget plan that would cut $487 billion in spending over the next decade by trimming approximately 100,000 ground troops, purchasing fewer ships and cutting back on air defense. For 2013, the Pentagon has asked for a base budget of $525 billion—down from $531 billion approved last year and the first reduction that the Pentagon has requested since 9/11. Only $108 billion of the total 2013 budget will be available for procurement of weapon systems, including guns, ships and jet fighters, down from $120 billion in 2012. As of the date of this writing, President Obama has announced that he would veto the House's 2013 defense spending bill in its current form.

The Impact of Sequestration on Defense Spending. Although the Pentagon's proposed 2013 budget takes into account spending caps mandated by the Budget Control Act, it does not address the additional $492 billion in defense cuts over nine years that will go into effect on January 2, 2013. Because the Joint Select Committee on Deficit Reduction did not agree on a comprehensive spending-reduction package, the Department of Defense and its agencies, like other parts of the government, are facing across-the-board, automatic and indiscriminate cuts, known as "the sequester." These cuts, which are estimated to be in the magnitude of 15 percent at the Program, Project and Activities level, will touch almost all discretionary defense programs and contracts. In late April, the Chairman of the House Armed Services Committee announced a plan that would eliminate the sequester and set the base defense budget at $554 billion—roughly $8 billion above the cap set by the Budget Control Act. While efforts to eliminate the sequester are gaining momentum on Capitol Hill, it is unclear whether those efforts will succeed.

The Debt Ceiling. There is—once again—a very real possibility that the government will reach the debt ceiling before year-end and potentially default on its obligations to contractors. It is, of course, impossible to predict when the government will hit the debt ceiling. Treasury Secretary Timothy Geithner recently reiterated his position that lawmakers will have until the end of 2012 to decide whether to raise the debt ceiling. It is possible, however, that the government will hit the debt ceiling in early-November 2012 if tax receipts fall short, economic growth continues to languish, and spending continues to outpace receipts. If the debt ceiling is not raised and the government is unable to pay its bills or, more likely, is forced to prioritize which bills it does pay, it may require contractors to continue performing. The government will likely take the position that, unless and until its failure to pay amounts to a material breach, contractors are obligated to continue contract performance and must attempt to recoup payments for their performance after-the-fact.

Given the present reality of reduced spending and fiscal uncertainty, defense contractors can take steps now to prepare for whatever lies ahead.

1. Classify existing contracts. Determine the nature of the work being performed and how existing contracts are funded. Contracts that support an essential government function are less likely to be impacted negatively by a potential default than are contracts funded with multi-year or revolving appropriations. Additionally, the sequester should not apply to contracts for which funds have been obligated prior to January 2, 2013.

2. Confirm the status of existing contracts. Review the statement of work, period of performance and funding level of existing contracts. If the performance period is about to end and the

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company has an option to extend, ensure that the contracting officer exercises the option prior to continuing performance. Performing after expiration of a contract, in excess of contract requirements or above the appropriated funding level, is risky and may not be compensated.

3. Anticipate a Reduction in Spending. For contracts that are coming up for renewal, have unexercised options or will be bid for as part of the 2013 budget, determine the impact of a 15-percent reduction in funding. Be prepared to renegotiate, taking this reduced spending level into account and take the lead on suggesting ways to implement the cut.

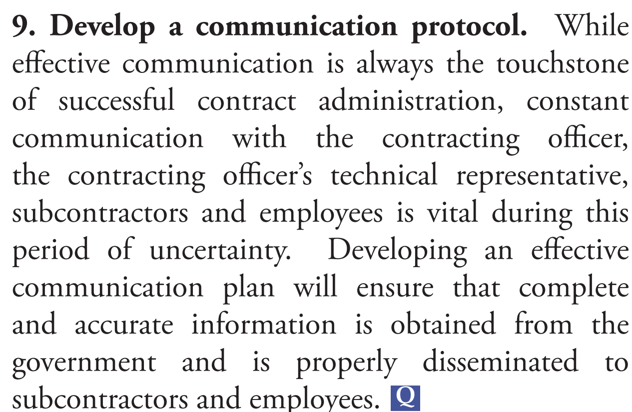
4. Submit ripe requests for equitable adjustment. Given funding uncertainties and the likelihood that the Department of Defense will put off executing new contracts, efforts should be undertaken to increase cash reserves. Getting paid for outstanding requests for equitable adjustment on existing contracts is an excellent way to do that.

5. Collect interest penalties. Review the status of progress payments on existing contracts and redouble efforts to submit timely progress payment requests going forward. Pursuant to the Prompt Payment Act, 31 U.S.C. § 3901 *et seq.*, federal agencies are required to pay their bills on time and to pay interest penalties when payments are late. Collecting interest penalties for late payments will improve liquidity. Moreover, it is critical to submit, on time, progress payment requests when they come due. Interest penalties accrue only if a request for payment has been submitted.

6. Track expenses. Develop procedures to track expenses associated with government-caused delays and terminations, including creating separate charge items. In the event of default or as a means to reduce spending, contracting officers may (depending on the terms of the contract) descope, issue stop work orders, order production breaks, suspend work, delay performance, or terminate contracts in whole or in part. The government generally must compensate contractors for the impact of such actions, but may avoid doing so if the impact on the contractor is not adequately documented.

7. Cure defects. Cure defects in existing contracts and, if appropriate, respond to show-cause notices. Contracting officers faced with slashed budgets may see terminating underperforming contractors for default as an easy way to save money. Contractors should eliminate every possible ground for default termination.

8. Review subcontractor agreements. Understand obligations to pay any subcontractor, and, correspondingly, entitlements to demand performance from that subcontractor. A prime contractor's obligation to pay a subcontractor depends on the terms of the agreement, as does the subcontractor's obligation to continue performance if it is not paid. Newly executed subcontracts should include a "payment-when-paid" clause that makes payment to the subcontractor contingent on the prime contractor's receipt of payment from the government.



9. Develop a communication protocol. While effective communication is always the touchstone of successful contract administration, constant communication with the contracting officer, the contracting officer's technical representative, subcontractors and employees is vital during this period of uncertainty. Developing an effective communication plan will ensure that complete and accurate information is obtained from the government and is properly disseminated to subcontractors and employees.

Will the FDIC's Claims Against Directors and Officers of Failed Banks for Simple Negligence Yield to the Protections of the Business-Judgment Rule?

Federal legislation has yet to specify the extent to which state law may protect directors and officers of failed banks against claims of simple negligence by FDIC, and Congress may soon be urged to step in. For now, directors of banks can breathe a modest sigh of relief. Earlier this year, the Federal District Court for the Northern District of Georgia ruled that directors of banks that failed during the 2008 economic collapse cannot be liable to the FDIC for simple negligence in a case when the directors qualify for protection under a state's business-judgment rule.

Whenever a bank insured by the FDIC fails, the FDIC will cover the bank's depository losses while retaining authority to sue those it deems responsible for causing the bank to fail. Integrity Bank of Alpharetta, Georgia had losses of over $70 million and failed. The FDIC, in its capacity as receiver of the failed Integrity Bank, brought a professional-liability

lawsuit against a number of the bank's former officers and inside and outside directors.

Such actions by the FDIC are nothing new. Since 2009, the FDIC has authorized over 460 lawsuits and formally filed 27 complaints in federal district courts. Some of the larger bank failures, including those of IndyMac and Washington Mutual, have been followed by professional liability lawsuits, yet many of the largest bank failures have not been. If history is any guide, bank directors and officers may face professional liability complaints or settlement agreements in the coming years.

The district court's recent order in the case against Integrity Bank and its directors and officers should offer some comfort. Almost all of the 27 complaints the FDIC has filed since 2009 accuse the directors and officers of simple negligence, gross negligence, and breach of fiduciary duties. In many states, including Georgia, however, the business-judgment rule protects against claims for simple negligence. To qualify for protection under the business-judgment rule, as recited by the Georgia court (quoting the Georgia statute), a director or officer must have "discharge[d] the duties of their respective positions in good faith and with that diligence, care, and skill which ordinarily prudent men would exercise under similar circumstances in like positions." Given the contours of that protection, the district court determined that the FDIC's "claims for ordinary negligence and breach of fiduciary duty based upon ordinary negligence fail to state a claim upon which relief can be granted."

It follows from the ruling that, to hold Integrity Bank's former directors liable, the FDIC would have to prove they were grossly negligent. For instance, the Georgia court referred to instances where a defendant has "engage[d] in fraud, bad faith, or an abuse of discretion" as instances that would extend beyond simple negligence and outside "the ambit of the protections of the business judgment rule." Gross negligence is more difficult to prove than simple negligence.

Notwithstanding the court's decision with respect to Integrity Bank and its former directors, the FDIC is persisting in its efforts to hold directors liable for simple negligence. The FDIC is seeking reconsideration of the court's ruling and indicated that it may appeal to the U.S. Court of Appeals for the Eleventh Circuit. Following the Integrity Bank order, the agency also filed two more complaints in Georgia against directors and offices of failed Georgia banks. Both allege claims for simple negligence.

The business-judgment rule has yet to be tested outside of Georgia as a defense against a claim of simple negligence by FDIC. Thus, there is cause for doubt and room for argument. Officers and directors of failed banks should monitor how courts handle the FDIC's simple-negligence claims against former directors and officers who invoke the business-judgment rule in their defense. Beyond that, officers and directors may ask Congress to pass legislation that federalizes the business-judgement defense for bank officers and directors. On the flip side, if the Georgia district court's ruling starts a trend, then the FDIC may seek expanded authority from Congress to hold officers and directors liable for simple negligence. Q

Notable Additions

Quinn Emanuel Urquhart & Sullivan LLP has continued to expand its presence in Washington D.C. with the addition of three more partners to join its D.C. office, which first opened last September. Since prominent white-collar defense lawyer **William Burck** came aboard in January to co-manage the Washington D.C. office with partner **Jon Corey**, the firm has further augmented its litigation capabilities by adding **Derek Shaffer**, **Jeff Gerchik**, and, most recently, **David Orta** as partners.

Derek Shaffer has litigated a wide range of complex matters, particularly those involving governmental bodies and unsettled questions of constitutional and statutory law. He also helped to launch and run the Stanford Constitutional Law Center as its inaugural Executive Director, leading student teams in constitutional litigation and academic projects. Shaffer joins Quinn Emanuel from Cooper & Kirk PLLC where he was a partner.

Prior to joining Quinn Emanuel, Shaffer served as lead attorney or otherwise played central roles in many high-profile trial and appellate matters. To date, he has represented six States and handled cases before numerous tribunals, including the U.S. Supreme Court, U.S. courts of appeals and district courts, state supreme courts, administrative tribunals and the NCAA. Shaffer graduated first in his Class of 1996 from the College of Industrial and Labor Relations at Cornell University. He then graduated first in his Class of 2000 from Stanford Law School as its Nathan Abbott Scholar, before clerking for Chief

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Judge Douglas Ginsburg on the D.C. Circuit.

"Derek's accomplishments speak for themselves. A lawyer of his acumen will offer great advantages to our clients with matters that touch upon constitutional law issues," said Quinn Emanuel's managing partner John Quinn. Co-Chair of the firm's Washington D.C. office Jon Corey added, "We feel lucky to have gained Derek for his academic approach, in addition to all his trial experience, especially for our national appellate trial practice."

Jeff Gerchick is an intellectual property litigation specialist who has litigated scores of U.S. district court cases as well as International Trade Commission Section 337 investigations. He joins Quinn Emanuel from the Washington DC Office of Kenyon & Kenyon LLP, where he was a partner.

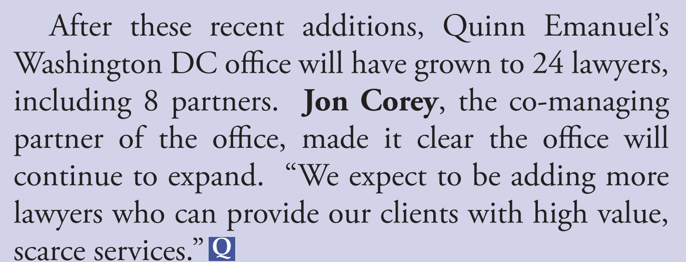
Gerchick, who has an Electrical Engineering degree from the University of Michigan, has litigated patent infringement cases covering a wide range of technologies, including wireless and wired networking, cellular mobile communications, computer hardware and software, consumer electronics, digital audio formats, and automotive technologies. In the past, he has represented consumer electronics and telecommunications companies such as Sony, Sony Computer Entertainment, Sony Ericsson Mobile Communications (now Sony Mobile Communications), Barnes & Noble, and automotive companies such as Toyota. Mr. Gerchick is also co-author of one of the leading treatises on Section 337 investigations, Unfair Competition and the ITC.

"Jeff is a very experienced patent trial lawyer. We tried a case with Jeff and saw him in action. He adds more depth to the firm's already deep bench of IP trial lawyers." said firm managing partner John Quinn. Mr. Gerchick said: "I like to try cases. Quinn Emanuel tries more patent cases than any other firm. I have seen first-hand how they work. It is a natural fit."

David Orta comes to Quinn Emanuel as an international arbitration specialist, making him the third such international arbitration specialist to join the firm in the last nine months. He was previously a partner in the Washington D. C. office of Arnold & Porter LLP.

Orta, an experienced trial lawyer and arbitration advocate, devotes the majority of his time to representing clients in international disputes. He has represented clients in arbitrations under the auspices of many different arbitral forums including the International Centre for Settlement of Investment Disputes (ICSID), UNCITRAL, the ICC and the International Centre for Dispute Resolution (ICDR/AAA). Fluent in Spanish, he has been particularly active representing Latin American companies and countries in investment treaty and commercial arbitration disputes and also has handled matters relating to Central and Eastern Europe, the Caribbean and Africa. Chambers Global, Chambers Latin America and Global Arbitration Review have all recognized Orta for his international arbitration work. Orta also regularly participates in conferences and seminars on subjects of international law and has published in the field. He is affiliated with various arbitral associations and institutions around the world.

"Our plan is to establish a top tier international arbitration practice and to do so quickly. We want to have well regarded international arbitration advocates in the major arbitrations centers. Washington is such a center and David is an important part of that plan," said John Quinn, the firm's managing partner. However, Quinn signaled that the firm's expansion of this practice area would not stop with the addition of Orta. "Within the coming months we will be adding well known international arbitration specialists in other major arbitration centers, including London." Of his move Orta said "I have always admired Quinn Emanuel and its spectacular track record of successes for its clients. I look forward to working with my new colleagues at Quinn Emanuel and to being an integral part of the firm's expansion of its international arbitration practice."



After these recent additions, Quinn Emanuel's Washington DC office will have grown to 24 lawyers, including 8 partners. **Jon Corey**, the co-managing partner of the office, made it clear the office will continue to expand. "We expect to be adding more lawyers who can provide our clients with high value, scarce services." Q

- We are a business litigation firm of more than 600 lawyers — the largest in the world devoted solely to business litigation.
- As of April 2012, we have tried over 1516 cases, winning over 90% of them.
- When we represent defendants, our trial experience gets us better settlements or defense verdicts.
- When representing plaintiffs, our lawyers have garnered over $15 billion in judgments and settlements.
- We have won five nine-figure jury verdicts in the last ten years.
- We have also obtained eight nine-figure settlements and five ten-figure settlements.

Prior results do not guarantee a similar outcome.

LOS ANGELES
865 S. Figueroa St., 10th Floor
Los Angeles, CA 90017
213-443-3000

NEW YORK
51 Madison Ave., 22nd Floor
New York, NY 10010
212-849-7000

SAN FRANCISCO
50 California St., 22nd Floor
San Francisco, CA 94111
415-875-6600

SILICON VALLEY
555 Twin Dolphin Dr., 5th Floor
Redwood Shores, CA 94065
650-801-5000

CHICAGO
500 West Madison St., Suite 2450
Chicago, IL 60661
312-704-7400

WASHINGTON, D.C.
1299 Pennsylvania Avenue NW, Suite 825
Washington, DC 20004
202-538-8000

TOKYO
NBF Hibiya Bldg., 25F
1-1-7, Uchisaiwai-cho, Chiyoda-ku
Tokyo 100-0011,
Japan
+81 3 5510 1711

LONDON
16 Old Bailey,
London EC4M 7EG,
United Kingdom
+44 0 20 7653 2000

MANNHEIM
Mollstraße 42
68165 Mannheim,
Germany
+49 (0) 621 43298 6000

HAMBURG
An der Alster 3
20099 Hamburg
Germany
+49 (0) 40 89728 7000

MOSCOW
Voentorg Building, 3rd floor
10 Vozdvizhenka Street
Moscow 125009
Russia
+7 495 797 36 66

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