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Corporate Liability Under The Alien Tort Statute, Splitting With Second Circuit

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In two recent decisions, the United States Courts of Appeals for the District of Columbia Circuit and the Seventh Circuit each split with the Second Circuit's 2010 decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), that corporations cannot be liable under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. As we reported, the Second Circuit in *Kiobel* held that the scope of liability under the ATS does not extend to corporations because imposing liability on corporations for violations of the law of nations has not achieved a sufficiently "specific, universal, and obligatory" character so as to be considered a norm of customary international law. However, in *Flomo v. Firestone Natural Rubber Co.*, No. 10-3675, 2011 WL 2675924 (7th Cir. July 11, 2011), and *Doe VIII v. Exxon Mobil Corp.*, Nos. 09-7125, 09-7127, 09-7134, 09-7135, 2011 WL 2652384 (D.C. Cir. July 8, 2011), the D.C. and Seventh Circuits each concluded that the Second Circuit's decision in *Kiobel* relied on factual inaccuracies and ignored the distinction between norms of conduct and remedies. The decisions deepen the circuit split on the question of corporate liability under the ATS, creating a likelihood that the conflict will be resolved by the United States Supreme Court.

Plaintiffs in *Flomo* were a group of children from Liberia, where defendant Firestone Natural Rubber Company ("Firestone") operated a 118,000-acre rubber

plantation through a subsidiary. Plaintiffs claimed that Firestone utilized hazardous child labor on the plantation and sued Firestone under the ATS. The ATS confers federal jurisdiction over tort actions brought by aliens for violations of the law of nations, or "customary international law." Although Firestone did not employ children at the plantation, plaintiffs had argued that the production quotas that Firestone set for its employees were so high that employees were forced to enlist their children to help them. Firestone countered that corporations have never been prosecuted for violations of customary international law and that there is therefore no principle of customary international law that binds them.

Plaintiffs in *Exxon* were a group of villagers from the Aceh province of Indonesia, where defendant Exxon Mobile Corporation ("Exxon") and several of its subsidiaries operated a natural gas extraction and processing facility. Plaintiffs claimed, among other things, that Exxon's security forces were comprised of Indonesian soldiers who committed genocide, extrajudicial killing, torture, crimes against humanity, sexual violence and kidnapping against Aceh residents in violation of the ATS. Plaintiffs argued that the soldiers' actions were attributable to Exxon because Exxon had the authority to control and direct the soldiers' actions. As Firestone argued in *Flomo*, Exxon claimed that as a corporation it was immune from liability under the ATS.

The Seventh Circuit in *Flomo* (Posner, J.) rejected the Second Circuit's holding in *Kiobel* that corporations cannot be liable under the ATS. The Court noted that the Second Circuit's premise in *Kiobel* that corporations have never been criminally or civilly prosecuted for violating customary international law was factually incorrect. The Court noted, for example, that the allied powers dissolved German corporations that had assisted the Nazi war effort at the end of the Second World War and that they did so on the authority of customary international law. The Court also noted that there was no compelling explanation as to why corporations have rarely been civilly or criminally prosecuted other than a desire to confine corporate liability to "abhorrent conduct" and that, even if no corporation had ever been punished for violating customary international law,

there always has to be a first time for litigation to enforce a norm. The Court also observed that international law only imposes substantive obligations, and that it is up to individual nations to decide how to enforce them.

The D.C. Circuit in *Exxon* likewise rejected *Kiobel*'s holding that corporations are immune from liability under the ATS. The Court (Rogers, J.) analyzed the historical context of the ATS and concluded that corporate liability under the ATS is consistent with the text, purpose, and history of the statute. Like the Seventh Circuit in *Flomo*, the D.C. Circuit faulted *Kiobel* for failing to distinguish between norms of conduct (which are determined by international law) and rules of remedy (which are determined by federal common law). The Court also concluded that, if anything, international law lends support to a recognition of corporate liability for violations of customary international law. The Court noted, for example, that the "corporate death penalty" for corporations that assisted the Nazi war effort was as much an application of customary international law as the sentences imposed on individuals by the Nuremberg tribunals.

The holdings in *Flomo* and *Exxon* also are in accord with the Eleventh Circuit's holding in *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008), that the ATS grants jurisdiction over corporate defendants and similar holdings by federal district courts in Maryland and Virginia. Thus, *Kiobel* increasingly appears to be an outlier among ATS cases ruling on corporate liability. The issue may face Supreme Court review in the near future. Plaintiffs in *Kiobel* recently filed a petition for writ of certiorari, and the Supreme Court will decide whether to review the case in the coming weeks.

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