Editor's comments

By Lewis F. Matuszewich

Thank you to Cindy Galway Buys, former Chair of the International and Immigration Law Section Council and Professor at Southern Illinois University School of Law, for providing, “Can Corporations be Held Liable for International Torts under the Alien Tort Statute?” In addition to being a frequent contributor, Cindy encourages her students to submit articles to The Globe. This issue includes, “Federal Law vs. the University of Illinois Act and other Similar State Statutes that Provide In-State Tuition Benefits to Qualifying Immigrants” by Elizabeth Adams, a student at Southern Illinois University School of Law with anticipated graduation in May of 2012.

Ian Robberechts, Director of Investments of the Flanders Investment and Trade Office in Chicago has provided us a significant amount of material on how to set up a business in Flanders, Belgium. The first installment of this material will be followed by additional installments in future issues.

International and Immigration Section Council Member Patrick Knally submitted, “The Child Status Protection Act is to Protect Children” and Member Tejas Shah provided, “USCIS Announcement Regarding Job Creation: The First Step in a Pro-Growth Immigration Policy.”

We have also continued in this issue the practice of including from the Illinois State Bar Association’s E-Clips, references to recently decided cases that should be of interest to international and immigration practitioners. Also included in this issue is, “International Issues are Everywhere,” compiled from information on the ISBA List Serves.

Thank you to all of the authors for submitting their material. ■

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Can corporations be held liable for international torts under the Alien Tort Statute?

By Cindy Galway Buys

That is the question that has split the federal circuits this past year and is likely headed for the U.S. Supreme Court. The Seventh Circuit recently answered this question in the affirmative in Fiono v. Firestone Natural Rubber Co., after the Second Circuit reached the opposition conclusion in Kool v. Royal Dutch Petroleum Co. Resolution of this issue by the U.S. Supreme Court will be important for corporations operating internationally and for the counsel representing them.

The Seventh Circuit’s decision in Fiono arose from a dispute between Liberian families and the Firestone Natural Rubber Company, which operates an 118,000-acre rubber plantation in Liberia through a subsidiary. The plaintiffs allege that Firestone subjected children to hazardous labor on its plantation in violation of customary international law. Plaintiffs brought suit in U.S. district court under the Alien Tort Statute (ATS),...
28 U.S.C. § 1350, which confers jurisdiction on federal courts over "any civil action by an alien for a tort only, committed in violation of law of nations or a treaty of the United States." The Seventh Circuit had to resolve two issues: (1) whether corporations can be liable under the ATS; and (2) whether plaintiffs' evidence was sufficient to create a triable issue of fact as to whether Firestone had violated customary international law.

1. Can Corporations Be Held Liable Under the ATS?

Congress enacted the ATS in 1789 and it lay dormant for almost 200 years, until the Second Circuit found a Paraguayan official liable for torture in a suit brought by Dolly Fiallita, the sister of the victim. Following that case, several other plaintiffs sought relief in U.S. federal courts for allegedly tortious conduct committed abroad both by individuals and by corporations. Defendants raised a variety of defenses in these suits, including that the ATS is a purely jurisdictional statute and does not allow courts to recognize new causes of action. One of those cases, Sosa v. Alvarez-Machain, reached the U.S. Supreme Court. The Supreme Court held that while the ATS is primarily jurisdictional, it also leaves the door ajar for judicial recognition of present-day actionable norms of customary international law. However, those norms must be accepted by States and defined with sufficient specificity such that they are comparable to the well-recognized torts of the 18th century (when the ATS was enacted), such as piracy, violations of safe conduct, and infringement on the rights of ambassadors.

In Fumo, Firestone argued that corporations cannot be held liable for international torts under the ATS. The issue was left unresolved by the Supreme Court's decision in Sosa, and a circuit split on the issue has developed, although all but one federal court has held or assumed that corporations could be liable. Firestone relied primarily on Kiobel, the 2010 decision of the Second Circuit holding that because corporations generally have not been prosecuted, criminally or civilly, for violations of customary international law, there cannot be a customary international law principle that binds corporations.

Writing for the Seventh Circuit in Fumo, Judge Posner took issue with the Second Circuit's holding, flatly stating that "the factual premise of the majority opinion in the Kiobel case is incorrect." In making this assertion, Judge Posner cited evidence of corporate liability under international law from post-Nazi Germany and the Nuremberg trials. The opinion also points out that "corporate tort liability is common around the world," apparently referring to standards for corporate liability under domestic laws.

The Seventh Circuit's decision in Fumo with respect to corporate liability is open to criticism. Judge Posner's support for the idea that corporations have been held liable under international law is limited to one example from World War II. He also does not explain whether international law or domestic law should govern the issue.

However, it is possible that Judge Posner believed it to be unnecessary to spend more time on the issue in light of the D.C. Circuit Court of Appeals' comprehensive decision holding corporations liable under the ATS just one month earlier in Doe v. Exxon Mobil Corp. In that case, plaintiffs were Indonesian villagers from the Aceh province who alleged that Exxon's security forces at a natural gas extraction and processing facility in Aceh committed murder, torture, sexual assault, battery and false imprisonment in violation of the ATS. In a lengthy decision, the D.C. Circuit held that "neither the text, history, nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations."

Like the Seventh Circuit in Fumo, the D.C. Court took issue with the Second Circuit's decision with respect to corporate liability in Kiobel. The D.C. Circuit criticizes the Second Circuit for improperly confusing the tortious behavior with the actor who commits it. While the "substantive content of the common law causes of action that courts recognize in ATS cases must have its source in customary international law," remedies for violations are left to municipal law. Thus, the D.C. Circuit held in Doe that domestic law, which has permitted corporate liability in tort since the founding of the nation, governs the issue of corporate liability under the ATS.

The Doe court further supports its conclusion by pointing out that the text of the ATS allowing "any civil action is 'inclusively and unrestriced' and 'does not distinguish among classes of defendants.'" After examining the historical record regarding enactment of the ATS, the Court determined that allowing corporate liability is consistent with the purpose of the statute, which was to provide the federal government with the authority to enforce the law of nations over all tortfeasors. Thus, the Seventh, Eleventh and D.C. Circuits have now all held in favor of corporate liability under the ATS, while the Second Circuit stands alone in denying such liability.

2. Did the Fumo plaintiffs present sufficient evidence to create a triable issue of fact as to whether Firestone had violated customary international law?

Proving a violation of customary international law has been equally, if not more, difficult for plaintiffs in these ATS cases. On the merits in Fumo, the Seventh Circuit held that plaintiffs did not meet their burden of proof with respect to Firestone's treatment of child labor as a violation of customary international law. The Court examined three international treaties that bar children from being forced to perform labor that may be harmful to them: the United Nations Convention on the Rights of the Child; the International Labour Organization Minimum Age Convention (neither of which have been ratified by the United States) and the International Labour Organization Worst Forms of Child Labour Convention (to which the United States is a party). In this case, Firestone does not employ children directly. However, plaintiffs allege that Firestone sets such high quotas for its workers that they are forced to rely on other poor Liberians, including family members and underage children, to meet their quotas or face losing their job. The Court held that plaintiffs had not created a sufficient evidentiary record documenting working conditions, how often children are employed, how hard the work is or how much work the average child does. Accordingly, plaintiffs failed to present enough evidence to create a triable issue of fact and the case was dismissed.

Conclusion

A petition for certiorari in the Kiobel case is already pending at the U.S. Supreme Court. More cert petitions are likely to be filed if corporations such as Exxon Mobil are found liable under the ATS. Thus, the ultimate resolution of this issue remains to be seen. However, the D.C. Circuit wrote a very persuasive and well-researched opinion in Doe justifying its decision that corporations may be liable under the ATS. Those arguments will be difficult for corporations to refute. In the meantime, corporations located in the Seventh Circuit may be subject to liability under the ATS in accordance with the Fumo decision.

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1. Fallone v. Firestone Natural Rubber Co., 643 F.3d 1023 (7th Cir. 2011).
3. Customary international law is generally defined as the practice of States accepted as law. Statute of the International Court of Justice at art. 38, Restatement (Third) of Foreign Relations Law of the United States § 102.
6. Id. at 729.
7. Id. at 725.
9. Fallone, 643 F.3d at 1017.
10. Id.
11. Id. at 1019.
13. Id., slip op. at 4.
14. Id. at 54.
15. Id. at 66, 73-74.
17. Id. at 57-58.
18. Fallone, slip op. at 16.
19. Id. at 20.
20. Id. at 22-23. By contrast, the Doe court remanded the case to the trial court for evidentiary proceedings, so no decision on the merits has been reached.

Federal law vs. the University of Illinois Act and other similar state statutes that provide in-state tuition benefits to qualifying immigrants

By Elizabeth Adams

Public education is provided to every child in the United States from kindergarten through 12th grade, regardless of the child’s citizenship. Higher education beyond that can come at a significant cost, however, to immigrants who previously benefited from the public education system. Both lawful and unlawful immigrants who received a high school education in the United States face out-of-state tuition rates even if they wish to attend a college in the same state they attended high school. To lessen this burden, several states across the country have passed laws which grant in-state tuition to unlawful immigrants based on a variety of factors. For example, the University of Illinois Act contains a provision that qualifies an individual as a resident of Illinois for purposes in-state tuition benefits if they: graduate from an Illinois high school, attend high school in Illinois for three years, graduates at an Illinois university, and if not a citizen or permanent resident, signs an affidavit stating they will file an application to become a citizen of permanent resident as soon as they are eligible. Recently, the California Education Code, which exempts certain non-residents and unlawful immigrants from paying non-resident tuition, was challenged by out-of-state residents. The out-of-state residents were U.S. citizens who claimed the law violated the United States Constitution and was also preempted by federal law. Under the California law, foreign nationals (even those unlawfully present) qualify for in-state tuition for post-secondary education if they: attended a California high school for three years, graduated, and sign an affidavit that they have begun the process to obtain legal status or will do so as soon as they are eligible. Federal law prohibits states from granting postsecondary education benefits to unlawful immigrants based on residence, without conferring the same benefits to a citizen or national of the United States.

Article VI, Clause 2 of the U.S. Constitution (the Supremacy Clause) provides that the “Constitution, and the laws... and all treaties made... shall be the supreme law of the land.” Accordingly, there are three ways a state law is preempted by federal law. First, if Congress uses explicitly statutory language to describe how the extent to which the statute preempts state law. Second, “in the absence of express pre-emptive language, Congress’ intent to pre-empt all state law in a particular area may be inferred.