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CLIENT ALERT

Supreme Court Leaves Narrow Path for Plaintiffs Asserting Claims Under the Alien Tort Statute

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Late last week, a fractured Supreme Court held in *Nestle USA, Inc. v. Doe* that American corporations accused of aiding and abetting child slavery in Ivory Coast could not be sued under the Alien Tort Statute (ATS) because "nearly all" of the alleged aiding and abetting occurred abroad and the corporations' "general corporate activity" did not constitute domestic conduct sufficient to overcome the presumption against extraterritorial application of U.S. laws.

The ruling is the latest in a series of decisions restricting the reach of the ATS, which grants U.S. courts jurisdiction over "any civil action by an alien" for torts "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The scope of that jurisdiction has been construed narrowly. Only three violations of international law—each already recognized when the ATS was enacted in 1789—have been recognized as causes of action under the statute: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."

The *Nestle* plaintiffs were citizens of Mali who alleged that they were kidnapped and forced to work on cocoa plantations in Ivory Coast when they were children. They alleged that the U.S.-based corporate defendants, manufacturers of food, aided and abetted those human-rights abuses by sourcing cocoa beans from the offending plantations and providing technical and financial support in exchange for exclusive sourcing agreements.

Owing to these allegations, the plaintiffs sued the defendants in 2005 in federal court in California. Whether their claims could be heard in a U.S. court would ultimately be litigated for more than fifteen years. The district court first dismissed the case in 2010 on the ground that a corporation could not be sued under the ATS. In 2013, the U.S. Court of Appeals for the Ninth Circuit vacated that decision and gave the plaintiffs leave to amend their complaint in light of the Supreme Court's decision in *Kiobel v. Royal Petroleum Co.*, which suggested in dictum that U.S. corporations may be sued by foreigners for violations of international law under the ATS so long as the presumption against extraterritorial application of U.S. laws is overcome. On remand, the district court dismissed the case once again, this time because the claims did not "touch and concern the United States enough to override that presumption." The Ninth Circuit again reversed, holding that aiding and abetting slavery is actionable under the ATS and that decisions the defendants allegedly made in the United States were sufficiently connected to the alleged slavery to overcome the presumption against extraterritoriality. The defendants' appeal to the U.S. Supreme Court culminated in last week's decision directing the dismissal of the plaintiffs' claims.

The Supreme Court was asked three questions: (1) whether the defendants' alleged U.S.-based oversight of and decision-making with respect to their foreign operations rebutted the presumption against extraterritorial application of U.S. law; (2) whether aiding and abetting child slavery could be recognized as a cause of action under the ATS; and (3) whether domestic corporations are immune from suit under the ATS.

The Court answered only the first question, holding by an 8–1 majority that the plaintiffs' allegations as to the defendants' U.S.-based conduct were insufficient to overcome the presumption against extraterritoriality. In concurring opinions that did not command a majority of votes, Justices Thomas, Gorsuch, and Kavanaugh would have reached the second question and held that courts may not recognize any causes of action under the ATS other than the three already recognized in 1789. Conversely, Justice Sotomayor, joined by Justices Breyer and Kagan, wrote an opinion expressing the view that courts may recognize new causes of action under the ATS as international law develops. Justice Alito dissented, stating that he would have held only that corporations may be sued under the ATS (a view seemingly shared by all the justices) and would have remanded the case to allow further proceedings in the district court.

Consistent with recent precedent, the Court reiterated that the ATS does not rebut the presumption against extraterritorial application of U.S. laws and that, therefore, plaintiffs cannot state a claim under the ATS for conduct that occurred exclusively on foreign soil.

Thus, the question in *Nestle* became whether the plaintiffs' allegation that the defendant corporations had aided and abetted slavery through financial decisions made in the United States was sufficient to allow suit under the ATS notwithstanding the presumption against extraterritoriality. Characterizing the allegation as "[p]leading general corporate activity," the Court held it insufficient to avoid the presumption. According to the Court, "[b]ecause making 'operational decisions' is an activity common to most corporations," plaintiffs suing under the ATS "must allege more domestic conduct than general corporate activity."

That was the extent of the Court's holding.

The justices disagreed on whether courts could recognize aiding and abetting slavery as a new cause of action under the ATS. Under what has come to be known as the *Sosa* framework, plaintiffs may state a new cause of action under the ATS if they establish that (1) the defendant violated "a norm that is specific, universal, and obligatory" under international law and (2) the courts should exercise judicial discretion to create a cause of action rather than defer to Congress.

Justice Thomas, writing for himself and Justices Gorsuch and Kavanaugh, would have interpreted *Sosa* narrowly, concluding that the Court should refrain from recognizing a cause of action "whenever there is even a single sound reason to defer to Congress." Indeed, Justice Thomas would effectively overrule *Sosa* given his view that, in light of the constitutionally mandated separation of powers, "there will always be a sound reason for courts not to create a cause of action for violations of international law." In his own concurring opinion, Justice Gorsuch would have gone farther and explicitly held that courts may not recognize any tort under the ATS other than those recognized in 1789.

Justice Sotomayor's concurrence, by contrast, criticized Justice Thomas's narrow reading of *Sosa*, which she believed would overrule *Sosa* "in all but name" and disregard congressional intent. According to Justice Sotomayor, "from the moment the ATS became law, Congress expected federal courts to identify actionable torts under international law and to provide injured plaintiffs with a forum to seek redress."

The Court's fractured opinions leave open an important question: whether courts hearing claims brought under the ATS may recognize causes of action other than those recognized in 1789. Even if they may, *Nestle* makes clear that plaintiffs invoking the ATS must adequately allege U.S.-based conduct sufficiently related to a violation of international law to overcome the presumption against extraterritorial application of U.S. law.

The decision is available here.

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