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Expert Analysis

Corporate Liability Under Alien Tort Statute in the Second Circuit

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It is emphatically the province of the courts to "say what the law is." A corollary to that principle is that litigants have a right to know what the law is, once a court has spoken. Yet, on the question of corporate liability under the Alien Tort Statute (ATS) in the U.S. Court of Appeals for the Second Circuit, no one really knows. Not the district judges, not the Second Circuit itself, and certainly not the litigants who continue to expend significant resources addressing the question. Given the continued state of uncertainty surrounding this important question, it may well be time for the Second Circuit to address the question head-on, and say what the law is in this circuit once and for all.

'Kiobel' Shockwave

The quagmire began with *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010). *Kiobel* involved a suit by Nigerian nationals against three foreign corporations engaged in oil exploration and production for allegedly aiding and abetting human rights abuses of the Nigerian government under the ATS, which provides federal jurisdiction for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The district court dismissed some of the plaintiffs' ATS claims on the merits, but allowed three claims—for aiding and abetting torture, arbitrary detention and crimes against humanity—to proceed. The question whether corporations can be sued under the ATS at all was never raised or decided in the district court. As in most ATS cases, the answer to this threshold question was likely assumed, given decades of ATS cases against corporations both within and without the Second Circuit.

On interlocutory appeal, the three judges of the Kiobel panel reached common ground in holding that the plaintiffs failed to state any ATS claim, and dismissed the complaint in its entirety. Two of the panel judges, however, did so on a novel basis that had never been briefed or argued in the nearly decade-long history of the case. In a 2-1 split decision issued over vigorous opposition, the panel majority held—as a matter of first impression without briefing—that corporations cannot be held liable for human rights violations under the ATS.

Kiobel sent a shockwave throughout ATS jurisprudence in the Second Circuit, where a number of significant ATS claims against corporations have been, and continue to be, adjudicated. A poll of active Second Circuit judges failed to garner enough votes for rehearing en banc, triggering the dissent of four active judges, creating a circuit split over the question of corporate liability, and leaving the Second Circuit as the "outlier" among circuit courts. See *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011).

Supreme Court

In light of this circuit split, the Supreme Court granted certiorari to address "[w]hether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decision provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS…." After oral argument, however, the Supreme Court directed the parties to address an entirely different question: Whether ATS claims can be brought for violations of the law of nations occurring outside the United States. The corporate liability question thus ceded importance to the question of extraterritoriality.

This supplemental extraterritoriality question formed the basis for the Supreme Court's ultimate decision. In *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (2012), the Supreme Court established a test for extraterritorial application of the ATS: A plaintiff's claims must "touch and concern the territory of the United States" with "sufficient force to displace" a "presumption against extraterritorial application." Since "all of the relevant conduct" in *Kiobel* "took place outside the United States," the Supreme Court had little difficulty finding that this test was not met. The court therefore affirmed the Second Circuit's judgment dismissing the Kiobel plaintiffs' claims, but on a radically different ground.

Having received full briefing and argument on the corporate liability question, the Supreme Court was well aware of its importance to the Kiobel case, and ATS jurisprudence generally. If the mere fact that the defendant is a corporation is a sufficient basis for dismissal, why did the court not rule on that simple ground? The answer could be found in a critical sentence of the court's decision, in which the court noted that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices" for extraterritorial ATS liability. The negative pregnant of this sentence is obvi-

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ous: While "mere corporate presence" is not enough, where more is alleged, corporate ATS liability can be established. This important sentence—indeed, the whole decision—would be superfluous if corporations can never be ATS defendants.

Uncertain Precedential Status

Following the Supreme Court decision, the precedential status of the Second Circuit's split decision on corporate liability became uncertain. On the one hand, the Supreme Court did affirm the Second Circuit, albeit on alternate grounds. As a matter of pure appellate formalism, that could be interpreted to mean the opinion below stands. Affirmed means affirmed. On the other hand, the Supreme Court reviews judgments, not opinions. Having concluded that the Kiobel plaintiffs failed to meet the court's extraterritoriality test, affirmance was the necessary consequence. Yet, in this context, affirmance does not in any way imply acceptance of the basis for the Second Circuit's judgment. This is particularly so in *Kiobel*, given the Supreme Court's explicit reference to potential ATS liability against corporations when more than "mere corporate presence" is alleged.

This is no minor issue. Litigants who file claims in derogation of binding circuit precedent face an uphill battle, having nothing to do with the substantive merits of the issue. If the Second Circuit decision in *Kiobel* remains good law, a suit against any corporate defendant within the circuit would terminate at the threshold stage. On appeal, a subsequent panel would be bound to follow the prior panel as circuit precedent. Given the Second Circuit's historical reluctance to hear cases en banc, the only real potential for a merits determination would lie with the Supreme Court—the very court that granted certiorari on the question of corporate liability but arguably declined to answer it in *Kiobel*. An uphill battle indeed.

This begs the question: Is the 2-1 panel decision in *Kiobel* binding precedent in the Second Circuit? Since *Kiobel* was decided, this question has divided the district courts and the Second Circuit itself.

In one of the earliest post-Kiobel cases in the Second Circuit to address the question of corporate liability, the panel was presented squarely with ATS claims against a corporate defendant and remanded. See *Licci v. Lebanese Canadian Bank*, 732 F.3d 161, 174 (2d Cir. 2013). In a prior decision, the Licci panel had recognized that an affirmance in *Kiobel* would require dismissal of the claims before it.

Following the Supreme Court's decision, however, the Licci panel noted that "[t]he Supreme Court has indeed affirmed, but on different grounds from those upon which we decided the [Kiobel] appeal" and remanded the question of corporate liability to the district court "because the Supreme Court's opinion did not directly address the question of corporate liability under the ATS." Id. If the issue of corporate liability in the Second Circuit had been settled as a matter of binding precedent, then the Licci panel directed a futile remand.

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On the other hand, three post-Kiobel panel opinions written by Judge José Cabranes—the author of the Kiobel majority decision—have stated in dictum that circuit law bars corporate ATS liability. See *Chowdhury v. Worldtel Bangladesh Holding*, 746 F.3d 42, 49 n. 6 (2d Cir. 2014) ("the Supreme Court's decision in *Kiobel* did not disturb the precedent of this circuit…that corporate liability is not…actionable under the ATS"); *Mastafa v. Chevron Corp*., 770 F.3d 170, 177, 179 n.5 (2d Cir. 2014) (Supreme Court "did not address, much less question or modify, the holding on corporate liability under the ATS that had formed the central conclusion in the Second Circuit's Kiobel opinion."); *Bantulino v. Daimler*, 727 F.3d 174, 191 n. 26 (2d Cir. 2013) (principle "that corporations are not proper defendants under the ATS" is "[t]he law of this Circuit").

It bears mention that, in her concurrence in *Chowdhury*, however, Judge Rosemary Pooler emphasized that Cabranes' language was "not pertinent to our decision, and thus is dicta," and noted that "[a]t least one sister circuit has determined that, by not passing on the question of corporate liability and by making reference to 'mere corporate presence' in its opinion, the Supreme Court established definitively the possibility of corporate liability under the ATS." 746 F.3d at 44 n.2.

Other ATS cases against corporate defendants have come before the Second Circuit, but have been decided on extraterritoriality grounds, casting some doubt on the precedential value of *Kiobel* as it pertains to corporate liability. If *Kiobel* remains the binding law of this circuit, appellate disposition in each of these would have required little more than a one sentence order stating that corporations can never be sued. There would have been no cause for lengthy opinions addressed to extraterritoriality. See, e.g., *Sikhs for Justice v. Nath*, No. 14-1724-cv, 2014 WL 7232492 (2d Cir. Dec. 19, 2014); *Ellui v. Congregation of Christian Bros.*, No. 11-1682-cv, 2014 WL 6863587 (2d Cir. Dec. 8, 2014).

District Court Divide

Given this apparent divide within the Second Circuit, it is no surprise that the district court judges are similarly divided. Some district judges have concluded that "the law in the Second Circuit is clear that the ATS does not confer jurisdiction over claims brought against corporations." *Ahmad v. Christian Friends of Israeli Communities*, No. 14 Civ. 3376 (JMF), 2014 WL 1796322, at *5 (S.D.N.Y. May 5, 2014) (Furman, J.); see also, e.g., *Tymoshenko v. Firtash*, No. 11-CV-2794(KMW), 2013 WL 4564646, at *3 (S.D.N.Y. Aug. 28, 2013) (Wood, J.). Other district judges, by contrast, have found the question of corporate liability to be an open one in the Second Circuit. See, e.g., *In re South African Apartheid Litig.*, 15 F.Supp.3d 454, 457-62 (S.D.N.Y. 2014) (Scheindlin, J.); *Sikhs for Justice Inc. v. Indian Nat'l Congress Party*, 17 F.Supp.3d 334, 339-41 (S.D.N.Y. 2014) (Sweet, J.) ("[T]he issue of corporate liability under the ATS is…an open question in this circuit….").

Conclusion

The state of the law on corporate ATS liability in the Second Circuit is therefore uncertain. Is the split panel decision in *Kiobel* binding precedent, or is the question open for substantive adjudication? For the time being, there is no clear answer. Given the substantial resources devoted to this issue by litigants and district court judges in ATS cases, perhaps the time has come for the circuit to "say what the law is" in a clearly articulated, precedential way.