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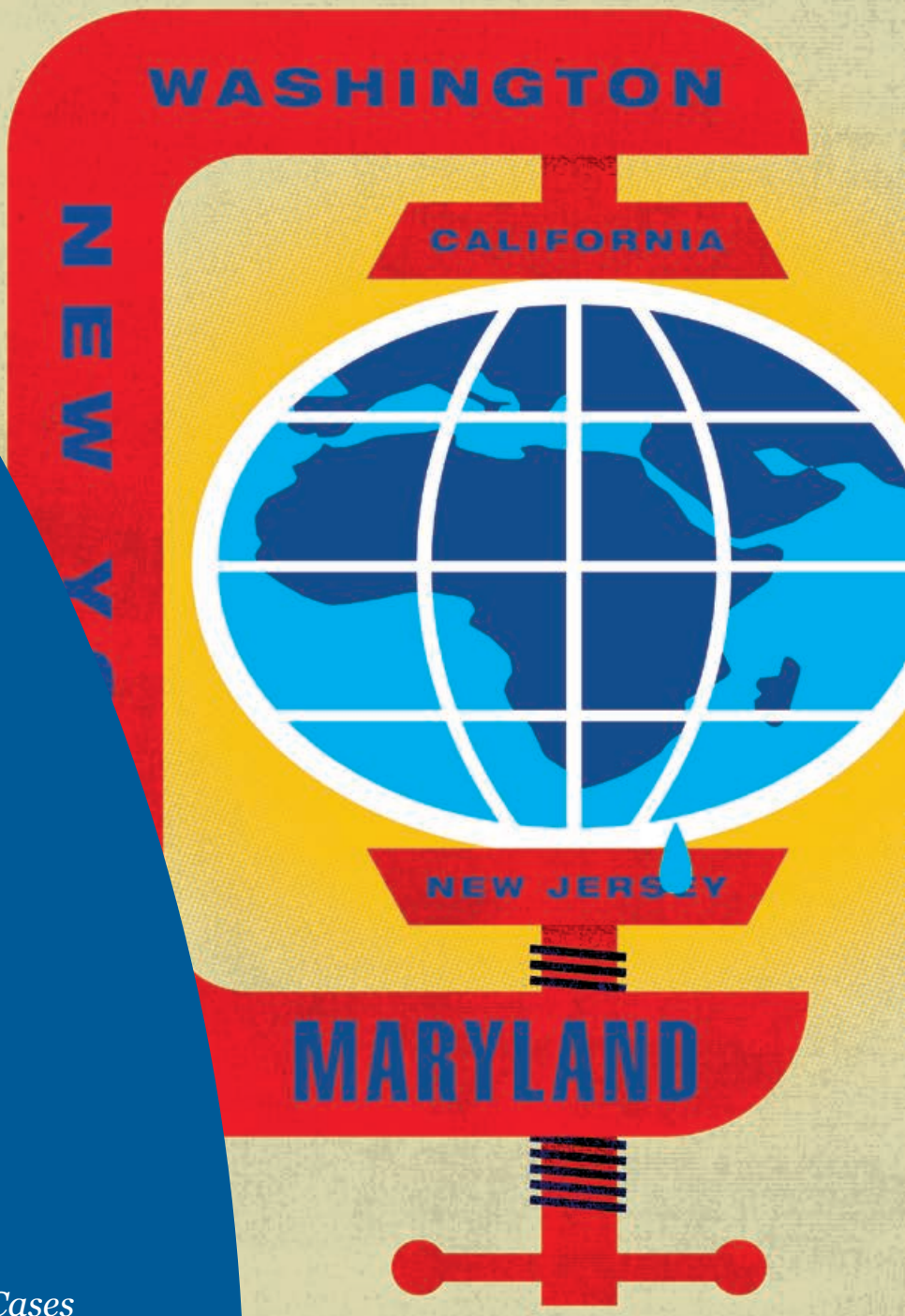

Should State Law Rule The World?

A Call for Caution in Applying State Law to Transnational Tort Cases

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Introduction

On April 17, 2013, the United States Supreme Court issued a landmark decision heard round the world in the case of *Kiobel v. Royal Dutch Petroleum Company.*[1] In that case, the Court held that a Nigerian plaintiff could not bring suit under the Alien Tort Statute (ATS)[2] against a Dutch corporation in a New York federal district court for alleged human rights violations occurring in Nigeria.[3] Applying the presumption against extraterritoriality to the ATS (a presumption that federal law applies only within the territory of the United States absent clear statutory language to the contrary),[4] the Court held that since all relevant conduct occurred outside the United States, the plaintiffs' claims were barred.[5] The Court went on to explain that in order for an ATS claim to survive a motion to dismiss, it must "touch and concern" activities occurring in the "territory of the United States" and "do so with sufficient force to displace the presumption against extraterritoriality."[6]

1 133 S. Ct. 1659 (2013).

2 28 U.S.C. § 1350. The ATS provides U.S. federal district courts with original jurisdiction over "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." *Id.*

3 *Kiobel*, 133 S. Ct. at 1669.

4 *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010).

5 *Kiobel*, 133 S. Ct. at 1669.

6 *Id.*

Since nearly all ATS claims filed against corporate defendants concern allegations that corporations aided and abetted torts committed by other (generally foreign state) actors outside of the United States, ATS claims filed against corporations should now be dismissed by courts.[7]

Notwithstanding the Supreme Court's holding, plaintiffs' lawyers have responded by arguing that U.S. corporate defendants might still be subject to the ATS for alleged harms occurring abroad. This argument was recently rejected by the United States Court of Appeals for the Second Circuit in the case of *Balintulo v. Daimler AG*.[8] There, the Second Circuit reasoned that ATS claims against Daimler AG, Ford Motor Company, and IBM Corporation for alleged violations of the law of nations occurring in South Africa during the Apartheid era were barred in light of the *Kiobel* decision.[9] The court refused to accept the plaintiffs' theory that "the ATS still reaches extraterritorial conduct when the defendant is an American national."[10] According to the Second Circuit, "[b]ecause the defendants' putative agents did not commit any relevant conduct within the United States giving rise to a violation of customary international law… the defendants cannot be *vicariously liable* for that conduct under the ATS."[11] The Second Circuit's well-reasoned opinion should be adopted by other courts and should confirm the view that the ATS, regardless of the nationality of the corporate actor sued, does not apply extraterritorially. Indeed, case law is already moving in this direction.[12]

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7 For cases in the Second Circuit, such claims should also be dismissed because, under controlling circuit precedent, ATS liability does not extend to corporations. *See Tymoshenko v. Firtash*, 2013 WL 4564646, at *3 (S.D.N.Y. Aug. 28, 2013) (explaining that the Supreme Court did not disturb Second Circuit precedent that corporations are not subject to suit under the ATS).

8 2013 WL 4437057, at *2 (2d Cir. Aug. 21, 2013). The Second Circuit returned the case to the district court to entertain a motion to dismiss. *Id.*

9 *Id.*

10 *Id.* at *6-*7.

11 *Id.* at *8 (citation omitted).

12 *E.g.*, *Adhikari v. Daoud & Partners*, 2013 WL 4511354 (S.D. Tex. Aug. 23, 2013); *Giraldo v. Drummond Co., Inc.*, 2013 WL 3873960 (N.D. Ala. July 25, 2013).

13 It is also likely that plaintiffs' lawyers will seek to plead *foreign law* claims in addition to state law claims. Assuming there is personal jurisdiction, once the federal ATS claim is dismissed, many of these claims will be dismissed for lack of subject matter jurisdiction. Even in cases where diversity or supplemental jurisdiction is present, many of these cases should be dismissed on forum non conveniens grounds. In many instances, the law pled will not provide a cause of action, and thus the case should be dismissed for failure to state a claim. While the focus of this paper is on state law claims, the corporate defense bar should pay careful attention to the pleading of foreign law claims as well and respond accordingly.

In sum, ATS claims filed against corporate defendants that seek relief for alleged violations of the law of nations occurring outside the United States are barred as a matter of federal law, whether they are filed against foreign or U.S. corporations when the acts or omissions complained of do not touch and concern the United States.

This is welcome news for corporate defendants. As many corporations are well aware, the ATS has served as a favored vehicle in recent years for plaintiffs to challenge overseas business practices, especially the practices of U.S. corporations. Yet, behind this welcome news lurks an unwelcome development that requires the attention of the corporate defense bar. While federal ATS claims have now been largely foreclosed by the Court's *Kiobel* decision, it is likely that plaintiffs' lawyers will plead state law claims (particularly common law tort claims) against corporations to challenge overseas business practices.[13] Such claims will substitute garden-variety, *state law* torts for federal ATS claims. According to one scholar, "[h]uman rights violations are transnational torts. . . . It is perhaps unseemly to treat grave human rights abuses as garden-variety torts. But with the Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.,* reframing human rights violations as transnational torts may be the only viable alternative for redressing international wrongs through U.S. litigation."[14] Some of these claims will even be pled in state courts.

This leads to an important question: Should state law rule the world when federal ATS law cannot?

As will be explained below, state law should not rule the world in transnational tort litigation. Such an approach to transnational tort litigation should be rejected by federal and state courts interpreting and applying state law for three reasons.

First, federal and state courts should exercise caution in interpreting and applying state law, even state common law, extraterritorially.

Second, federalism and due process concerns counsel in favor of a unified approach to transnational tort litigation. Federal and state courts should exercise caution in evaluating plaintiffs' lawyers call to create a patchwork of state laws to address these national and international problems.

Third, Congress should be encouraged to fix these problems by providing federal fora and choice of law rules to protect corporate defendants from the inappropriate extraterritorial application of state law.

These points will be discussed in detail in Part III after first providing a brief overview of corporate ATS litigation (Part I) and the reasons why plaintiffs' lawyers will plead state law claims in response to the *Kiobel* decision (Part II).

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14 Roger P. Alford, *Human Rights After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation*, 63 Emory L.J. ____ (forthcoming 2014) (draft on file with author).

15 Judiciary Act of 1789, ch. 20, 1 Stat. 73.

A Brief History of Alien Tort Statute Litigation Against Corporate Defendants

The ATS was passed as part of the First Judiciary Act of 1789,[15] which, among other things, created the federal court system[16] and implemented Article III's grant of diversity and alienage jurisdiction.[17] The ATS vests federal courts with original jurisdiction over "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."[18] The statute was largely ignored for its first two centuries,[19] leading Judge Henry Friendly to describe it as a "legal Lohengrin" in that "no one knows from whence it came."[20] This legal Lohengrin, unlike the legendary figure, did not disappear.[21]

Shortly after Judge Friendly's observation, the Second Circuit in *Filártiga v. Peña-Irala*[22] "breathed new life"[23] into the statute by finding as a jurisdictional matter that foreign nationals could sue one another in U.S. federal courts for international human rights violations occurring abroad. In that case, two Paraguayan nationals (after unsuccessfully seeking relief in Paraguayan courts) sued a Paraguayan police official (who was living in New York and was thus subject to personal jurisdiction there) for the torture and death of their son (also a Paraguayan national) that occurred in Paraguay.[24] Given that alien versus alien suits fall outside of diversity or alienage jurisdiction,[25] the question before the court was whether a suit for violations of

16 *Id.*

17 *Id.* § 11, 1 Stat. 78-79.

18 28 U.S.C. § 1350. For the original version, see Judiciary Act of 1789 § 9(b), 1 Stat. 77.

19 Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 31 (4th ed. 2007).

20 *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

21 Robert Jaffray, The Two Knights of the Swan: Lohengrin and Helyas 11 (1910).

22 630 F.2d 876 (2d Cir. 1980).

23 Anne-Marie Burley (now Slaughter), *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 461 (1989).

24 *Filártiga*, 630 F.2d at 877-88.

25 28 U.S.C. § 1332.

customary international law could give rise to federal question jurisdiction. The district court dismissed the case for lack of subject matter jurisdiction, holding that the tort alleged was not in violation of "the law of nations" and thus the ATS did not apply.[26] The Second Circuit reversed and upheld jurisdiction under the ATS. It found that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."[27] According to the court, the claim arose under federal law because "[t]he constitutional basis of the Alien Tort Statute is the law of nations, which has always been part of the federal common law."[28] The case was returned to the district court for further proceedings.[29]

Following this case and over the past thirty years, the ATS has increasingly been used by human rights activists and plaintiffs' lawyers seeking to hold multinational corporations, especially U.S. corporations, accountable for alleged human rights violations committed outside of the United States.[30] Unable to bring suit against foreign governments and their officials on account of statutory and common-law-immunity doctrines,[31] lack of personal jurisdiction, and limited possibilities of judgment enforcement, plaintiffs in the 1990s and early 2000s creatively sued corporate actors, alleging that they were complicit with state actors in committing torts in violation of international law. There are scores of ATS actions against corporations pending or recently decided in the federal courts.[32]

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26 *Filártiga*, 630 F.2d at 876.

27 *Id.*

28 *Id.* at 877-88, 885.

29 *Id.* at 889. In those proceedings, the plaintiffs won a $10.39 million dollar judgment. *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984). Because the defendant had been deported during the pendency of the case, the plaintiffs were never able to collect. *See Filártiga*, 630 F.2d at 880.

30 *See* Gary Clyde Hufbauer & Barbara Oegg, *Economic Sanctions: Public Goals and Private Compensation*, 4 Chi. J. Int'l L. 305, 326 (2003).

31 *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1604 (2006) (providing sovereign immunity to foreign states subject to limited exceptions); *Samantar v. Yousuf*, 130 S. Ct. 2278, 2286-93 (2010) (discussing common law immunity).

32 *See, e.g., In re Chiquita Brands Int'l Inc.*, No. 10-CV-80954 consolidated (S.D. Fla.) (six actions); *Doe v. Cisco Systems, Inc.*, No. 11-cv-2449 (N.D. Cal.); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011 (No. 01-CV-01357 (D.D.C.)).

In most ATS cases filed against corporations, corporations are not accused of having directly committed the alleged international law violations, but rather are alleged to be liable under theories of secondary liability (such as aiding and abetting) for actions taken in conjunction with foreign government officials.[33] The plaintiffs' allegations can be summarized as follows: The defendant corporation did business in a nation known to have a tarnished human rights record.

Since the modern resurgence of the ATS that began with the Second Circuit's landmark decision in *Filártiga*,[34] which opened U.S. federal courthouse doors to foreign plaintiffs claiming international-human-rights violations,[35] there have been about 173 judicial opinions regarding the ATS. Over the past two decades, more than 150 ATS cases have been filed against U.S. and foreign corporations doing business in two dozen industry sectors in federal courts, with about six-to-ten ATS cases being filed annually.[36] These lawsuits target business activities in more than 60 countries as alleged human rights abuses actionable in U.S. courts.[37] The countries involved include close allies and trading partners of the United States, such as Israel, Colombia, Mexico, and Indonesia. The suits have sought as much as *$400 billion* in damages.[38] While at least seventeen cases have settled, most ATS cases have

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33 *See, e.g.*, *Baloco v. Drummond Co.*, 631 F.3d 1350 (11th Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F3d 1013 (7th Cir. 2011); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009). Only a few cases have claimed that a company directly engaged in human rights violations overseas. *See, e.g.*, *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 112-14 (2d Cir. 2008) (alleging that a U.S. chemical company violated international norms in manufacturing Agent Orange).

34 630 F.2d 876 (2d Cir. 1980).

35 *See id.* at 878. The first case of a foreign citizen bringing a human rights lawsuit against a multinational corporation in a U.S. court appears to be *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *dismissed in part*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part*, *rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *vacated*, *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *dismissed*, 403 F.3d 708 (9th Cir. 2005).

36 Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkeley J. Int'l L. 456, 460 (2011).

37 *Id.* at 464.

38 Jack Auspitz, *Issues in Private ATS Litigation*, 9 Bus. L. Int'l 218, 220 (2008).

resulted in rulings favorable to corporate defendants.[39] It has been challenging for plaintiffs to litigate ATS cases against corporations to a favorable judgment.[40] Yet, plaintiffs' lawyers have generally chosen to press ahead with ATS claims.

In light of the dim chances for success in ATS cases based on the small number of plaintiff judgments, it is arguable that modern uses of the ATS against corporations have been driven by the signaling value that is offered when bringing suit against a corporation for alleged violations of international law.[41]

By alleging that a corporation is violating international-human-rights law, plaintiffs subject corporations to brand damage while gaining significant publicity in hopes of both encouraging policy change and a monetary settlement. The use of the ATS converts a claim sounding in tort against a corporation into a claim sounding as a violation of international law. This has the potential to create public relations problems for corporations, and thus force a settlement, because no corporation, even when they have done nothing wrong, wishes to be known as a human rights abuser or violator of international law.

"By alleging that a corporation is violating international-human-rights law, plaintiffs subject corporations to brand damage while gaining significant publicity in hopes of both encourage policy change and a monetary settlement."

39 Michael D. Goldhaber, *The Life and Death of the Corporate Alien Tort*, The American Lawyer (Oct. 12, 2010), *available at* http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202473215797.

40 In fact, there appears to be only a small number of cases against corporations litigated to a plaintiff-friendly judgment. *See, e.g.*, *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008), *appeal filed*, No. 09-4483-cv (2d Cir.) (awarding a $1.5 million ATS judgment against corporate defendant); *Licea v. Curaçao Drydock Co.*, 584 F. Supp. 2d 1355, 1366 (S.D. Fla. 2008) ($80 million ATS judgment against corporate defendant). There have been two trials in which defendants have prevailed. *See Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010); *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008).

41 *See* Rosemary Nagy, *Postapartheid Justice: Can Cosmopolitanism and Nation-Building Be Reconciled?*, 40 Law & Soc'y Rev. 623, 627-28 (2006) (noting the "moral and political symbolism" of ATS litigation).

To be clear, such pressure does not always achieve results in the best interest of transnational business and human rights. For instance, in the wake of an ATS case filed against Talisman Energy and on account of shareholder pressure, Talisman decided to exit the Sudan even though the Second Circuit ultimately dismissed the suit.[42] After Talisman's departure, Chinese companies moved in and dominated the market. The vacuum produced by Talisman's departure was filled by Chinese companies that take an official policy of "noninterference in domestic affairs"—a polite way of saying that China will not interfere with local regimes' oppression of their populations.[43] This certainly does not encourage international human rights.

Given this development, one might question whether the requisite public policy goals were achieved by forcing one company subject to jurisdiction in the United States out of the Sudan while encouraging other companies not subject to jurisdiction to enter. To be clear, the U.S. Chamber of Commerce unequivocally condemns human rights abuses and strongly advocates measures to strengthen corporate responsibility. However, extraterritorial liability under the ATS has not solved these shared human rights concerns.

The *Kiobel* decision should end this approach to challenging the business practices of corporations. Yet, as in many other areas of tort law, plaintiffs' lawyers should not be expected to close up shop. Indeed, as discussed in the next Part, significant reasons remain for plaintiffs' lawyers to seek out and find other ways to bring transnational tort cases in the United States.

42 Stephen J. Korbin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. Int'l L. & Pol. 425, 444 (2004).

43 *See* Christopher Alessi & Stephanie Hanson, Council on Foreign Relations, *Backgrounder: China, Africa, and Oil* (Jun. 6, 2008), *available at* http://www.cfr.org/china/expanding-china-africa-oil-ties/p9557; *see also* Council on Foreign Relations, *More Than Humanitarianism: A Strategic U.S. Approach Towards Africa* 43 (2006) (describing how "China . . . quickly filled the gap" after Talisman and other Western companies departed the Sudan).

Why Plaintiffs Will Choose State Law

To understand why plaintiffs' lawyers will begin pleading state law in transnational tort cases, it is useful to examine more completely the *Kiobel* decision. In *Kiobel*, the Supreme Court held that the ATS must be interpreted in light of the usual "'presumption that United States law governs domestically but does not rule the world.'"[44] The Court concluded that Congress enacted the ATS to ensure that federal courts have jurisdiction to decide claims involving international law violations that occur within the United States, but that there is "no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad."[45] Because nothing in the statutory text, history, or purpose rebuts the presumption against extraterritoriality, the ATS does not confer jurisdiction for claims "seeking relief for violations of the law of nations occurring outside the United States."[46]

Under *Kiobel*, a federal court has jurisdiction under the ATS only for claims that "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."[47] To displace the presumption, an ATS plaintiff must do more than simply allege that some conduct took place in the United States. As the Supreme Court has explained, "it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case."[48] Accordingly, to determine whether a particular ATS claim is barred, a court must determine whether the conduct that was "the 'focus' of congressional concern" took place in the United States.[49] The *Balintulo* case discussed in the Introduction confirms this understanding.[50]

44 *Kiobel*, 133 S. Ct. at 1664.

45 *Id.* at 1667.

46 *Id.* at 1669.

47 *Id.*

48 *Morrison*, 130 S. Ct. at 2884.

49 *Id.*

50 2013 WL 4437057, at *2 (2d Cir. Aug. 21, 2013).

There has been no showing in any filed case that corporate defendants have committed torts in violation of the law of nations in the United States. Because of this fact, ATS lawsuits against corporate defendants should be dismissed. As already mentioned, the *Kiobel* decision short-circuits the ability of plaintiffs' lawyers to forum shop their way into U.S. federal courts by pleading federal ATS law.

While *Kiobel* has closed the door to nearly all ATS cases against corporate defendants, plaintiffs will now seek out other ways to bring suit in the United States. This is so because the United States is seen as a magnet forum for transnational tort cases. As a practical matter, plaintiffs' lawyers bring transnational tort cases in the United States in hopes of finding a more favorable forum and law to litigate their case.[51] To understand why plaintiffs' lawyers would be drawn to U.S. courts and state law, one must understand the traditional advantages offered to a foreign plaintiff by U.S. courts and law.

First, U.S. courts allow extensive pre-trial discovery controlled by the parties and not the court. In most other legal systems, pre-trial discovery is limited.[52] As such, U.S. courts give plaintiffs' lawyers significant advantages to force settlements through the threat of discovery.[53]

Second, it is believed that U.S. courts grant and approve higher damages awards than foreign courts, in particular in cases that are tried to a jury.[54] U.S. law also recognizes categories of compensatory damages, such as damages for emotional distress or pain and suffering, which are not generally recognized in foreign fora.[55] U.S. law also provides for punitive damages, which are rejected in most other legal systems.[56]

"There has been no showing in any filed case that corporate defendants have committed torts in violation of the law of nations in the United States."

51 Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 Harv. L. Rev. 1137, 1137 (2007).

52 *See* John H. Langbein, *The German Advantage in Civil Procedure*, 51 U. Chi. L. Rev. 823, 830-31 (1985) (explaining the differences).

53 *See* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 551 (2010) (analyzing this belief through empirical data).

54 *See* Russell J. Weintraub, *Methods for Resolving Conflicts-of-Laws Problems in Mass Tort Litigation*, 1989 U. Ill. L. Rev. 129, 152-53 (foreign parties flock to United States for variety of reasons including the "open-hearted generosity of the American jury").

55 Roger P. Alford, *Arbitrating Human Rights*, 83 Notre Dame L. Rev. 505, 509, 511-12, 516 (2008).

56 *Id.*

> U.S. courts, both federal and state, present a compelling choice for plaintiffs' lawyers in transnational tort cases.

Third, U.S. courts permit class actions that cannot be brought as aggregate cases in other countries.[57] In these cases, which can involve thousands of class members, potential liability for defendants is compounded providing incentives for settlement even when a corporate defendant has done nothing wrong.

Finally, U.S. plaintiffs' lawyers are able and willing to represent plaintiffs on contingent-fee arrangements. Such arrangements are generally not permitted in other countries.[58]

For each of these reasons, U.S. courts, both federal and state, present a compelling choice for plaintiffs' lawyers in transnational tort cases. Given that *Kiobel* limits the possibility of pleading federal law, state law will become the next battleground, as plaintiffs look for a way to sue corporate defendants in the United States to take advantage of these incentives.[59]

57 *See generally* Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 B.U. Int'l L.J. 141, 173 (2010) (discussing the differences).

58 Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. Cal. L. Rev. 1551, 1555 (2012).

59 *See generally* Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 Geo. L.J. 709 (2012).

Why Federal & State Courts Should Exercise Caution & How Congress Might Fix the Problem

In recent ATS cases, plaintiffs have not only pled ATS claims but also claims in diversity or supplemental claims, alleging the same facts as a violation of state law.[60] In some cases, plaintiffs have filed such cases in state courts in the first instance.[61] One would expect such claims to increase in light of the *Kiobel* decision. Both federal and state courts should proceed with caution in interpreting and applying state law extraterritorially. This has not always been the case.

In one ATS case filed against Chevron for activities purportedly undertaken in response to rebels seizing an oil platform in Nigeria, a California federal district court determined that, based on California's choice of law rules,[62] California substantive law should be applied to activities occurring solely in Nigeria.[63] While defendants argued that Nigerian law should be applied, the court determined there was no conflict between Nigerian and California law as to some claims, and, as to other claims, California's interest in ensuring that its corporations behave in an appropriate manner outweighed Nigeria's regulatory interests. Thus, California law could be applied to all claims.[64] In the end, a jury found for the defendants even under California law.[65] However, the risk of liability under California law, and with that California damages law, certainly made the defendant's decision whether to take the case to trial much more complicated.

60 *See, e.g.*, *Bowoto v. Chevron,* 621 F.3d 1116 (9th Cir. 2010); *Doe v. ExxonMobil*, 473 F.3d 345 (D.D.C. 2007).

61 *See, e.g.*, *Doe I v. Unocal Corp.*, Nos. BC 237980 & BC 237679, 2002 WL 33944506 (Cal. Super. Ct. June 11, 2002). That case was settled on the eve of trial and thus the state-law claims were never resolved by the California state court. *See* Marc Lifsher, *Unocal Settles Human Rights Lawsuit over Alleged Abuses at Myanmar Pipeline*, L.A. Times, Mar. 22, 2005, at C1. One recent case has followed a similar strategy. *See Bowoto v. Superior Court of State of Cal.*, No. S122000 (Ca. Jan 20, 2004), 2004 WL 526553 at *4-*8.

62 The case was proceeding in part in diversity, and thus California's choice of law rules were applied to these claims.

63 *Bowoto v. Chevron Corp.*, 2006 WL 2455761 (N.D. Cal. Aug. 22, 2006).

64 *Id.* at *8-*10.

65 *Bowoto v. Chevron,* 621 F.3d 1116, 1117 (9th Cir. 2010).

In another ATS case filed against Exxon Mobil relating to natural gas extraction activities in Indonesia, a federal district court in the District of Columbia determined that District of Columbia and Delaware law were to be applied to activities occurring solely in Indonesia because of the interest of the states in applying their law to their corporations.[66] The court, assuming there was a conflict between the laws of Indonesia and the laws competing for application, deemed Indonesia's interests outweighed by those of the United States in applying what the court termed "U.S. state law."[67] In the district court's view, the United States "has an overarching, vital interest in the safety, prosperity, and consequences of the behavior of its citizens, particularly its super-corporations conducting business in one or more foreign countries."[68] The choice to apply U.S. state law meant that U.S. damages law would be applied, thus making it possible that a substantial award, including punitive damages, could be entered. While the D.C. Circuit ultimately reversed the district court and found that Indonesian law applied,[69] the impact on the defendants and their choice of whether to go to trial was significant.

The threat of U.S. damages law is not the only reason that complicates a corporate defendant's choice to litigate a case. The discovery process can be unusually expensive and burdensome in transnational tort cases.[70] Transnational tort cases also take many years to litigate. "Multinational corporations will spend millions of dollars moving these cases through motions and procedures and changing forums."[71] But, this is not the only harm to corporations. The mere filing of such a case can topple corporate stock values and debt ratings.[72] The extreme allegations alleged inflict significant damage on a business's reputation, regardless of whether it has done anything wrong.

"The mere filing of such a case can topple corporate stock values and debt ratings. The extreme allegations alleged inflict significant damage on a business's reputation, regardless of whether it has done anything wrong."

66 *Doe v. Exxon Mobil Corp.*, 2006 WL 516744, at *1-*2 (D.D.C. March 2, 2006).

67 *Id.*

68 *Id.*

69 *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 69-70 (D.C. Cir. 2011).

70 Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. Int'l Econ. L. 245, 253 (2004).

71 Rosaleen T. O'Gara, *Procedural Dismissals Under the Alien Tort Statute*, 52 Ariz. L. Rev. 797, 820-21 (2010).

72 Joshua Kurlantzick, *Taking Multinationals to Court: How the Alien Tort Act Promotes Human Rights*, 21 World Poly. J. 60, 63 (2004).

It may seem surprising that state law could even govern alleged harms committed abroad or that plaintiffs' lawyers would even file such claims. Yet, understanding the impact the *Kiobel* decision might have requires taking a step back to see what has happened since the Court's decision in *Morrison v. National Australia Bank Limited*,[73] which like *Kiobel* involved the extraterritorial application of U.S. law to foreign conduct. In that case, the Court held that Section 10(b) of the 1934 Securities Exchange Act does not provide a cause of action to foreign plaintiffs suing foreign defendants for misconduct in connection with securities traded on foreign exchanges. The *Morrison* decision has required courts not only to dismiss so-called "foreign cubed" cases—that is, foreign plaintiff, foreign defendant, foreign conduct—filed under the federal securities laws, but also federal securities law claims where the harm complained of occurred on foreign securities exchanges regardless of the nationality of the parties.

On some level, this forum shopping was to be expected. But what was perhaps less expected is how plaintiffs' lawyers responded to *Morrison*. Recognizing that federal courts were unlikely to sustain claims predicated on federal law, plaintiffs pursued two strategies. First, plaintiffs pled their claims under state law in federal court, a tactic not explicitly rejected by the Court in *Morrison*. Second, plaintiffs began looking to other fora—such as state courts—in order to pursue their claims and escape the now-limited strictures of the federal securities laws.

Two New York state court decisions highlight the trend. In *Basis Yield Alpha Fund v. Goldman Sachs Group, Inc.*, a New York Supreme Court court refused to dismiss a fraud claim brought against Goldman Sachs by an Australian hedge fund.[74] The case was originally filed in federal district court the same month the Supreme Court decided *Morrison*.[75] The federal court dismissed the suit following the *Morrison* decision, and plaintiffs' lawyers filed a parallel case in state court alleging state law claims.[76] The state law claims included a variety of common law claims. While the court granted defendants' motion to dismiss on some of those claims, it denied the motion with respect to most of plaintiffs' claims.[77]

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73 130 S. Ct. 2869 (2010).

74 *See* 37 Misc. 3d 1212(A) (N.Y. Sup. Ct. 2012).

75 *See id.* at *4.

76 *See Basis Yield Alpha Fund v. Goldman Sachs Group, Inc.*, No. 652996/2011 (Oct. 19, 2012) (acknowledging that the S.D.N.Y. dismissed the same case "on the ground that the underlying transactions were not domestic securities transactions, and, therefore, not subject to federal securities laws").

77 *Id.* at 19.

> “In light of the *Kiobel* decision, this leads to a foundational question: If the ATS cannot rule the world, how can state law rule the world?”

In *Viking Global Equities, LP v. Porsche Automobil Holding SE*,[78] plaintiff hedge funds allegedly sustained losses as a result of misrepresentations made by Porsche relating to its intention to acquire shares in Volkswagen AG. Although plaintiffs initially survived a motion for summary judgment, the victory was short-lived. In December 2012, only a month after argument on Porsche's appeal, New York's Appellate Division, First Department reversed the trial court, holding that the plaintiffs were barred on the ground of forum non conveniens.[79]

In other words, the *Morrison* decision moved litigants away from federal law in federal courts and towards state law and state courts. One should expect similar movement in the transnational tort context.

In light of the *Kiobel* decision, this leads to a foundational question: If the ATS cannot rule the world, how can state law rule the world?[80] The reasons for a cautious approach to interpreting and applying state law extraterritorially are discussed in the following two subparts, and a possible congressional fix is explored in the third subpart.

Courts Should Exercise Caution in Interpreting & Applying State Law Extraterritorially

Notwithstanding the above cases, some federal courts have already shown appropriate attentiveness to the issues presented by the extraterritorial application of state law. In the case of *Romero v. Drummond Company*, for instance, the Eleventh Circuit affirmed a federal district court decision rejecting plaintiffs' lawyers attempt to apply the law of Alabama to allegations of aiding and abetting torture and murder in Colombia.[81] The plaintiff sought to plead state common law claims for assault and battery, intentional/negligent infliction of emotional distress, negligent supervision, and false imprisonment.[82] But the court rejected this tactic finding, under Alabama choice of law rules, that Colombian law applied as it was the law of the place of injury.[83] Similarly, in *Al Shimari v. CACI International, Inc.*,

78 No. 650432/11, 2012 WL 6699216 (N.Y. App. Div. Dec. 27, 2012).

79 *Id.*

80 As explained by the Supreme Court in *Kiobel*, there is a “‘presumption that United States law governs domestically but does not rule the world.’” *Kiobel*, 133 S. Ct. at 1664 (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)).

81 552 F.3d 1303, 1318 (11th Cir. 2008).

82 *Id.*

83 *Id.*

a federal district court in Virginia recently employed choice of law rules to reject the argument for the application of Virginia common law for actions that occurred on the battlefield in Iraq.[84]

As these cases show, it appears that the question of the extraterritorial application of state law in transnational tort cases will be a question of choice of law. Yet, even though the results reached above were correct, a different approach should be considered by the corporate defense bar.[85]

First, corporate defendants should explain to courts that state law is generally presumed to apply only within the territory of a state. Indeed, as explained by Judge J. Harvie Wilkinson III in the *Al Shimari* case, "[g]iven that the Constitution entrusts foreign affairs to the federal political branches, limits state power over foreign affairs, and establishes the supremacy of federal enactments over state law, *the presumption against extraterritorial application is even stronger in the context of state tort law.*"[86] While courts may generally treat the question of the extraterritorial application of state common law as a choice of law question, it is in fact a question of the *scope* of state law. A choice of law analysis is only appropriate in cases where there are actually a state law and a foreign law that compete for application in the instant case.

The first question is, therefore, whether state law should reach extraterritorial harms.[87] This is a question of state law. It is a question whether the state sovereign itself intends to apply its law extraterritorially. The common law is not "a brooding omnipresence in the sky" that automatically extends around the globe, but rather "the articulate voice of some sovereign" that generally intends to regulate within a particular boundary.[88] If the state sovereign does not intend its law to reach the extraterritorial conduct, the law does not so reach; choice of law principles are irrelevant. Where state law of its own force does not extend abroad, there is no choice of law decision to make.

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84 2013 WL 3229720, *10-*12 (E.D. Va. June 25, 2013).

85 Of course, before reaching the issue of the extraterritorial application of state law, corporate defendants must make sure that the court has jurisdiction. *See Kaplan v. Cent. Bank of Islamic Republic of Iran*, 2013 WL 4427943, at *17 (D.D.C. Aug. 20, 2013) (dismissing ATS claims as extraterritorial, even though alleged wrongdoing affected some Americans, and declining to exercise supplemental jurisdiction over remaining Israeli-law tort claims, holding that "[p]rinciples of comity indicate that these claims under Israeli law are best addressed by Israeli courts").

86 *Al Shimari v. CACI Intern., Inc.*, 679 F.3d 205, 231 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting on other grounds).

87 Asking this question assumes that there is personal jurisdiction over the defendant. In light of the Supreme Court's recent decisions in *Nicastro* and *Goodyear*, corporate defendants should continue to resist expansive theories of personal jurisdiction propounded by plaintiffs.

88 *See S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

> “Many states have already adopted something akin to the federal presumption against extraterritoriality in interpreting the reach of state law.”

Second, many states have already adopted something akin to the federal presumption against extraterritoriality in interpreting the reach of state law. For instance, California law does not apply to extraterritorial conduct.[89] Courts in other U.S. jurisdictions routinely dismiss state-law claims alleging conduct committed entirely abroad. For example, in *In re Chiquita Brands International, Inc.*, a Florida federal district court dismissed state-law claims for assault, battery, intentional infliction of emotional distress, and negligence against a U.S. corporation for alleged injuries in Colombia to Colombian victims at the hands of Colombian paramilitaries, reasoning that “the civil tort laws of Florida, New Jersey, Ohio, and the District of Columbia do not apply to the extraterritorial conduct.”[90] Indeed, in the words of one court, “common law claims, which only allege conduct abroad, must be dismissed.”[91]

The words of Judge Wilkinson are again worth consideration. When the Fourth Circuit was asked recently to find that the common law of Virginia applied to extraterritorial harms, he observed: “Here there is no indication that the Commonwealth of Virginia intended to apply its laws of assault, battery, sexual assault, intentional and negligent infliction of emotional distress, and negligent hiring and supervision . . . abroad . . . A state’s interest in employing a tort regime is largely confined to tortious activity within its own borders or against its own citizens. It is anything but clear that Virginia has any interest whatsoever in providing causes of action that allow foreign citizens that have never set foot in the Commonwealth to drag its own corporations into costly, protracted lawsuits under who-knows-what legal authority.”[92]

Such an approach would do much to short-circuit the incentives discussed above that encourage plaintiffs to forum shop into U.S. courts.

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89 *See Maez v. Chevron Texaco Corp.*, 2005 WL 1656908, at *3 (N.D. Cal. July 13, 2005) (“Under California law, there is a presumption against applying state laws extraterritorially to encompass conduct occurring in a foreign jurisdiction.”) (citations omitted).

90 792 F. Supp. 2d 1301, 1355 (S.D. Fla. 2011) (citation omitted).

91 *Mertik Maxitrol GMBH & Co. v. Honeywell Tech. SARL*, 2012 WL 748304, at *8 (E.D. Mich. Mar. 6, 2012); *see also Romero*, 552 F.3d at 1318 (in ATS case, affirming dismissal of “plaintiffs’ claims, under Alabama law, for assault, intentional infliction of emotional distress, negligent supervision, false imprisonment, and negligent infliction of emotional distress because Alabama law does not apply to injuries that occurred outside the state”); *Roe I v Bridgestone Corp.*, 492 F. Supp. 2d 988, 1024 (S.D. Ind. 2007) (in ATS case, “Plaintiffs have not yet articulated a viable basis for applying California law or Indiana law to [conduct] in Liberia. The state [tort] law claims are dismissed”).

92 *Al Shimari*, 679 F.3d at 233 (en banc) (Wilkinson, J., dissenting).

Federalism & Due Process

The appropriateness of applying state law extraterritorially also touches on bedrock principles of the allocation of authority between federal and state law as well as federal and state courts. The extraterritorial application of state law threatens a delicate balance in light of the potential for transnational forum shopping.

Given the potential for forum shopping, plaintiffs' lawyers would be expected to compare the choice of law rules of several states, determine which rule would require the federal court sitting in diversity or with supplemental jurisdiction (or even a state court) to apply the most favorable substantive law, and then file suit in the most favorable court.[93] So, for example, a foreign plaintiff hoping to have foreign law applied to an injury sustained abroad might choose to file a lawsuit against a California corporation in Virginia or another state (assuming the corporation is subject to personal jurisdiction there) that still follows the First Restatement,[94] where the choice of law rules would direct the federal court to the place of the injury and thus foreign law.[95] The choice to forum shop away from California's "comparative impairment" approach[96] would thus be made if Virginia's rules were more favorable to the plaintiff and resulted in the application of favorable substantive law to the plaintiff's case.[97] Of course, a plaintiff might in fact prefer to have California's rules applied if foreign law were not helpful to the plaintiff's claim, because California's rules might direct the application of California law or some other better substantive law to the plaintiff's case.

To understand the complex legal and forum shopping issues this raises, one need only look to the current state of choice of law in the several states. 14 states—Alabama, Florida, Georgia, Kansas, Maryland, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wyoming—continue to

93 *See, e.g.*, Robert M. Cover, Narrative, Violence, and the Law 59 (1995) (explaining the "strategic behavior embodied in forum shopping").

94 Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 Am. J. Comp. L. 1, 5-6 (2010) (listing the conflict-of-laws rules of the several states).

95 *See, e.g., Hodson v. A. H. Robins Co.*, 528 F. Supp. 809, 823 (E.D. Va. 1981) (finding "that the Virginia rule in personal injury actions is that the law of the place of the injury, the *lex loci delecti*, will control" and thus that "[s]ince plaintiffs' injuries were incurred in England, the laws of that country must be applied in the present cases"); *Dunham v. Hotelera Canco S.A. de C.V.*, 933 F. Supp. 543, 555 (E.D. Va. 1996) (same).

96 *See, e.g.*, *Pubali Bank v. City Nat'l Bank,* 777 F.2d 1340, 1343 (9th Cir. 1985) (finding under California's "comparative impairment test" that California had the greatest interest in a breach of contract and fraud action brought by a foreign bank against a California bank, and thus California law applies); *Marsh v. Burrell,* 805 F. Supp. 1493, 1502 (N.D. Cal. 1992) (same).

97 *See, e.g.*, Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. Rev. 333, 383 (2006) ("The law regularly provides more than one authorized, legitimate forum . . . To shop among those legitimate choices for the forum that offers the potential for the most favorable outcome is the only rational decision under rational choice theory and game theory because forum shopping maximizes the client's expected payoff.").

apply the First Restatement in whole or in part to torts and contracts cases.[98] For cases filed in diversity in federal district courts (or in state court) in these states that raise international-choice-of-law issues, therefore, there is a strong possibility that the court would be required to apply foreign law.

Even beyond these states, foreign law might be required to be applied under more modern choice of law rules employed in the vast majority of states, even though there might be varying degrees of contact necessary with the foreign state to justify the application of its law.[99] Only two states apply the law of the forum to all cases sounding in tort—Kentucky and Michigan—while other states or districts—e.g., California and the District of Columbia—apply the doctrine of interest analysis that strongly favors the application of forum law.[100] All other states use some form of balancing that may direct them to the application of foreign law.[101] But that balancing might equally direct the court to apply the law of the forum or the law of another U.S. state, as shown in the *Bowoto* and *Exxon Mobil* cases discussed above.

To be clear, choice of law analysis raises constitutional concerns. Supreme Court case law intimates that a U.S. state may not apply its law unless a state has "a significant contact or significant aggregation of contacts, creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair."[102] Based on the Court's reasoning, it seems clear that since a state court cannot apply forum law unless it comports with the Constitution, a federal court may similarly not do so. Likewise, because a state court must apply law "in a constitutionally permissible manner," meaning that a state "must have significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary or fundamentally unfair,"[103] it should also be true that a state court may not apply the law of a forum, and neither may a federal district court, unless that forum would meet this test. This is so because "if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional."[104] And this is because the Due Process Clause "denies to a state any power to . . . control the legal consequences of a tortious act committed elsewhere."[105]

98 Symeonides, *supra* note 94, at 5-6.

99 *See id.* (exploring in detail the theories of conflict of laws currently used by state courts).

100 *Id.*

101 *Id.*

102 *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 818-19 (1985); *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 305 (1981).

103 *Allstate*, 449 U.S. at 313.

104 *Id.*. at 310-11 (plurality); *id.* at 332 (Powell, J., dissenting).

105 *Alaska Packers Ass'n v. Indus. Accident Comm'n,* 294 U.S. 532, 540-41 (1935); *see Watson v. Employers Liability Assur. Corp.*, 348 U.S. 66, 70-71 (1954); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892).

In that the district courts in the cases discussed above determined that U.S. state law was to be applied to activities occurring solely in another country just because the defendant corporation was domiciled in a given state (or in the United States as a whole), it may be the case that this stretches the constitutional requirement of due process in choice of law to the limit given the lack of significant contacts to the case at bar. Importantly, whether such cases are heard by federal courts or in state courts, these due process concerns will continue to be an issue because due process constraints regarding choice of law apply equally to federal and state courts.

Choice of law will not only have an impact on the application of substantive law, but will also have an impact on what remedies are available. As noted above, plaintiffs' lawyers file transnational tort cases in U.S. courts, among other reasons, to benefit from more permissive remedial regimes. The application of U.S. remedies law to foreign facts also raises federalism and due process issues.

For example, in *State Farm Mutual Automobile Company v. Campbell*, the Supreme Court made clear that the Constitution prevents a U.S. state's law of damages "from punish[ing] a defendant for conduct that may have been lawful where it occurred."[106] Likewise, in *BMW of North America, Inc. v. Gore*, the Court held that a state "may not impose economic sanctions on violators of its law with the intent of changing the tortfeasors' lawful conduct in other States."[107] "To avoid such encroachment, the economic penalties that a State . . . inflicts on those who transgress its laws, whether the penalties take the form of a legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy."[108] "[N]o single State," the Court explained, may "impose its own policy choice on neighboring States."[109] Allowing local law "'to operate beyond the jurisdiction of that State . . . [would] throw [] down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.'"[110]

106 538 U.S. 408, 421 (2003).

107 517 U.S. 559, 572 (1996).

108 *Id.*

109 *Id.* at 571 (quoting *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).

110 *Id.* at 571 n.16 (quoting *N.Y. Life Ins. Co. v. Head,* 234 U.S. 149, 161 (1914).

Under this precedent, there may be due process problems raised should U.S. courts apply U.S. state law, especially punitive damages law, to foreign facts given the lack of significant contacts between state law and the foreign elements of the case.

As discussed above, one answer may be for courts to interpret state law as primarily territorial. To be clear, the prospect of 50 different States and the District of Columbia all applying their own local laws to overseas conduct is ripe for a foreign relations and federalism disaster. Furthermore, the fact that some of these claims might be common law actions might underscore the need to presume a limited geographic scope. Because courts lack both a democratic mandate and institutional competence to address foreign policy, they should "look for legislative guidance before exercising innovative authority over substantive law" affecting international affairs.[111]

For these reasons as well, federal and state courts interpreting and applying U.S. state law extraterritorially should exercise caution.

> "Congress could provide for removal of cases that touch on issues of foreign affairs."

Congressional Action

Ultimately, these profound questions perhaps may counsel in favor of congressional action. The reason why Congress might be encouraged to step in can be seen through an analogy to the Class Action Fairness Act of 2005 ("CAFA"), which expanded federal diversity jurisdiction over many state class actions that previously were not removable to federal court.[112] In passing CAFA, Congress was acting, in part, to correct problems of "false federalism," whereby "one state's courts try to dictate its laws to 49 other jurisdictions."[113] The problem proponents of CAFA were seeking to address "was the application of a single state's law to multi-state controversies, thereby allowing one state to dictate its views of the law to others."[114] This problem is especially relevant to transnational tort cases. There are similar problems with U.S. states applying their law to transnational tort controversies, especially considering that the application of state law might create a clash with foreign sovereigns.

While the arguments for caution in interpreting and applying state common law extraterritorially should resolve these issues, Congress could also undertake two fixes using CAFA as a template.

First, Congress could provide for removal of cases that touch on issues of foreign affairs.

111 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004).

112 28 U.S.C. § 1332(d).

113 *See, e.g.*, S. Rep. No. 108-123, at 26, 61 (2003).

114 C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 Emory L.J. 487, 523 (2006).

Congress could provide for removal when an action filed under state law "strikes not only at vital economic interests but also at sovereign interests by seeking damages for activities and policies in which the government actively has been engaged."[115] In such cases, the case would be deemed to raise "substantial questions of federal common law by implicating foreign policy concerns."[116] As such, these cases would be subject to removal to federal court. Centralizing such cases in federal courts might encourage a more national approach to the resolution of these transnational issues.

Second, because removal alone does not solve the problem of choice of law identified above—namely, what law the federal court should apply—a further congressional fix related to choice of law might be appropriate. The options would be international law, forum state law, another U.S. state law, federal common law, or foreign law. The process of globalization combined with the expansion of jurisdiction over corporate defendants gives plaintiffs' lawyers a wide and almost unlimited choice as to the state laws under which they can bring a transnational tort suit against a corporate defendant.[117] Moreover, as noted earlier, states have adopted various approaches to choice of law. Permissive choice of law means that even a U.S. state with little connection to the particular transaction can use its choice of law approach to select the law applicable to the transaction. A federal choice of law rule in transnational tort cases would have the advantage of limiting forum shopping between the several states as well as providing clear direction for federal courts faced with transnational tort questions.

> "…a further congressional fix related to choice of law might be appropriate."

The most appropriate choice of law rule for Congress to choose would probably be the law of the place of injury. As explained by Judge Richard Posner, the benefit of such a rule is that

> the place that has the greatest interest in striking a reasonable balance among safety, cost, and other factors pertinent to the design and administration of a system of tort law [is the place of injury]. Most people affected whether as victims or as injurers by accidents and other injury-causing events are residents of the jurisdiction in which the event takes place. So if law can be assumed to be generally responsive to the values and preferences of the people who live in the community that formulated the law, the law of the place of the accident can be expected to reflect the values and preferences of the people most likely to be involved in accidents—can be expected, in other words, to be responsive and responsible law, law that internalizes the costs and benefits of the people affected by it.[118]

115 *See Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997).

116 *Id.*

117 *Cf.* Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. Pa. L. Rev. 2001, 2027 (2008) (making a similar proposal in the context of multi-state class actions).

118 *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 845 (7th Cir. 1999).

Conclusion

Corporations need to turn their attention to the application of U.S. state law in transnational tort cases following the *Kiobel* case. Encouraging caution on the part of federal and state courts interpreting state law and potential Congressional action is but a first step in resolving these important transnational human rights and business issues. To do otherwise risks decades of confusion that will hurt business interests.

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