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# FEDERAL COURT APPLIES BRAKES TO ALIEN TORT STATUTE LITIGATION

by

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In recent years, Federal courts throughout the United States have seen an increase in cases where aliens are seeking redress in this country for actions which occurred around the world. The vehicle plaintiffs' lawyers are using is the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. The ATS, enacted in 1789, allows an alien to file an action in U.S. Federal court "for a tort only, committed in violation of the law of nations or a treaty of the United States." After being asserted as grounds for jurisdiction in only a handful of cases in its first two centuries of existence, the ATS is being asserted to seek jurisdiction over a variety of claims, including environmental torts, expropriated property claims, and various forms of complicit liability relating to human rights violations committed by host governments. The common thread in these cases is the defendants — U.S. corporations with deep-pockets and minimal ties to the conduct at issue.

The Supreme Court recently considered the scope of the ATS, but unfortunately did not set any definitive guidelines. In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004), the Court held that the ATS does not confer jurisdiction on federal courts for claimed "violations of any international norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted." While the Court refused to restrict the application of the ATS to the few recognized violations of the law of nations which existed at the time of the statute's enactment,<sup>1</sup> it did make clear that judicial recognition of actionable violations of international norms was subject to "vigilant doorkeeping, and thus only open to a narrow class of international norms today." *Id.* at 729.

In *Abdullahi v. Pfizer*, 2005 U.S. Dist. LEXIS 16126 (S.D.N.Y. Aug. 9, 2005), the Southern District of New York exercised its doorkeeping function in denying jurisdiction under the ATS for the alleged failure of Pfizer to obtain medical consent prior to treating children in Kano, Nigeria inflicted with bacterial meningitis. In response to this crisis, Pfizer agreed to fly employees to Kano and treat inflicted children with Trovan, a drug which had not been approved by the FDA, but for which there was significant clinical data demonstrating its effectiveness. Despite Trovan's proven effectiveness, several of the parents of children treated with Trovan brought suit against Pfizer under the ATS claiming

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<sup>1</sup>When the ATS was enacted, the recognized violations of the law of nations were: violation of safe conducts, infringement of the rights of ambassadors, and piracy. See 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769).

that the company failed to obtain informed consent to treat the children with Trovan, and therefore, its actions constituted medical experimentation, which violated international law.

The Southern District of New York followed *Sosa*'s lead and refused to "judicially forge broad aspirational language into customary international law." *Id.* at \*13. It noted that a court's obligation is to apply established law, not normative or moral ideals. The court held that none of the sources cited by the plaintiffs as establishing international law norms allegedly violated by Pfizer created a private right of action under the ATS. It held that creating a cause of action based on Pfizer's alleged failure to obtain informed medical consent would expand customary international law far beyond what the ATS contemplated, and refused to grant jurisdiction to the plaintiffs. *Id.* at \*14.

The *Abdullahi* opinion is an example of a district court refusing to turn the federal courts into a pseudo-International Claims Court. Plaintiffs' lawyers will no doubt continue to push the envelope on ATS jurisdiction. Many of the current cases appeal to emotion by recounting horrific violations of human rights, and subsequently, through dubious theories of vicarious liability, attempt to tie deep-pocketed corporations to the people who committed those atrocities. Until the Supreme Court creates firmer guidelines for the outer reaches of the ATS, plaintiffs' lawyers will continue to stretch its bounds as far as possible. Courts must follow the lead of the *Abdullahi* court in ensuring that it is not stretched beyond recognition.

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