

Corporate Social Responsibility Law **Update**

In This Issue:

Summer 2007

- **Litigation**

[Romero v. Drummond Company](#),
(N.D. Ala., jury verdict on July 26, 2007)
(consolidated with Rodriguez v.
Drummond Company)

[Carrizosa v. Chiquita](#),
(S.D. Fla., case filed on June 13, 2007)

[Doe v. Chiquita](#),
(D.N.J., case filed on July 18, 2007)

[Arias v. DynCorp](#),
(D.D.C., decision on May 21, 2007)

[Xiaoning v. Yahoo! Inc.](#),
(N.D. Cal., case filed April 18, 2007)

[Carijano v. Occidental Petroleum](#),
(Cal. Super. Ct., case filed on May 10, 2007)

- **International**

- **Industry Watch**

Foley Hoag's **Corporate Social Responsibility Law Update** is a periodic update of the firm's unique CSR legal practice. The CSR practice works with major multinational companies to formulate legal strategies and business policies that incorporate respect for human rights and comply with existing national and international laws, voluntary codes and industry best practices. If you find this update useful, please encourage your colleagues and contacts to also register with us at foleyhoag.com/signup.asp. As always, you can access all of our publications on our website foleyhoag.com. For more information on the Corporate Social Responsibility practice group, please contact **Gare Smith** or **Dan Feldman**.

Litigation

Foley Hoag tracks litigation in both U.S. and international courts, and in particular, cases that underscore important industry trends and/or suggest future legal risks for our clients. For further analysis of the cases below, please contact us.

Due to its impact on the intersection of business and human rights, we closely follow Alien Tort Claims Act ("ATCA") jurisprudence. Recently, there have been several significant developments in ATCA jurisprudence, most notably, a verdict in the first ATCA case against a corporation to come to trial - a case filed against Drummond Company. Also of note are recent cases filed against Chiquita, for alleged actions in Colombia; Occidental Petroleum, for alleged actions in Peru; as well as the first ATCA case filed against a technology company — a suit filed against Yahoo! for alleged actions in China. These cases are described in greater detail below.

Romero v. Drummond Company, (N.D. Ala., jury verdict on July 26, 2007) (consolidated with Rodriguez v. Drummond Company)

On July 26th, after a trial lasting two weeks, a jury found in favor of the Drummond Company in the first ATCA case to proceed to trial. Plaintiffs have announced that they will appeal.

As noted in an earlier Foley Hoag Update, this case involved the murders of three Colombian trade union leaders who were working for Drummond's Colombian coal mine operations. In two separate incidents in 2001, the three leaders of the Sintramienergetica labor union were pulled off buses chartered by Drummond and killed by paramilitary groups.

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This case has been watched closely by many observers, who believed the case could provide significant precedent in the area of human rights litigation against corporations. One observer, Martin Flaherty, a professor of international human rights law at Fordham Law School in New York, noted at the outset of the trial that the case “has enormous significance...this suit and other suits like it will answer – the role of corporate responsibility.”

On June 15th, the court had granted defendants’ motion for summary judgment as to plaintiffs’ claims for wrongful death under Colombian law. The case proceeded on the basis of plaintiffs’ allegations that the murder of the unions members, in the context of ongoing civil conflict in Colombia, constituted “war crimes” under ATCA.

On June 28th, Edwin Guzmán, a former Colombian army sergeant who subsequently worked for a paramilitary unit, and a key witness during the Drummond trial, testified before the United States Congress that paramilitary members and the Colombian military received significant aid from Drummond.

Carrizosa v. Chiquita, (S.D. Fla., case filed on June 13, 2007)

Doe v. Chiquita, (D.N.J., case filed on July 18, 2007)

On June 13th, an ATCA suit was filed in federal court in Florida against Chiquita by the relatives of individuals who were killed in Colombia, allegedly by the United Self-Defense Forces of Colombia (“AUC”), a paramilitary group.

On July 18th, a second ATCA suit was filed in federal court in New Jersey with similar allegations.

Both suits come after Chiquita’s public admission, in March 2007, that it had provided payments to the AUC from 1997 to 2007. At the time, the company agreed to pay a \$25 million fine for providing funds to a terrorist group and to cooperate in an investigation by the U.S. Department of Justice into the payments. The company has asserted that the payments were meant to

ensure the protection of its employees and its banana plantations in Colombia.

Plaintiffs in the Florida suit have brought claims under ATCA alleging that Chiquita provided “material support to a terrorist organization resulting in death” and engaged in “extrajudicial killing” by “knowingly aiding and abetting” the AUC. Plaintiffs assert that AUC “was and is a dangerous terrorist organization that was created in order to combat other guerrilla groups. It has engaged in kidnapping, the murder of innocent civilians, and drug trafficking. The AUC has been a named terrorist organization every year by the United States since 2001.” Plaintiffs allege that “Chiquita Brands knew or should have known that its relationship with AUC would lead to decedents’ deaths.”

Plaintiffs in the New Jersey suit similarly allege that Chiquita “knew or should have known that the AUC was a violent paramilitary organization continually engaging in vicious crimes and human rights violations against civilians in Colombia, including extrajudicial killing, torture, and forced disappearances.” Plaintiffs in the New Jersey suit also explicitly allege that AUC conducted its activities with “the tacit approval and active cooperation of official government security forces” and that therefore the AUC’s activities “were inflicted under color of law, and/or in joint criminal enterprise with” Colombian authorities.

Arias v. DynCorp, (D.D.C., decision on May 21, 2007)

Ecuadorian plaintiffs filed suit in 2001, alleging that DynCorp, pursuant to a contract with the U.S. Government, sprayed fumigants in the border areas of Ecuador and Colombia in an effort to eradicate cocaine and heroin crops growing in Colombia. Plaintiffs are Ecuadorian nations who allege that they suffered severe harm to their health and their livelihoods as a result of contamination from the fumigation. They assert that “defendants knew or acted in willful disregard of the fact that winds would carry the toxic spray to area inhabited by plaintiffs” and asserted claims under ATCA, the Torture Victim Protection

Act (“TVPA”), common law, and various international agreements and conventions.

In a May 21st decision, the District Court for the District of Columbia found that plaintiffs presented a justiciable question of law under ATCA, but dismissed their claims under the Torture Victim Protection Act. Defendants had argued that plaintiffs’ ATCA claims should be dismissed in part because Congress had authorized the aerial fumigations. The Court also found that, even if defendant’s actions were authorized by Congress, “plaintiffs have alleged a conflict between any such congressional authorization and international law.” Notably, Defendants had argued that Plaintiffs’ claims are nonjusticiable because they raise matters closely related to foreign policy and national security concerns.

Xiaoning v. Yahoo! Inc. (N.D.Cal., case filed April 18, 2007)

On April 18th, Wang Xiaoning, his wife, Yu Ling, and other temporarily undesignated plaintiffs filed suit against Yahoo! Inc., alleging that by revealing identifying information to authorities of the People’s Republic of China, the company knowingly took actions that lead to plaintiffs’ arbitrary arrest, detention, and torture. Plaintiffs allege that Yahoo! had been informed by various human rights organizations that providing Chinese authorities with the identity of individuals associated with specific email accounts could place those individuals at risk of significant harm. Chinese authorities sought information regarding individuals accused of anti-government speech.

In their initial complaint, plaintiffs have asserted claims under ATCA, the TVPA, international law, and California statutes and common law. With regard to the ATCA-specific claims, plaintiffs have alleged that the company aided and abetted and/or ratified acts of torture, cruel, inhuman, or degrading punishment or treatment, and arbitrary arrest and prolonged detention, all in violation of international law.

In an amended complaint filed on May 29th, another named plaintiff, Shi Tao, joined the complaint.

Carijano v. Occidental Petroleum (Cal. Super. Ct., case filed on May 10, 2007)

While this case is not an ATCA case, it also addresses the issue of corporate responsibility for alleged human rights violations.

This suit was filed in California state court in May by Peruvian plaintiffs who allege that Occidental Petroleum’s operations in the Peruvian Amazon resulted in severe contamination of the land and rivers in the region. Occidental began operating in the region in 1971, but sold its holdings to an Argentinean company in 2000 and has since ceased all operations in the region. Plaintiffs allege that, as a result of the pollution, they have suffered adverse health effects, including widespread lead and cadmium poisoning, as well as a negative impact on their livelihoods due to damage to the local soil and waterways. This suit is of note because rather than seeking redress through ATCA, the plaintiffs’ initial complaint largely consists of state common law tort claims, including negligence, battery, wrongful death, and trespass. The suit also includes claims under California’s Business & Professions Code.

International

Foley Hoag has worked with many clients to assess developments in both international law and the laws of countries outside the United States. Our services are premised upon an observance of universal standards and best practices worldwide.

In June, John Ruggie, Special Representative of the U.N. Secretary-General on the issue of human rights and transnational corporations, released a report on the International Covenant on Civil and Political Rights (“ICCPR”), as part of a series of reports on State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations’ core Human Rights Treaties. These reports seek to provide substance to the scope and content of state responsibilities and are being prepared under a two-year mandate from former U.N. Secretary General Kofi Annan and the U.N. Commission on Human Rights (now the Human Rights Council).

The latest report looks at the obligation of state parties under the ICCPR to “respect and ensure” the rights in the Covenant to “all individuals within [their] territories and subject to [their] jurisdiction.” (ICCPR, Art. 2(1)). Ruggie observed that the Human Rights Committee, the group of independent experts that monitors implementation of the ICCPR, considers that the Covenant “requires States Parties to protect against violations by both State agents and private parties or entities.”

The report looks closely at the “duty to protect” and its meaning for private enterprises. Ultimately, Ruggie observes that the Human Rights Committee is “clear that it considers States parties to have a duty to act with due diligence to prevent, punish, investigate, and redress private abuse of all rights capable of being violated by private actors.” Noting that “the Committee does not often prescribe exactly what measures States should take in order to fulfill the duty in relation to corporate activities,” Ruggie states that “it is clear that it considers legislative, administrative, judicial, and educational tools to be of significant importance.”

Ruggie notes a number of difficult issues on which the Human Rights Committee might be able to provide greater clarity for private actors, and notes that the scope of the “duty to protect” remains uncertain. For instance, must States only take “reasonable steps” to protect rights or is more required? Ruggie also observed that it would be helpful if the Committee addressed the distinction between natural and legal persons. Finally, Ruggie notes the uncertainty surrounding States’ obligations to take action with regards to behavior outside of their national territory. He writes that more “detailed discussion on this issue could help States to better understand whether the [Human Rights Committee] believes the Covenant requires extraterritorial regulation or other action to curb corporate abuses affecting individuals who are both outside the State’s national territory and its effective control.”

Industry Watch

*Foley Hoag attorneys track developments and trends related to corporate social responsibility in a variety of sectors and industries. If you have questions about specific issues related to a particular industry, please contact us. In this update, we focus on CSR issues facing companies in **the pharmaceutical industry**. Foley Hoag has a large pharmaceutical and health care practice, headed by partners Nick Littlefield, Brian Carey, Paul Kim, and Jayne Bultena. Please let us know if you have questions about this practice group.*

In recent years, increasing attention has been paid by stakeholders to corporate social responsibility issues in the pharmaceutical industry. Access to safe and affordable healthcare is a universal human concern, and thus companies within the pharmaceutical industry have come under scrutiny regarding issues ranging from the cost of medications to the safety of clinical trials.

In response to global health concerns, many companies within the industry are participating in public-private partnerships seeking to address healthcare priorities, particularly in the developing world. The International Federation of Pharmaceutical Manufacturers & Associations recently reported that between 2000 and 2005, companies in the pharmaceutical industry formed 126 health partnerships to address global health concerns.

Examples of public-private partnerships include the Novartis Institute for Tropical Diseases, established in 2002 by **Novartis**, in partnership with the Singapore Economic Development Board, to develop treatment for tropical diseases endemic in developing countries. Another major initiative is the Botswana/Gates/Merck partnership (also known as the African Comprehensive HIV/AIDS Partnership), established in 2000, through which **Merck** and the Gates Foundation are working together to support the Government of Botswana in coordinating a national HIV/AIDS policy and in developing institutional capacity to deal with the disease. This initiative is expected to run through 2009. In 2005, **Sanofi Aventis** signed a partnership agreement with the World Health Organization to sponsor work on treating “neglected” tropical diseases, like sleeping sickness, that have not received much research attention.

To address concerns about the safety of clinical trials, there have been both public and private responses in recent years. The Pharmaceutical Research and Manufacturers of America (“PhRMA”) developed a set of voluntary principles called the “Principles of Good Conduct for Clinical Trials” which became effective for all trials worldwide begun after October 1, 2002. Also seeking to address concerns about the ethics of clinical trials, the World Health Organization has developed an International Clinical Trials Registry Platform, released in 2005, which seeks to collect information on all clinical trials worldwide and to make available to the public a minimum set of results for each trial conducted.

Concerns about the ethics and safety issues associated with clinical trials are central to a new lawsuit filed in Nigeria against **Pfizer, Inc.** The lawsuit was filed on July 19th by the Government of Nigeria and accuses the company of fraud in connection with the testing of an experimental meningitis drug on Nigerian children during a 1996 meningitis epidemic.

Other major issues facing the pharmaceutical industry include concerns about marketing practices, pricing policies, and the development and prioritization of research initiatives. Many of these concerns were highlighted in a recent report, *Pharma Futures – Prescription for Long Term Value*, released in June 2007, by SustainAbility, a consultancy group working with institutional investors, including ABP, OPERS, and USS, that highlighted investors’ concerns and thoughts regarding the challenges and opportunities facing the pharmaceutical industry. (Foley Hoag previously worked with SustainAbility on a report, *The Changing Landscape of Liability – A Director’s Guide to Trends in Corporate Environmental, Social, and Economic Liability*. Please let us know if you would like a copy.) In future editions of the CSR Update, Foley Hoag will provide more information on the CSR issues facing this pharmaceutical sector, as well as other industry sectors.

This Update was prepared by Foley Hoag’s Corporate Social Responsibility Practice Group, which includes the following members:

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