

O'Melveny, Cravath Lawyers Are Litigators of the Week

By Scott Flaherty

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More than a decade of litigation in New York federal court whittled dozens of corporate defendants accused of contributing to human rights abuses in South Africa down to just two: Ford Motor Co. and International Business Machines Corp. On Monday, O'Melveny & Myers' Jonathan Hacker (pictured at left) and Cravath, Swaine & Moore's Keith Hummel convinced a federal appeals court to clear away the final remaining claims in the case.

A three-judge panel at the Second Circuit concluded Monday that the companies didn't have a close enough connection to South Africa's former apartheid regime to sustain a claim under the U.S. Alien Tort Statute (ATS). The ATS allows U.S. courts to hear civil cases brought by foreign nationals, often stemming from human rights violations in other countries.

"The law, we think, is clear that the companies I've been representing were never intended to be liable under U.S. law in a U.S. courtroom," Hacker said.

The apartheid litigation dates back to 2002, and initially the South African plaintiffs sued dozens of companies over claims that they contributed to the atrocities carried out by South Africa's government. Both O'Melveny and Cravath have been involved since the case's earliest days. Hacker entered an appearance at the district court in 2013, and later took over the appellate efforts for Ford after his former colleague Sri Srinivasan, now a judge on the U.S. Court of Appeals for the D.C. Circuit, left O'Melveny to serve as deputy solicitor general. Hummel has been involved much longer, having attended a hearing on IBM's behalf before the company was even served with the amended complaint that added it to the list of defendants.

Of the companies initially targeted, most were dismissed from the litigation. Eventually, Ford and IBM were the only ones left, in part because of a 2009 district court ruling that allowed the claims against them to go forward.

While an appeal of that 2009 ruling was pending, however, the Second Circuit ruled in 2010 on another ATS case, *Kiobel v. Royal Dutch Petroleum*. In 2013, the U.S. Supreme Court affirmed the Second Circuit's ruling in *Kiobel*, which effectively limited the extraterritorial reach of the ATS. The justices held in *Kiobel* that courts must reject an ATS claim that doesn't "touch and concern" the U.S. with "sufficient force."

The impact of *Kiobel* then became a focus of the apartheid litigation against Ford and IBM. The plaintiffs had alleged that Ford provided specialized vehicles to South African police and security forces that helped the apartheid government carry out its racially motivated restrictions. IBM was alleged to have designed technologies, such as software used to collect population data, that aided the South African government in its racial segregation efforts.

In light of *Kiobel*, the South African plaintiffs attempted to beef up their complaint by adding allegations that, they believed, tied the companies' U.S. conduct more closely to the apartheid regime's



actions in South Africa. In September 2014, however, U.S. District Judge Shira Scheindlin in Manhattan sided with the companies and their lawyers, concluding that the recent Second Circuit and Supreme Court precedent effectively cut off the plaintiffs' claims.

On appeal, the plaintiffs, represented by Paul Hoffman of Schonbrun DeSimone Seplow Harris & Hoffman, made the case that they had, in fact, provided enough evidence to show that both Ford and IBM took actions within the U.S., which, in turn, contributed to the apartheid regime in South Africa. The alleged conduct on U.S. soil, the plaintiffs maintained, meant that they had satisfied the ATS territoriality requirements set out in *Kiobel*.

The two companies, led by Hacker and Hummel, argued that there wasn't enough to tie the U.S. companies to alleged misconduct that took place in South Africa, and that there was no evidence that Ford and IBM ever intended to help the apartheid regime commit human rights abuses.

Ultimately, the Second Circuit agreed.

"Plaintiffs' amended pleadings do not establish federal jurisdiction under the ATS because they do not plausibly allege that the companies themselves engaged in any 'relevant conduct' within the United States to overcome the presumption against extraterritorial application of the ATS," U.S. Circuit Judge Jose Cabranes wrote in the court's opinion.

Reflecting on the case on Thursday, both Hummel, who argued the appeal for IBM, and Hacker, who argued for Ford, acknowledged that ATS claims, such as those in the apartheid litigation, are sensitive ones for clients. Both lawyers maintain, however, that they rarely have qualms about defending against them.

"The thing you have to remember in all of these cases is that those are allegations," said Hummel. "Very much more often than not in those cases, when you have your trial and you have your discovery ... you realize that there's really no merit." Hoffman, who argued for the plaintiffs, told us he's disappointed with the Second Circuit's ruling and plans to seek an en banc rehearing.

CRAVATH, SWAINE & MOORE LLP