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WHITE PAPER

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Labor Trafficking in Corporate Supply Chains— Summer 2020 Update

Courts and legislatures both in the United States and abroad continue to prioritize the eradication of labor trafficking in corporate supply chains. Labor trafficking litigation in the United States remains widespread and varied, premised on legal theories derived from consumer protection laws, the Alien Tort Statute, and the Trafficking Victims Protection Reauthorization Act. The United States has also focused heavily in recent months on addressing human rights violations occurring in Xinjiang, China, resulting in new legislation and corporate sanctions. Similarly, the United Kingdom has seen recent advancement in governmental response to labor trafficking, as well as litigation alleging corporate liability for international human rights violations.

This Jones Day *White Paper* serves as an update to our prior publications regarding legislation and executive action aimed at curbing forced labor in supply chains, setting forth developments in the areas of: (i) litigation within the United States; (ii) efforts to end labor violations in Xinjiang, China; and (iii) other developments abroad.

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INTRODUCTION

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Jones Day has previously published *White Papers* outlining developments in legislation and executive action aimed at curbing forced labor in supply chains: a *White Paper* published in August 2018 and an updated *White Paper* published in December 2019. This Jones Day *White Paper* serves as an update to those publications, setting forth developments in the areas of: (i) litigation within the United States; (ii) efforts to end labor violations in Xinjiang, China; and (iii) other developments abroad.

UNITED STATES LITIGATION

Perhaps the most significant update in labor trafficking litigation in the United States is the Supreme Court's grant of certiorari in *Nestlé USA, Inc. v. John Doe I* in July 2020.¹ That case involves allegations that two victims of child labor from Mali were forced to work cultivating cocoa beans; the purported victims sued Nestlé under the Alien Tort Statute for aiding and abetting their traffickers.² Nestlé was previously dismissed—twice—by the district court, and after each dismissal, the Ninth Circuit reversed and remanded. After the Ninth Circuit's second remand, and the denial of Nestlé's petition for rehearing, Nestlé filed a petition for a writ of certiorari with the Supreme Court.

The Supreme Court has agreed to consider three issues: (i) whether domestic corporations are subject to liability under the Alien Tort Statute; (ii) whether there is a cause of action for aiding and abetting a violation of international law under

the Alien Tort Statute; and (iii) whether general allegations of corporate oversight in the United States are sufficient to overcome the bar against extraterritoriality, which the Supreme Court recently decided applies to the Alien Tort Statute in *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013).³ Nestlé will resolve a circuit split and could establish a clear path for victims of trafficking if the Court rules in plaintiffs' favor. Depending on the outcome, corporate entities should expect to see an increase in litigation resulting from purported violations of trafficking laws in global supply chains.

Across the country, other claims have been brought at the district and appellate court levels with varying results. Two cases premised on consumer protection laws—filed well after the Nestlé case described above—continue to be litigated in California district courts.⁴ Both cases allege that the defendant companies made affirmative statements about responsible chocolate sourcing and that plaintiff consumers would not have purchased chocolate products if the companies had divulged the presence of slavery in their supply chains.⁵ As both cases are in fairly early stages of litigation, their resolution and subsequent effect on forced labor claims premised on consumer protection laws remains to be seen.

In a similar case this year, the First Circuit affirmed the dismissal of claims predicated on the Massachusetts Consumer Protection Law.⁶ Plaintiffs in that case alleged that Nestlé, Mars, and Hershey violated consumer protection laws against deceptive advertising by omitting information about potential child labor in their cocoa supply chains.⁷ While noting that the exploitation of child labor in the sourcing of chocolate is a “humanitarian tragedy,” the First Circuit ultimately agreed with the District Court's dismissal, holding that plaintiffs failed to state a claim based on either a deceptive or unfair acts theory.⁸ The First Circuit's interpretation will make it difficult for labor trafficking claims based on consumer protection laws to survive in that circuit.

Since the last update, plaintiffs have also brought claims under the Trafficking Victims Protection Reauthorization Act's (“TVPPRA”) labor trafficking provision, which provides for liability on the basis that a company knowingly benefitted from participation in a venture that engaged in forced labor.⁹ Many predict the TVPPRA will form the basis for newly filed labor trafficking litigation, as the consumer protection cases have not succeeded. This prospect is illustrated by a recent case in

which plaintiffs, purported victims of child labor and unsafe work conditions in the Democratic Republic of Congo's cobalt mining industry, brought suit against numerous corporations.¹⁰ Plaintiffs allege that the companies knowingly benefitted from and provided support to the Democratic Republic of Congo's mining sector that relies on children performing dangerous work.¹¹ The amended complaint asserts that if defendants deny knowledge about the forced child labor in their supply chains, plaintiffs should be able to obtain discovery on the internal knowledge that each company had based on their internal reporting and risk assessment.¹² If the action is successful, it could establish a straightforward path for those seeking to hold American corporations accountable for labor violations in their supply chains. Even if plaintiffs' claims are ultimately unsuccessful, this case may set important precedent for discovery disputes in future claims under this Act.

Last, negligence claims have also been brought against companies alleging issues relating to labor trafficking another trend that could continue depending on the success of the early cases. For example, this April, victims of sex trafficking have filed complaints in the Northern District of Illinois alleging that Salesforce was negligent in working with Backpage, a company that faces criminal prosecution for having allegedly knowingly facilitated advertisements for trafficking on its website.¹³ Plaintiffs allege that Salesforce was aware that Backpage was facilitating sex trafficking and was negligent in building tools specific to Backpage that allowed the trafficking to continue.¹⁴ If Salesforce is found liable on negligence grounds, it could open the door to broad liability for corporations.

UNITED STATES EFFORTS TO STOP LABOR VIOLATIONS IN XINJIANG

The United States has also recently taken an active role in denouncing and attempting to mitigate labor and human rights violations specific to the Xinjiang region of China. In Xinjiang, the Chinese government has allegedly detained more than one million Uyghur people and members of other Muslim ethnic minority groups since 2017.¹⁵ Detainees allegedly have been subjected to serious human rights violations, including forced labor, physical and psychological abuse, denial of their religious practices and use of their native languages, and forced study and recitation of Chinese Communist Party

propaganda.¹⁶ Reports indicate that detainees have also been subject to intense surveillance, by way of facial recognition and artificial intelligence meant to track their movements and monitor their behavior.¹⁷ Some American companies source materials from factories using forced labor in the region, as illustrated by a recent report naming 83 companies that are directly or indirectly benefitting from the use of Uyghur workers.¹⁸

In response to China's treatment of the Uyghur people, Congress passed the Uyghur Human Rights Policy Act on June 17, 2020.¹⁹ The Act requires the president to submit an annual report to Congress identifying foreign persons who are responsible for torture; cruel, inhuman, or degrading treatment; prolonged detention without charges and trial; abduction; or other flagrant denials of the right to life, liberty, or the security of persons in Xinjiang.²⁰ For each foreign person identified, the Act states that the president shall impose either asset blocking sanctions or visa restrictions.²¹ Additionally, the Act calls upon U.S. companies to take steps to ensure that their commercial activities are not contributing to human rights violations in Xinjiang or elsewhere in China, and that their supply chains are not compromised by forced labor.²²

On July 1, 2020, the United States Department of State published a Xinjiang Supply Chain Business Advisory.²³ The advisory details the situation in Xinjiang and identifies industries whose supply chains are especially likely to be compromised by Uyghur forced labor.²⁴ The advisory identifies potential indicators of forced labor or labor abuses, including the use of internment terminology, the use of government incentives and recruiters, a lack of transparency, and factory location.²⁵ U.S. companies are called to implement human rights due diligence policies and procedures, though the advisory highlights the unique difficulties of conducting due diligence in these areas given the repressive environment in Xinjiang and the threat that third-party auditors will be detained or harassed.²⁶

The United States Customs and Border Protection ("CBP") has also recently used its authority to seize products that it believes were made with forced labor in Xinjiang.²⁷ Thus far in 2020, CBP has seized two shipments of weaves and other beauty accessories that it believes were created with forced labor or with the hair of forcibly interned people.²⁸ CBP issued a detention order for the goods, which allows them to be detained until federal authorities can investigate, under

authority granted to the agency by the 1930 Tariff Act's prohibition on the importation of goods produced with forced labor.²⁹ Although this authority has rarely been used, it is now being exercised with more frequency, particularly on goods being imported from China.³⁰ For an in-depth look at CBP's increasingly frequent use of its authority to prevent the importation of goods produced with forced labor, view the *White Paper* published by Jones Day in March 2020.³¹

DEVELOPMENTS ABROAD

The United Kingdom continues to be a world leader in abolishing labor trafficking. In March, the UK government became the first to publish a statement outlining how it will eradicate slavery in its own supply chain.³² The statement is issued in compliance with the country's Modern Slavery Act, which requires companies with revenue exceeding 36 million pounds to release annual disclosures concerning labor trafficking in their supply chains.³³

However, recent litigation in the United Kingdom has shown that, much like in the United States, plaintiffs will not always prevail in cases alleging international human rights violations. While liability for foreign human rights abuses is a cognizable claim in the United Kingdom, a recent Court of Appeal decision dismissed a case brought in an English court by residents of Sierra Leone.³⁴ The plaintiffs in that case alleged that African Minerals supported police who used excessive force in Sierra Leone and therefore were liable to plaintiffs on several different legal grounds.³⁵ The trial court sided with African Minerals, and the Court of Appeal agreed, finding that African Minerals did not owe a duty of care to the people of Sierra Leone, had not acted in furtherance of a common design with the police, and had not caused the plaintiffs' alleged losses³⁶. It is unclear what impact this decision will have on future supply chain labor trafficking cases, where causation and duty may be closer calls.

CONCLUSION

Though the landscape of liability for corporations as a result of labor trafficking in their supply chains continues to evolve, recent litigation and legislation demonstrate the need for companies to continue to consider conducting due diligence to identify forced labor that may be present in their supply chains. The increasing focus of the United States in addressing and combatting forced labor in Xinjiang, China, is particularly illustrative of the need for companies to be proactive in this area, or risk consequences, including sanctions or exclusion of goods from the United States. Companies should consult with counsel and labor experts to ensure that their current practices and policies are in compliance with relevant United States and international law.

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ENDNOTES

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- 24 *Id.* at 1-3, 4-5, 16.
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