

TAB 22

THE EVOLUTION OF AND CURRENT TRENDS IN ANTI-TERRORISM CIVIL LITIGATION

There has been a dramatic evolution in anti-terrorism evolution since I brought the first successful case for the state sponsorship of terrorism against US citizens in 1996. I have seen this evolution occur literally before my own eyes beginning with my first case Flatow v. Islamic Republic of Iran and one of my more recent cases, Little v. Arab Bank. We have seen the field of anti-terrorism litigation grow from a handful of cases against states like Iran to a flood of cases against states and recently a diversification into cases against foundations and corporations charged with aiding and abetting acts of terrorism.

Today, U.S. victims of international terrorism have a robust, legal right against the terrorists that attack them, their state sponsors, and private individuals or organizations that knowingly support or facilitate terrorism. Despite inconsistent and conflicting signs of support or hostility from the Executive Branch and law enforcement and investigatory officials, the field of anti-terrorism litigation has stabilized and continues to evolve as our understanding of international terrorism increases.

If I were to characterize the evolution of anti-terrorism civil litigation with one phrase it would be: "Follow the money".

Anti-terrorism civil litigation has always been about hitting those who bankroll terrorism. Terrorists from Abu Nidal to al-Zarqawi have all relied on someone else to provide their support. Some of these sponsors are states like Iran and some are small

foundations with a “charitable organization” front. Prior to 2001, I don’t think many realized that terrorist organizations and charitable fronts were operating in the United States to raise money for activities against the US. I was intimately involved with the FBI investigation of Sami Al-Arian at the University of South Florida in the late 90s for raising money for Palestine Islamic Jihad, an organization that killed the daughter of Stephen Flatow, my first client that was a victim of terrorism.

These kinds of flows of money are now under attack by civil litigators in the US, as well as criminal investigators and law enforcement.

The continuing focus on terrorist money trails has led anti-terrorism litigators increasingly away from state sponsors toward the groups that act as fund raisers and the banks that participate. Also while acts of international terrorism continue to increase, acts of state sponsored terrorism against US citizens seem to be waning.

I say seem to be because today the vast majority of acts of terrorism against US citizens continue to occur in Iraq, and may yet turn out to be state sponsored. At present, indications are that there is an Iraqi insurgency, supported by Iran and Syria, as well as foreign fighters supported by extra-national groups. My latest lawsuit against a state-sponsor revolves around that issue, a lawsuit against Syria for its role in support of al-Zarqawi during his reign of terror in Iraq.

Financial institutions are a classic deep pocket and are inherently, though sometimes innocently, involved in every terrorist network. Every international terrorist operation and attack involves the international movement of funds and at some point this movement crosses through legitimate financial institutions. Civil litigators have recently become more willing to take on the banks that participate in the financing of terrorism.

BRIEF OVERVIEW OF ANTI TERRORISM LITIGATION

Prior to 1996, civil recourse for the victims of international terrorism effectively did not exist. While there were several laws on the books, attorneys were unwilling to represent U.S. citizens who had suffered death and personal injury as a result of international terrorism largely because of the minimal hope of recovery. The success of *Flatow v. Islamic Republic of Iran*,¹ opened the transitory phase from inaction to the frenetic innovations that characterize today's litigation on behalf of the victims of terrorism. As channels of recovery have been uncovered after several groundbreaking cases, this hesitation to litigate has diminished.

While no one is saying that litigation would stop Iran or Libya from pursuing their foreign policy by any means necessary, but I am saying that these countries now know that their overseas assets are vulnerable to valid US judgment holders. These suits are also useful because they give the victims a voice in a transaction that otherwise chewed them up and spit them out.

In a moment I will explain how the war on terrorism fought by civil litigators has expanded from the state sponsors of terrorism to its individual supporters and facilitators. But first some background material on the early years of anti-terrorism litigation.

The war on international terrorism has become the nation's top priority. As Congress increases the number and reach of the laws designed to fight international terrorism, more individual actors find their activities potentially under the scrutiny of the criminal law enforcement community. The expansion in criminal liability greatly factors in the future expansion of civil liability.

We are talking about the progression of civil litigation against state sponsors of terrorism to the recent focus upon individual sponsors and facilitators. As more actors

find their activities regulated under the scrutiny of criminal statutes, they should be aware of the implications this has for their civil liability.

Bitter Disappointment Leads to the Passage of 28 U.S.C. § 1605 (a)(7)

There was a time when U.S. victims of terrorism had no explicit civil recourse for acts of international terrorism.

And so we saw decisions like *Tel-Oren v. Libyan Arab Republic*, a 1984 DC Circuit opinion, where victims of horrendous attacks learned that they had no suitable remedy despite identifiable defendants. On March 11, 1978, thirteen heavily armed members of the Palestine Liberation Organization landed by boat in Israel and captured two buses, and a few carloads of hostages. They tortured them, shot them, wounded them and murdered them. Before the Israeli police could stop the massacre, 22 adults and 12 children were killed, and 73 adults and 14 children were seriously wounded.

In a per curiam opinion with three concurring written decisions, the court found that the trial court correctly dismissed the case for lack of subject matter jurisdiction. The court looked at both the Foreign Sovereign Immunities Act ("FSIA") and the Alien Tort Claims Act ("ATCA") and found no jurisdictional basis for the court to adjudicate these acts of international terrorism. The case was dismissed.

In 1992, Congress passed 18 U.S.C. § 2333, allowing a person "injured in his or her person, property, or business by reason of an act of international terrorism" to sue to recover damages. The key to understanding § 2333 is to know that "international terrorism" is defined by a separate statute, 18 U.S.C. § 2331, as "activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the

United States." As we discuss later, this open-ended definition has led to an expanding class of potential defendants in civil proceedings.

Despite the presence of this statute, civil litigation didn't materialize because the attacks often occurred abroad, were carried out by individuals without identifiable assets, and supported by foreign states shielded by the impenetrable shroud of sovereign immunity. U.S. citizens cannot sue a foreign state in the United States unless the basis of the suit fits within several enumerated exceptions, listed in 28 U.S.C. § 1605, the FSIA, which was passed in 1976. Hence the result in *Tel-Oren*.

The FSIA begins with blanket immunity for foreign states and then strips it away in certain circumstances, codified in its exceptions to foreign sovereign immunity. For example, 28 U.S.C. § 1605 (a)(6), the "non-commercial tort" exception to the FSIA, allows lawsuits against foreign states or their officials based upon torts that occur in the United States.

As recently as 1995, plaintiffs' lawyers were not able to find an applicable exception to foreign sovereign immunity to allow a suit based upon an act of terrorism abroad. Thus, in 1995, the Eastern District of New York dismissed a lawsuit, *Smith v. Socialist People's Libyan Arab Jamahiriya*, against Libya based upon its complicity in the 1988 destruction of Pan Am 103 over Lockerbie, Scotland.³ This case followed on the footsteps of another case that remains noteworthy for the inhumanity of the crimes involved and the exasperation and despair that resulted when it was dismissed. In 1994, the District of Columbia Circuit dismissed *Princz v. Federal Republic of Germany*, a case that I brought against Germany and several German corporations, based upon their exploitation of captured U.S. passport holders for slave labor in concentrations camps. It

was dismissed for principally the same reason as the Pan Am case—the case did not fit within an applicable exception to the FSIA.⁴

However, the attorneys for the *Princz*, Pan Am 103 cases, and the Brothers to the Rescue case in Florida were able to extricate a measure of victory from the jaws of defeat with some help from Congress.⁵ After their courtroom defeats, the attorneys successfully exerted a great deal of effort at cultivating an appropriate congressional response. Subsequently, in 1996, over strident State Dept. objections, Congress passed a new exception to the FSIA, 28 U.S.C. § 1605 (a)(7), for lawsuits "against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking." This exception denied sovereign immunity to any foreign state that sponsored a terrorist attack upon U.S. citizens, as long as the state had already been officially recognized as a state sponsor of terrorism by the U.S. Department of State. As a footnote, *Princz* finally settled after vigorous protests by members of the U.S. government and after I named several large German corporations that profited from Mr. Princz' slave labor.

The passage of this new exception to the FSIA set the stage for some spectacular fireworks. The victims of terrorism were about to learn that their most frequent courtroom opponent would not be the government of Iran, but the U.S. Department of Justice acting on behalf of the Department of Treasury and the Department of State.

Civil Litigation Gets a Running Start After the Passage of 28 U.S.C. § 1605 (a)(7)

Civil litigators struck their first blows against international terrorism by documenting the links between foreign states and individual acts of terrorism carried out against U.S. citizens.

In 1995, the Shaqaqi faction of the Palestine Islamic Jihad detonated a bomb that vaporized an Israeli bus and killed twenty year old Alisa Flatow. Our efforts, together with co-counsel Thomas Fortune Fay, on behalf of Stephan Flatow, Alisa's father, paid off in *Flatow v. Islamic Republic of Iran*.⁶ For the first time, a court found a foreign state liable for its sponsorship of a terrorist group that killed a U.S. citizen and awarded damages of roughly \$229 million. The *Flatow* case documented the links between the terrorist group that carried out the attack and Iran, which acted as a sponsor for the group through the provision of support and training.

There have since been numerous cases since *Flatow* that have documented the ties between Iran, Iraq, Syria, the Sudan, and Libya and individual acts of terrorism.

While the nature of civil litigation against international terrorism has changed since the *Flatow* case, the cases against the state sponsors of terrorism continue. We brought a case in the District Court for the District of Columbia against Iran for its complicity in the 1983 marine barracks bombing in Beirut, Lebanon that caused the death of over 240 servicemen, captioned *Peterson v. the Islamic Republic of Iran*.⁷ Judge Royce Lamberth authored a May 30, 2003 opinion that adjudged Iran liable based upon the mountain of evidence we unearthed that linked Iran to the 1983 attack. While the damages phase of the trial continues, we expect compensatory damages alone to rise over \$2 billion.

A final word about litigation against state sponsors. Recent adverse precedent, in my opinion incorrectly decided for several reasons that I won't go into here for the sake of time, poor reasoning the description of which would take a few days much less 20 minutes, has hindered litigation against state sponsors of terrorism. A case called *Cicippio Puleo* recently came out in the DC Circuit and proclaimed that legislation that Congress passed in 1996 as a measure against state sponsored terrorism is not applicable against the state sponsors, only the bombers themselves, if you can understand that logic. The bottom line is that there is currently legislation pending in Congress that would correct this decision and its passage is vital to victims of state sponsored terrorism. If you are interested in helping the legislative push please contact me.

Getting a 28 U.S.C. § 1605 (a)(7) Judgment is Easier Than Collecting It or The Empire Strikes Back

Another reason that litigation against state sponsors is slowing a bit is that collection efforts have been hampered by the lack of accessible foreign state assets as well as the numerous court appearances by the State Dept., who never lose in proceedings like these.

Unsurprisingly, the foreign state defendants deny that U.S. courts have the ability to judge their sovereign acts, even when those sovereign acts include training and support of militia groups that murder and injure unarmed, innocent civilians.

The foreign state defendants either do not defend the lawsuits at all or melt away after mounting a myriad of unsuccessful procedural challenges. Iran does not make any appearances in any proceeding that deals with its liability for murder or personal injury under the FSIA, but Iran does vigorously defend its assets when we try to execute against

them in an effort to satisfy the Flatow judgment and other outstanding judgments. This leaves plaintiffs with few options after obtaining a final judgment.

After the *Flatow* case, we began an arduous journey to collect Mr. Flatow's judgment against Iran. Our initial collection efforts focused upon Iranian property frozen within this country since the 1979 Iranian revolution. Our client was surprised and disappointed, as were all subsequent victims of Iranian terrorism who hold a final judgment, to find that our attachment efforts were strenuously resisted by the U.S. government. The reason given for this resistance has always been to preserve these frozen assets for use as bargaining tools by the Department of State with Iran. We vehemently disagree with any strategy that includes negotiation with terrorists.

Among the targeted frozen assets that were defended by attorneys from the Department of Justice were the former Iranian embassy, former Iranian embassy officials' residences, over \$400 million in frozen funds in the Foreign Military Sales account⁸, and over \$1 billion in funds awaiting transfer to Iran to settle arbitration awards Iran has won against the United States in international tribunals. The legal defenses raised against the attachments on the diplomatic property was the resulting conflict with the obligations of the United States under the Vienna Convention on Diplomatic Relations, a treaty to which the United States is a signatory.⁹ The U.S. position is that permitting attachment of these properties would violate its treaty commitments. The defense raised against the attachments on Iranian funds sitting in U.S. accounts is sovereign immunity. According to prevailing case law, an attachment on money in a U.S. account destined for Iran is still an attachment on U.S. money, irrespective of its ultimate destination, and therefore fails against sovereign immunity.¹⁰

In a series of decisions, the district court that originally granted the writs of attachment in *Flatow* dismissed them by granting the U.S. government's motions to dismiss.¹¹ We took an appeal of each decision and were prepared to fight, but voluntarily dismissed the appeals as part of the deal brokered by Congress in 2000 that netted our clients partial compensation for their final judgments.¹²

Another option for satisfaction of outstanding final judgments is hunting for foreign state investments across the United States. This is a difficult task also because countries such as Iran layer their investments in holding companies and shell corporations to escape detection of the numerous creditors that hold judgment against them. After Mr. Flatow received his final judgment in 1998, as part of our collection efforts we attached three Iranian assets throughout the country: an international arbitration award that Iran attempted to enforce against a U.S. company in California¹³; the proceeds from a land sale owned by a subsidiary of an Iranian national bank called Bank Saderat Iran¹⁴; and three pieces of property owned by the Alavi Foundation, a U.S. nonprofit corporation ostensibly operating as a Muslim charitable foundation for the needy.¹⁵ The Alavi Foundation may sound familiar to some. As reported by the Washington Post, "David Cohen, the New York City Police Department's intelligence chief, said in a recent court document that the Alavi Foundation is 'totally controlled by the government of Iran' and 'funds a variety of anti-American causes,' ... [t]hese organizations, said Cohen, a 35-year veteran of the CIA, have affiliates that support Hezbollah and the Islamic Resistance Movement, or Hamas, two groups the U.S. government has deemed terrorist."¹⁶

Unfortunately, these initially promising efforts at judgment collection ended in frustration for Mr. Flatow. An international law doctrine called the *Bancec* doctrine served to block our attachment efforts in the Bank Saderat Iran case, which involved the

land sale proceeds, and the Alavi Foundation case. The *Bancec* doctrine respects decisions of foreign nations to establish government agencies separately from the state and protects separately established entities from judgments creditors of the state.¹⁷

The Bank Saderat Iran case exemplifies one of the difficulties inherent in this collection strategy. Bank Saderat Iran is wholly owned by the state of Iran, as are all banks in Iran, due to the nationalization of banks in 1979 after the revolution. We registered the *Flatow* judgment and obtained a writ of execution in the district where Bank Saderat Iran was attempting to collect the proceeds of a land sale by its subsidiary. The Southern District of California and the Ninth Circuit agreed that the *Bancec* doctrine prevented execution against an entity established separate from the state by the state, unless the plaintiff can show the state exercises extensive or "day to day" control over the formally separate entity. Thus, judgment creditors who proved in open court that Iran murdered their family members cannot attach the assets of a nationalized Iranian bank because the law sees it as an entity separate from the Iranian state. Our litigation to attach the international arbitration award in the Ninth Circuit ended.¹⁸

Another option in our quest to satisfy the outstanding judgments in cases such as these has been to call on Congress to free up any available frozen assets of the foreign state defendant. On October 28, 2000, the Congress of the United States enacted the Victims of Trafficking and Violence Protection Act.¹⁹ This legislation was the culmination of extensive negotiations between the Clinton administration and the victims' families, brokered by several members of Congress. The Victims Protection Act mandated that the Department of Treasury pay a specified portion of Mr. Flatow's judgment, subrogated against frozen Iranian assets, in consideration for his relinquishment of his right to attach against certain categories of Iranian property within

the United States. The legislation gave Mr. Flatow, and all other claimants covered by the statute, a choice between two options in a bifurcated payment scheme. Mr. Flatow could choose one of two options:

This law allowed victims who had final judgments against Iran to effectively sell their judgments to the United States.²⁰ The United States in turn has the right to enforce these judgments against Iran as relations become normalized between the two countries. The payments to the victims were drawn against the balance left over from 1979 in the Foreign Military Sales ("FMS") account. Today, the Iranian FMS account has been effectively depleted and cannot act to compensate victims any longer.

In 2001, Congress passed the Terrorism Risk Insurance Act in an attempt to clarify the ability of the victims of terrorism to seize frozen assets in the United States.²¹ The act provides " ... in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism ... the blocked assets of that terrorist party [including the blocked assets of any agency or instrumentality of that terrorist party] shall be subject to execution or attachment...." Prior to the Act's passage, based upon the Department of Justice's resistance to the Flatow judgment satisfaction efforts, it was unclear to the victims of terrorism what their rights were to the frozen assets of the terrorists who injured them. Victims of Iraqi terrorism used this law in the months preceding the second Gulf War to successfully attach millions in frozen Iraqi funds.

NEEDED LEGISLATIVE REFORM

So we can see that while some success has been achieved with lawsuits brought under the FSIA, recurrent problems have manifested that threaten to derail these suits and

nullify any possible deterrent effect. Over the past couple years, a small group of law firms and lobbyists have banded together to attempt to push a package of legislative remedies as a band aid for these lawsuits.

For example, the *Bancec* problem as we discussed before creates obstacles for victims of terrorism who have been able to win their cases in federal courts. The *Bancec* doctrine would protect Iran's assets, or the assets of any other state sponsor of terrorism, from judgment creditors if the assets were properly invested through separately established entities. A foreign state that sponsors terrorism, such as Iran, can easily invest in the United States, as long as it sufficiently layers its investments in separately established entities. It is nearly impossible to meet the day-to-day control test necessary to pierce the presumption of the *Bancec* doctrine. Thus, we need to clarify the doctrine to lower the burden of proof. Altering the *Bancec* test will make investments of state sponsors of terrorism appropriately vulnerable to those victims that obtain valid judgments in US court. The day-to-day test is a reasonable limitation when applied in normal commercial litigation. However, where the intent of Congress is to deter terrorism and the limitations of the *Bancec* doctrine hamper the accomplishment of Congress's goal.

The legislation would change the legal standard of the *Bancec* doctrine from day to day-managerial control to one of beneficial ownership, only as it applies to states sponsors of terrorism for their terrorist acts against U.S. citizens. The families of victims of terrorism would be able to attach the hidden assets of terrorist states held within the United States.

The legislation was in front of the House of US representatives as HR 865 and in front of the Senate as S 1257. Currently we are trying to work our legislation into a bill

working its way through Congress known as the 9/11 bill. If that doesn't work out, we will be seeking legislative vehicles to introduce the language before Congress this session.

The pursuit of the assets of state-sponsors of terrorism in foreign jurisdictions is but one predictable result of this legislative impasse, which brings us all the way back to the Flatow case. We have been pursuing Iranian assets for over four years in Italy in an effort to resolve the outstanding judgment debt owed to my clients by Iran.

The attachment program consisted of two phases. First we applied to the proper Italian court that had jurisdiction over the question of domestication. Once the court officially recognized the judgment, we engaged in search for Iranian assets. Then we attached several Iranian assets. The first attachment created quite the political firestorm, something we have come to anticipate in these sorts of groundbreaking legal maneuvers.

Despite Italy's official stance in the War on Terrorism, the Italian Foreign Ministry actively supported the Iranian position. The judge dismissed the attachment and the question is now before the Italian Supreme Court. While our case has not attracted political support in Italy, we are confident of our legal position and so in the meantime, we have attached several more Iranian assets. The battle continues...

THE NEXT WAVE: GOING AFTER NON-STATE SPONSORS

Emboldened by extraordinarily large damage awards, plaintiffs' attorneys are now investing more time and resources into the development of novel theories to tie increasing numbers of defendants to acts of international terrorists and to find ways to tap into available pools of assets.

Boim v. Quranic Literacy Institute, a case against a terrorist group and its financial sponsors, is symbolic of the evolutionary path leading from cases against the state sponsors of terrorism and the role played by the increasing number of anti-terrorism criminal statutes. In *Boim*, the Seventh Circuit ruled that a provider of even small amounts of funds or support to a terrorist organization could be held liable for a murder or injury if the provider was generally aware of the organization's activities and the murder was a reasonably foreseeable result of that support. The court supported its ruling with reference to criminal anti-terrorism laws. The evolutionary path for civil liability was partially determined by a preceding expansion in criminal liability.

In *Boim*, the family of 17 year old David Boim, who was shot to death at an Israeli bus stop, defeated a motion to dismiss filed by two of the defendants in the case. The defendants were not the shooters themselves or their state sponsors. The defendants were private non-profit Muslim organizations: the Quranic Literacy Institute ("QLI"), an Illinois corporation, and the Holy Land Foundation for the Relief and Development ("HLF"), a California corporation. The Boims alleged that these organizations, ostensibly devoted to charitable fund raising and humanitarian missions, were fronts for fundraising in America for missions of terror abroad. These organizations allegedly solicit contributions in the United States for terror abroad; their leaders arrange for the money to be laundered and wired overseas; and then Hamas terrorists in Gaza and the West Bank use the money for violent acts of terrorism. The Boims allege that these defendants raised the money to pay for the training and weapons for their son's murderers, and for a stipend for the shooter's family.

The Boims wielded the little used anti-terrorism statute, 18 U.S.C. § 2333, against these defendants; allowing "[a]ny national of the United States injured in his or her

person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue..." The defendants filed a motion to dismiss charging that the anti-terrorism statute only covered violent acts of terrorism by the perpetrators of the actual terrorist act. The Boims argued:

- § 2333 creates liability for injury resulting from international terrorism;
- international terrorism is defined in another statute, 18 U.S.C. § 2331, as activities that "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States;"
- the defendants in this case have provided support to Hamas, a formally identified terrorist organization;
- thus, civil liability under § 2333 exists because the provision of support to terrorists "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States."

The Seventh Circuit also found that a violation of an anti-terrorism criminal statute could, per se, lead to § 2333 liability. The criminal statute, 18 U.S.C. § 2339A or 2339B, outlaws the provision of material support to terrorists and their organizations. The court agreed that proof of support or facilitation of terrorism, a criminal violation of § 2339A or § 2339B, would satisfy the definition of international terrorism in § 2331, as acts that "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States." Funding terrorism involves a violent act — the eventual terrorist attack — and is per se a violation of § 2339A or § 2339B. The court noted that the Senate Report accompanying 18 U.S.C. § 2333 sought to interrupt or imperil the flow of money from sponsor to terrorist "at any point along the causal chain of terrorism."²²(emphasis added). The district court and then the court of appeals found

that funding that meets the definition of "aiding and abetting" an act of terrorism does create liability under § 2333.²³

Why should anyone care about the *Boim* result, as long as they aren't raising funds for weapons and training for Hamas or Hezbollah? What the financial community might be curious about is the court's ruling that a violation of an anti-terrorism statute, 18 U.S.C. § 2339A and 18 U.S.C. § 2339B in this case, satisfied the definition of international terrorism under 18 U.S.C. § 2333, perhaps opening the way for civil liability for an injury resulting from a violation of other anti-terrorism statutes.

Banks have long operated under the regulatory gaze of criminal anti-money laundering statutes, such as the Bank Secrecy Act of 1970²⁴ and the Money Laundering Control Act of 1986²⁵. The International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 ("IMLA Act"), or Title III of the Patriot Act of 2001²⁶, extends new and old anti-money laundering laws to a broad range of financial institutions with new exacting requirements.²⁷ This expansion of anti-money laundering prohibitions under the auspices of the Patriot Act reflects our increasing understanding of the role money laundering plays in international terrorism. Certainly the role overseas financing from terrorist sources played in the tragedy of September 11th highlighted the importance of scrutinizing anti-money laundering mechanisms with an eye to its role in international terrorism.

Those institutions that will feel the greatest burden in complying with Title III of the Patriot Act will not be banks whose internal compliance programs already had to meet pre-2001 anti-money laundering compliance standards, but the newly covered financial institutions such as credit card firms and the money service industry, which previously had not been forced to bear the burden of anti-money laundering

compliance.²⁸ The inexperience these institutions may have with the creation and maintenance of internal anti-money laundering standards will inevitably lead to breakdowns in compliance.

How Substantial is This Specter of Litigation for Banks and Other Financial Institutions?

On February 20, 2003, the FBI arrested University of South Florida Professor Sami Amin Al-Arian for allegedly serving as the conduit for funneling money from the United States to the Palestinian Islamic Jihad in the Middle East. We played a role in the FBI's investigation of the U.S. operations of the Palestinian Islamic Jihad, the group that murdered Alisa Flatow, by providing evidence to the FBI collected during our pre-trial investigation of the causes of Alisa's murder. The 121-page indictment of Al-Arian and his co-defendants is striking for many reasons, not the least of which is the length of time the terrorist cell engaged in sponsorship of Middle Eastern terrorism while based in Florida. The number of references to major U.S. banking institutions used by Al-Arian to transact the everyday banking that facilitated terrorism in the Middle East also catches one's attention. In the *Boim* case, the appellate court recognized that money laundering plays a critical role in the transmittal of funds from the United States to the Middle East. Inevitably, major financial institutions in America will play an inadvertent role in this process. The Al-Arian indictment illustrates one example of how a pipeline connects money in the United States to Middle East terrorism. This sort of pipeline may be replicated by dozens of other terrorist cells throughout the United States.

Almost as inevitable as the inadvertent role played by honest bankers and financial institutions, is an occurrence of a failure in compliance with anti-money

laundering statutes at a financial institution. This seems particularly likely considering the great numbers of financial institutions that will be forced to adopt unfamiliar internal compliance standards as a result of the wide-ranging extension of anti-money laundering regulations by the Patriot Act.

I originally posed the following hypothetical in a piece I wrote for the *Journal of Bank and Lender Liability* in June 2003.

What if it turns out that Sami Al-Arian transferred the funds that bought the bomb that killed Alisa Flatow through a U.S. financial institution that had a criminally inadequate anti-money laundering system? An interesting issue arises when there is a terrorist atrocity in combination with evidence of a violation of an anti-terrorist, anti-money laundering, criminal statute by a financial institution. The victims of the terrorism act would allege that their injury was a foreseeable result of the breach of the criminal statute by the financial institution. While the plaintiffs would have to overcome several obstacles, we can't think of any financial institution that would feel happy having to litigate against victims of terrorism.

This 2003 hypothetical has turned into a 2004 lawsuit. Last year my firm joined with several other law firms to bring dozens of claims against the Arab Bank of Jordan, located in New York City, headquartered in Amman, Jordan. The case is captioned *Little v. Arab Bank* and was brought in the Eastern District of New York. Listen to the following from a Wall Street Journal article written by Glen Simpson on April 20, 2005.

NETANYA, Israel – Two blocks from the beach on a spring day here in March 2003, a 20-year-old Palestinian named Rami Ghanem walked up to the London Cafe and blew himself up, shattering the cafe's 15-foot-high windows and seriously wounding more than 35 people.

A few weeks afterward, Mr. Ghanem's father received at least \$14,000 from an account at Jordan's Arab Bank PLC -- money that was delivered thanks to a local Islamic charity, according to Israeli documents.

The lawsuit is based upon the transfer of millions of dollars from various fundraisers on Saudi Arabia and elsewhere to both charitable front groups for terrorist organizations and to families of Palestinian suicide bombers. The same Wall Street Journal identifies 20 million dollars worth of suspect transfers, to or from more than 45 suspected terrorists or terrorist groups. As most of you know, during the Second Intifada, or Palestinian uprising, any Palestinian who blew himself or herself up, or was imprisoned while trying, was eligible to receive a cash amount from Middle Eastern donors, usually from Saudi Arabia. The Arab Bank funneled a majority of these funds through its New York branch, where the funds were converted to US dollars, to the Bank's Palestinian branches where family members could present martyr certificates and collect their martyr subsidy. Palestinians knew that their families would be paid \$5300.00 dollars should they perform a suicide bombing. This funding scheme was nothing short of a solicitation for murder.

When I wrote the article for the journal in 2003 I never expected to find a bank that knowingly and willingly transferred funds in this manner. To update everyone on the litigation, we have defeated the Bank's 12b motion to dismiss and are wading into discovery against the Bank so we can find further proof of its complicity in the Second Intifada. And two new lawsuits based upon the same fact pattern against two banks separate from the Arab Bank have been brought by a number of the Arab Bank plaintiffs. Strauss v. Credit Lyonnais and Weiss v. NatWest have both survived a motion to dismiss in the United States District Court for the Eastern District of New York. So the idea is

spreading. If we can strike at banks that send monies to terrorist groups, we will do a lot to increase the transaction costs for the terrorists.

Perhaps the signal achievement of anti-terrorism litigation came this year as we heard Hamas complain about the Arab Bank's refusal to hold PA government out of fear of consequential litigation. After Hamas became part of the Palestinian system of governance, several banks severed their ties to the PA or refused to hold PA money. A large part of the banks' fears of litigation was derived as a result of the Arab bank litigation.

It's a shame however that it took a lawsuit to convince banks they should not transfer money to terrorists.

Conclusion

Civil litigators are now playing a role in the war on international terrorism, partially shaped by the tools given to them by Congress and partially shaped by their own creativity and ambition. The evolution of civil liability has proceeded briskly, keeping pace with our changing understanding of the world of international terrorism and how it operates against our citizens. It is safe to say that the field of anti-terrorism civil litigation has innovated its way out of the quiet period that preceded 1996.

The main target these days has become the non-state groups that funnel money or support to terrorist although suits against state-sponsors continue. International financial institutions should especially be aware of the burgeoning field of litigation. International terrorism inherently and unknowingly involves financial institutions in the transfer of funds for a terrorist attack or in the money laundering that is critical to the criminal enterprise. The stiff penalties resulting from anti-money laundering criminal statute

violations would pale in comparison to the costs of big stakes litigation and to the financial institution's reputation should it be named in a complaint.

¹ Steven R. Perles formed the litigation team with Thomas Fortune Fay in 1998 that brought the Flatow case against Iran and five subsequent other cases against various state sponsors of terrorism. *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp 2d 1 (D.D.C., 2000); *Jenco v. Islamic Republic of Iran*, 154 F. Supp 2d 27 (D.D.C., 2001); *Peterson v. Islamic Republic of Iran*, No. 01-2684, (D.D.C., May 30, 2003); *Owens v. Islamic Republic of Iran*, No. 01-2244, (D.D.C.), *Beecham v. Socialist People's Libyan Arab Jamahiriya*, No. 02-0639, (D.D.C.); *Beecham v. Socialist People's Libyan Arab Jamahiriya*, No. 01-2243 (D.D.C.).

³ *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306 (E.D.N.Y. 1995).

⁴ 26 F.3d 1166 (D.C. Cir. 1994).

⁵ Early disappointment gave way to ultimate vindication for Mr. Perles' client, Hugo Princz. After the U.S. Court of Appeals for the District of Columbia Circuit dismissed the suit against Germany, the attorneys for the *Princz* plaintiffs maintained the pressure on the German government by amending the complaint to include four prominent German corporations, current day successors in interest to the German corporations that enslaved Mr. Princz in Auschwitz. While the court refused to allow Mr. Princz' suit against Germany to go forward, the suit was allowed to proceed against the German corporations. Mr. Perles also orchestrated a publicity campaign that coordinated public outrage with support from Congress and the Clinton Administration to force the Federal Republic of Germany to the settlement table. Mr. Princz and all similarly situated victims received a share of a \$23 million settlement.

⁶ 999 F. Supp. 1 (D.D.C. 1998).

⁷ ___ F. Supp. 2d ___, 2003 WL 21251867, (D.D.C., May 30, 2003).

⁸ The Foreign Military Sales program is governed by the Arms Export Control Act, 22 U.S.C. §§ 2751 *et seq.*, under which the President and the Department of Defense enter into agreements with eligible foreign governments and international organizations to sell them defense articles and defense services. The FMS Trust Fund account contains funds on deposit in the United States Treasury. The account is credited with receipts from FMS customers. At the U.S. Treasury, the corpus of the FMS Fund represents the total aggregation of balances for all FMS customers. At the country or customer level, there are 183 separate accounts used by the DoD to separately account for each FMS customer's deposits, other collections or deposits, payment of customer-related bills, refunds and adjustments. As payments are received, the United States deposits them in the foreign customer's FMS Fund account. The United States subsequently makes disbursements from the customer's account to pay for all of the obligations incurred by

the U.S. for each contract for that customer. At the end of the 1970's, Iran had one of the largest FMS programs with the United States. In 1978 and into 1979, Iran was, however, behind in making the required payments under the program. In February 1979, the Iranian program was restructured, with Iran canceling orders for major weapons systems and other items it purchased through the FMS program. On November 4, 1979, the U.S. Embassy and hostages were taken in Iran. On November 19, 1979, Iranian officials repudiated Iran's foreign obligations. Since then, the United States has continued to credit the Iran FMS program account with funds received from diversions (i.e., sales to others) and to debit it for disbursements for termination and other costs.

⁹ The Vienna Convention on Diplomatic Relations, T.I.A.S. 7502, 23 U.S.T. 3227 (1964).

¹⁰ *Flatow v. Islamic Republic of Iran*, 74 F.Supp.2d 18 (D.D.C. 1999).

¹¹ *Flatow v. Islamic Republic of Iran*, 74 F.Supp.2d 18 (D.D.C. 1999); *Flatow v. Islamic Republic of Iran*, 76 F.Supp.2d 16 (D.D.C. 1999); *Flatow v. Islamic Republic of Iran*, 76 F.Supp.2d 28 (D.D.C.,1999).

¹² Senator Frank Lautenberg (D.-N.J.) was instrumental in the passage of the compromise legislation. He has been and continues to be a friend of the victims of terrorism and has supported them in their various battles for help from our government.

¹³ *Ministry of Defense & Support for Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems Inc.*, 29 F. Supp 2d 1168 (S.D. Cal., 1998).

¹⁴ *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065 (9th Cir., 2002).

¹⁵ *Flatow v. Islamic Republic of Iran*, 67 F. Supp 2d 535 (D. Md., 1999).

¹⁶ John Mintz, U.S. Keeps Close Tabs on Muslim Cleric Officials Suspect Activist Has Close Ties With Iranian Regime, Washington Post, A1 (January 1, 2003).

¹⁷ *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

¹⁸ *Cubic Defense Sys., Inc. v. Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran*, 236 F.Supp.2d 1140 (S.D.Cal. 2002).

¹⁹ Pub. L. No. 106-386, § 2002, 114 Stat. 1464 (2000).

²⁰ The Victims Protection Act also covered a single lawsuit against the Republic of Cuba, *Alejandre v. Republic of Cuba*, based upon the Cuban Air Force shoot-down of a small unarmed civilian plane and the resulting deaths of its four passengers. 996 F. Supp. 1239 (S.D.Fla., 1997). The Victims Protection Act allowed the plaintiffs in this case to draw directly from frozen Cuban assets to satisfy their outstanding compensatory damages. 114 Stat. 1464 (2000). The Victims Protection Act's compensation mechanism covered only this lawsuit in addition to the several lawsuits against Iran.

²¹ Pub. L. No. 107-297, 116 Stat. 2322, Nov. 26, 2002.

²² S. Rep. 102-342 at 22 (1992).

²³ *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002).

²⁴ 31 U.S.C. § 5311.

²⁵ 18 U.S.C. § 1956.

²⁶ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107- 56, 115 Stat. 272 (2001).

²⁷ George A. Lyden, *The International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001*, 8 *Fordham J. Corp. & Fin. L.* 201 (2003).

²⁸ *New Rules for Money Laundering*, *Wall Street Journal* (April 23, 2002).