Clients&FriendsMemo

U.S. Firms Continue to Face Liability for Terrorist Attacks under the Antiterrorism Act

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Last year, a group of U.S. military veterans and the relatives of troops killed in Iraq filed a lawsuit against several large international pharmaceuticals, accusing them of aiding and abetting terrorism by selling products to Iraq's Ministry of Health which were used to finance operations by the notorious Mahdi Army Group.[1] In early 2018, a woman injured in the 2015 Paris attacks by the Islamic State of Iraq and the Levant sued Facebook, Twitter, and Google, alleging that the social media platforms assisted terrorists by allowing them to recruit members, distribute propaganda, and coordinate activities.[2] These are just two recent examples of U.S. companies facing potential exposure under the Antiterrorism Act ("ATA"), a decades-old statute designed to permit terrorist victims to seek compensation from their attackers.[3]

Since many would-be defendants under the ATA reside in foreign jurisdictions far beyond the reach of U.S. district courts, and those that are reachable often lack assets to satisfy a judgment, plaintiffs' lawyers have been turning to deeper and more available pockets. Financial services, social media, life sciences, and other companies have become targets of ATA actions on the theory that, by processing financial transactions and engaging in other commercial activities with terrorist groups, they are complicit in terrorist attacks. In addition, there have been media reports that ATA lawsuits have led to inquiries by the Department of Justice into defendants' international business practices.[4] Therefore, in-house counsel and compliance officers should familiarize themselves with the ATA to determine whether and how to vet potential clients, counterparties, and business partners for potential litigation exposure under this increasingly important body of law.

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1 *Atchley, et al. v. AstraZeneca, et al.,* 2017 WL 4685832 (D.D.C. 2017).

2 *Palmucci v. Twitter, Inc.*, *et al.*, 2018 WL 898469 (N.D.Ill.).

3 18 U.S.C. § 2331, *et seq.*, *available at* https://www.gpo.gov/fdsys/pkg/USCODE-2017-title18/html/USCODE-2017-title18-partI-chap113B.htm.

4 *See* Gardiner Harris, *Justice Dept. Investigating Claims That Drug Companies Funded Terrorism in Iraq*, N.Y. TIMES, July 31, 2018, *available at* https://www.nytimes.com/2018/07/31/us/politics/drug-companies-iraq-terrorism.html.

I. Background

Congress enacted the ATA in 1987 to prohibit financial transactions supporting the Palestine Liberation Organization.[5] In 1992, Congress amended the law to include criminal penalties for extraterritorial terrorist attacks on U.S. nationals, along with a private right of action for U.S. victims of international terrorism.[6] This allowed victims to bring civil actions against the principals behind a terrorist attack and recover treble damages and attorneys' fees. Plaintiffs were able to sue for injuries to their "person, property, or business" and have ten years to bring a claim.

Under the ATA's original private right of action, suits alleging secondary liability for third parties for helping to facilitate a terrorist attack were not permitted by most courts.[7] However, plaintiffs could subsequently bring actions against financial institutions and others under the material support statutes,[8] the first of which was enacted in 1994, which prohibit knowingly providing "material support or resources" to a Foreign Terrorist Organization.[9] This includes any property, tangible or intangible, or service, including banking and other financial services.[10] As a result, financial institutions that provide basic banking services could run afoul of the material support statutes if the elements for culpability were met.[11]

In 2016, the ATA changed significantly with passage of the Justice Against Sponsors of Terrorism Act ("JASTA"), which Congress enacted over President Obama's veto.[12] JASTA expanded the ATA to provide for aiding and abetting liability, permitting plaintiffs to bring actions against those who

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5 Pub. L. No. 100-204, §§ 1001-1005, 101 Stat. 1406 (codified at 22 U.S.C. §§ 5201-5203 (1987)).

6 18 U.S.C. § 2333(a).

7 *See Rothstein v. UBS AG*, 708 F.3d 82, 97-98 (2d Cir. 2013); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 93 (7th Cir. 2008).

8 The violations of criminal law creating civil liability under 18 U.S.C. § 2333 can include both direct acts of violence as well as the related material support and terrorist financing statutes: 18 U.S.C. § 2339A (which prohibits providing material support to for the commission of terrorist acts); 18 U.S.C. § 2339B (which prohibits providing material support to designated terrorist organizations); and 18 U.S.C. § 2339C (which prohibits the financing of terrorism).

9 A Foreign Terrorist Organization ("FTO") is a foreign organization that has been designated by the Secretary of State pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. § 1189). *See* U.S. DEPARTMENT OF STATE website at https://www.state.gov/j/ct/rls/other/des/123085.htm.

10 18 U.S.C. § 2339A(b)(1).

11 *See Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 44 (D.D.C. 2010) (the provision of basic banking services can constitute material support "so long as other elements of § 2339A(a), such as knowledge, are met"). *But cf. Hussein v. Dahabshiil Transfer Servs. Ltd.*, 230 F. Supp. 3d 167 (S.D.N.Y. 2017) (finding that although money passed through the defendant's business, a traditional Middle Eastern financial network, to Al-Shabaab (a designated FTO), the defendant merely processed small transactions between individuals using pseudonyms without violating anti-money laundering controls or knowing of the terrorist connection); *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 833-35 (S.D.N.Y. 2005) (holding that providing routine banking services, without having knowledge of terrorist activities, was insufficient to subject a bank to liability).

12 Pub. L. No. 144-222, 130 Stat. 854 (Sept. 28, 2016) (expanded secondary liability provision codified at 18 U.S.C. § 2333(d)(2)).

knowingly provide substantial assistance, or who conspire with the person who committed such an act of terrorism, where such acts were planned or authorized by an FTO.[13] As a result, companies now face a greater risk of liability for inadvertently providing material support in the form of money, goods, or services to FTOs. This risk is particularly significant for those entities doing business – even remotely over the internet – in countries or markets with a history of terrorist activity.

II. Standard for ATA Liability

To establish liability under the ATA, a plaintiff must prove the following:[14]

- *Act of International Terrorism*. This includes any activities that "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State" and that "appear to be intended to coerce or intimidate a civilian population or influence government conduct or policy."[15] The acts must occur "primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum."[16] "Acts of war" and "domestic terrorism" are expressly excluded.[17]
- *Injury*. The plaintiff-victim must be a U.S. national or his or her estate, survivors, or heirs.
- *Causation*. Historically, plaintiffs were required to prove that a defendant's conduct was the proximate cause of the plaintiff's injuries – *i.e.*, that it was reasonably foreseeable that the defendant's actions would cause the resulting injuries.[18] However, as a result of JASTA, plaintiffs may pursue secondary liability on the argument that a defendant aided and abetted acts of terrorism by others – that acts caused plaintiff's injuries.[19]
- *Intent*. The ATA is silent on the required intent required to establish liability, and the requisite mental state has instead been defined by courts according to general principles of tort law. Although secondary aiding and abetting and conspiracy liability are now permitted post-JASTA,

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[13] 18 U.S.C. § 2333(d)(2). Since the enactment of JASTA, courts are recognizing the broader liability now available under the ATA. *See*, *e.g.*, *Owens v. BNP Paribas S.A.*, 235 F. Supp. 3d 85, 95 (D.D.C. 2017) (distinguishing between the pre-JASTA ATA (which still applies to pre-September 11, 2001 claims) and the post-JASTA ATA (which expressly includes aiding and abetting liability)).

[14] *Owens*, 235 F. Supp. 3d at 90.

[15] 18 U.S.C. § 2331(1).

[16] *Id.*

[17] 18 U.S.C. §§ 2331(4)-(5).

[18] *See Sokolow v. Palestine Liberation Org.*, 60 F. Supp. 3d 509, 514-515 (S.D.N.Y. 2014) (quoting *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 542, 553 (E.D.N.Y. 2012)).

[19] *See Linde v. Arab Bank, PLC*, 882 F.3d 314, 331 (2d Cir. 2018).

the contours of that secondary liability remain under debate. However, a showing of mere negligence is insufficient – a defendant either must knowingly engage in intentional misconduct or must have acted recklessly or willfully blind.[20]

In addition, the Second Circuit recently held in *Linde v. Arab Bank* that proving a violation of the material support statutes alone is not enough to constitute an "act of international terrorism."[21] For the material support statutes, the requisite *mens rea* is clearly defined.[22] However, to establish aiding and abetting liability under the ATA, a plaintiff must fully prove the elements constituting an "act of international terrorism" – including violence to human life, intent to intimidate or coerce a civilian population, and occurrence primarily outside the United States or transcendence of national boundaries.[23] As a result, the Second Circuit in *Linde* vacated a $100 million judgment for the plaintiff after finding that the trial court's jury instructions had erroneously substituted the *mens rea* of a material support statute (18 U.S.C. § 2339B) for the mental state required to prove an aiding and abetting theory under § 2333—finding that § 2333 required a greater showing of intent than mere knowledge of terrorist activity.[24]

III. Key Takeaways for U.S. Companies

Financial institutions and public companies with global operations should be wary of potential exposure under the ATA, and should implement defensive measures to avoid inadvertently doing business with individuals or organizations associated with terrorism. A few items to consider include:

- Companies should monitor the news regularly in their countries of operation to identify potential trends in terrorist activity. Modern terrorist groups have become adept in using technology and obtaining financing, and can act quickly to exploit new opportunities and expend their activities into countries traditionally seen as having a lower risk of terrorism. Legal and compliance personnel should consider the Federal Bureau of Investigation and the Department of State as outside resources for updated information on terrorist trends and developments.
- Companies manufacturing or distributing products in markets with a higher risk of terrorist activities could consider taking steps to go beyond simply knowing who their customers are, but

[20] *Boim*, 549 F.3d at 693.

[21] *Linde*, 882 F.3d at 329.

[22] 18 U.S.C. § 2339A requires that the material support be provided "knowing or intending" that it will be used to plan or carry out a terrorist act. 18 U.S.C. § 2339B(a)(1) requires that "a person must have knowledge that the organization is a designated terrorist organization . . ., that the organization has engaged or engages in terrorist activity . . ., or that the organization has engaged or engages in terrorism. . . ."

[23] *Linde*, 882 F.3d at 329 ("[A]iding and abetting an act of international terrorism requires more than the provision of material support to a designated terrorist organization. Aiding and abetting requires the secondary actor to be "aware" that, by assisting the principal, it is itself assuming a "role" in terrorist activities.").

[24] *Id.*

also determining, to the extent feasible, whether their products are being misused or diverted from legitimate users for the benefit of FTOs.

- Firms entering into or operating in markets with a higher risk of bribery and corruption should consider how to enhance their existing compliance programs and controls under the Foreign Corrupt Practices Act ("FCPA") and the UK's Bribery Act 2010 to also identify potential indirect transactions with FTOs. Prominent individuals, charities and companies in such countries may have links to terrorist organizations even though they are respected in the local business and political environment.
- Financial institutions that should remain diligent to ensure their Bank Secrecy Act anti-money laundering ("BSA/AML") compliance programs are duly designed to detect terrorist financing and economic sanctions violations. Vetting potential clients and businesses for links to FTOs should be incorporated into routine due diligence procedures, with enhanced due diligence for higher-risk countries and industries.
- Technology companies should be vigilant in monitoring how users may be misusing their platforms in ways to support FTOs and terrorist activity. If such misuse is identified, companies should make a swift determination on how to address it and whether additional safeguards are necessary and appropriate.
- Companies should consider specialized training and close supervision for their foreign branches and subsidiaries to ensure that local national employees do not entertain higher levels of risk than their U.S. counterparts.

IV. Conclusion

Lawsuits under the ATA are a growing area of liability against which financial institutions and public companies should protect themselves. With the recent enactment of JASTA and potential legislative developments in the works that may make the ATA even more expansive, U.S. firms in higher-risk markets and industries with potential indirect ties to terrorist groups should expect such lawsuits to continue with a vengeance. In addition, as has recently been the case, these lawsuits can potentially lead to regulatory scrutiny over companies' overseas activities in the FCPA and BSA/AML space. Firms that implement and can demonstrate active measures to identify trends and avoid transactions which can be linked to terrorist groups and activities will have a much stronger defense against litigation and regulatory exposure than those which opt for a more passive approach.

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