Anti-Terrorism Act Liability for Financial Institutions

Second Circuit Holds That Plaintiffs Seeking to Bring Anti-Terrorism Act Claims Against a Financial Institution Failed to Adequately Allege Proximate Causation

SUMMARY
The past decade has seen a surge in the number of cases brought against financial institutions and other major corporations under the Anti-Terrorism Act, 18 U.S.C. § 2331 et seq. (“ATA”). Plaintiffs alleging injuries by acts of international terrorism have sought to recover treble damages for their injuries from financial institutions on the theory that the financial institutions supplied, directly or indirectly, financial services to the terrorist groups. The frequency with which such suits are filed is unlikely to diminish, particularly because Congress recently extended the statute of limitations for ATA claims from four to ten years, and in some circumstances even longer. On February 14, 2013, the United States Court of Appeals for the Second Circuit issued a significant opinion with respect to the ATA’s causation requirements. In Rothstein v. UBS AG, the Court held that the plaintiffs had failed adequately to allege that UBS’s transfers of funds for the government of Iran were the proximate cause of the plaintiffs’ injuries suffered in terrorist attacks by Hamas and Hizbollah in Israel. Rothstein will be an important precedent for financial institutions and other companies in defending themselves against ATA lawsuits.

BACKGROUND
The ATA provides for a private right of action for treble damages to any U.S. national “injured in his or her person, property, or business by reason of an act of international terrorism.” 18 U.S.C. § 2333(a). The statute defines “international terrorism” to include “activities that . . . involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States.” 18 U.S.C. § 2331(1)(A). In ATA cases filed against financial institutions, plaintiffs have alleged that a financial institution violated the
criminal laws prohibiting persons from knowingly providing material support to a foreign terrorist organization (“FTO”) as designated by the U.S. Department of State. 18 U.S.C. § 2339B. “Material support” is defined broadly to include the provision of “financial services.” 18 U.S.C. § 2339B(g)(4). Moreover, courts have interpreted one of the relevant material support provisions, 18 U.S.C. § 2339B, to require only that the defendant financial institution know that it is providing material support to a FTO, or to an entity controlled by the FTO (e.g., a charity run by a FTO), and not that the defendant knew the organization would use the funds for terrorism.¹

The plaintiffs in Rothstein were victims of terrorist attacks that were carried out by Hamas and Hizbollah in Israel. The plaintiffs sued UBS under the ATA, claiming that UBS had transferred U.S. currency to the government of Iran, which in turn had provided financial support to Hamas and Hizbollah. The State Department has designated Iran as a state sponsor of terrorism that is a “central banker for terrorism” and that continues to encourage terrorist attacks by Hamas and Hizbollah. The plaintiffs alleged that the support Iran provided to Hamas and Hizbollah facilitated the terrorist attacks that caused plaintiffs’ injuries.

The district court granted UBS’s motion to dismiss the action, holding that the plaintiffs’ “extended chain of inferences” was “far too attenuated to provide plaintiffs with sufficient standing to bring this action under federal law.” The plaintiffs appealed to the Second Circuit.

DISCUSSION

The Second Circuit reversed the district court’s holding that the plaintiffs lacked standing to sue UBS. Noting that “the test for . . . Article III standing imposes a standard lower than proximate cause,” the Court held that the plaintiffs had satisfied the standard because UBS’s transfers increased the amount of U.S. currency Iran had, and “the more U.S. currency Iran possessed, the greater its ability to fund Hizbollah and Hamas for the conduct of terrorism; and the greater the financial support Hizbollah and Hamas received, the more frequent and more violent the terrorist attacks they could conduct.”

The Court nevertheless dismissed the complaint, holding that it failed to allege “a proximate causal relationship between the cash transferred by UBS to Iran and the terrorist attacks by Hizbollah and Hamas that injured the plaintiffs.” Analogizing the text of the ATA to similar provisions in other federal statutes, the Court held that the ATA does not “permit recovery on a showing of less than proximate causation.”² The Court rejected the plaintiffs’ argument that because “the legislative history of the ATA indicates that Congress intended to create impediments to terrorism by ‘the imposition of liability at any

¹ Plaintiffs also have asserted claims under related sections of the ATA, which require a defendant to know or intend that the material support will be used to violate certain criminal laws or that it is providing funds to finance terrorist activities. See 18 U.S.C. §§ 2339A, 2339C.

² Although Rothstein did not explicitly define proximate causation, the Second Circuit, in analogous contexts, has explained the concept in terms of “reasonable foreseeability.”
point along the causal chain of terrorism,’ . . . a standard lower than proximate cause in § 2333 is needed to implement that intent.”

The Court determined that the plaintiffs had failed adequately to plead proximate causation because they did not allege that (i) “UBS was a participant in the terrorist attacks that injured plaintiffs;” (ii) “UBS provided money to Hizbollah or Hamas;” (iii) “U.S. currency UBS transferred to Iran was given to Hizbollah or Hamas;” or (iv) “if UBS had not transferred U.S. Currency to Iran, Iran, with its billions of dollars in reserve, would not have funded the attacks in which plaintiffs were injured.” The Court rejected as “conclusory” the plaintiffs’ allegations that “UBS knew full well that the cash dollars it was providing to a state sponsor of terrorism such as Iran would be used to cause and facilitate terrorist attacks by Iranian-sponsored terrorist organizations such as Hamas [and] Hizbollah.” The Court noted that, as a government, Iran “has many legitimate agencies, operations, and programs to fund,” and that the plaintiffs needed more than conclusory allegations to plausibly show that the funds UBS transferred to Iran were used for terrorism.

The Second Circuit further held that the ATA does not support civil aiding and abetting liability. The Court reasoned that, because § 2333 “is silent as to the permissibility of aiding and abetting liability,” the Court should not infer congressional intent to impose such liability. The Court also noted that the ATA’s criminal provisions refer to aiding and abetting liability and concluded that it doubted “that Congress, having included in the ATA several express provisions with respect to aiding and abetting in connection with the criminal provisions, can have intended § 2333 to authorize civil liability for aiding and abetting through its silence.”

**IMPLICATIONS**

There has been a steady increase in the number of ATA lawsuits, including more than a dozen against third parties such as major financial institutions, oil companies and food distribution companies. The number is only likely to increase in the future. On January 3, 2013, Congress extended the statute of limitations for ATA claims to ten years (from four years). Congress also implemented a special limitations period for ATA claims arising from acts of international terrorism that occurred on or after September 11, 2001, allowing plaintiffs to bring those claims until January 2, 2019, or until the normal ten-year limitations period expires, whichever is longer.

*Rothstein* is certain to play a prominent role in future decisions interpreting the ATA. For the several ATA cases currently pending in courts within the Second Circuit, *Rothstein* is binding authority. Even beyond the Second Circuit, *Rothstein’s* reasoning likely will be highly influential given the unsettled area of law with respect to the ATA. The decision will be an important precedent for financial institutions and other corporations defending themselves from ATA claims. First, *Rothstein* clearly set forth the proximate cause requirement that plaintiffs must adequately allege. The plaintiffs’ causation arguments that the Second Circuit rejected in *Rothstein* are similar to those alleged by plaintiffs in several other ATA cases.
In addition, Rothstein’s holding—in conflict with the decisions of several other federal courts—that the ATA does not provide for civil aiding and abetting liability will help to limit potential ATA claims against financial institutions solely to theories of primary liability. Given the disagreement between the Second Circuit and some other federal courts that have addressed the availability of secondary liability under the ATA, it is possible that the Supreme Court eventually may need to consider the issue.

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CONTACTS

New York
Nicolas Bourtin +1-212-558-3920 bourtinn@sullcrom.com
Bruce E. Clark +1-212-558-3557 clarkb@sullcrom.com
Elizabeth T. Davy +1-212-558-7257 davye@sullcrom.com
Mitchell S. Eitel +1-212-558-4960 eitelm@sullcrom.com
Tracy Richelle High +1-212-558-4728 hight@sullcrom.com
Sharon L. Nelles +1-212-558-4976 nelless@sullcrom.com
Joseph E. Neuhaus +1-212-558-4240 neuhaujs@sullcrom.com
Steven R. Peikin +1-212-558-7228 peikins@sullcrom.com
Richard C. Pepperman II +1-212-558-3493 peppermanr@sullcrom.com
Karen Patton Seymour +1-212-558-3196 seymourk@sullcrom.com
Samuel W. Seymour +1-212-558-3156 seymours@sullcrom.com
Michael M. Wiseman +1-212-558-3846 wisemannm@sullcrom.com
Alexander J. Willscher +1-212-558-4104 wilschera@sullcrom.com

Washington, D.C.
Daryl A. Libow +1-202-956-7650 libowd@sullcrom.com

Los Angeles
Robert A. Sacks +1-310-712-6640 sacksr@sullcrom.com

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