

Second Circuit Opens Door to 9/11 Claims Against Foreign Governments

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This past November, in *Doe v. Bin Laden*,¹ the U.S. Court of Appeals for the Second Circuit ruled that a man could proceed with his lawsuit against the nation of Afghanistan for the death of his wife in the Sept. 11, 2001, World Trade Center attack. The plaintiff, who was allowed to file the action using a pseudonym to protect himself and his family, seeks to hold Afghanistan liable for the support and protection its former Taliban-led government provided to the al Qaeda terrorists. The ruling was the first positive legal news for 9/11 families who have brought death claims against Afghanistan and other foreign sovereigns.



Doe represented a swift legal about-face for the Second Circuit that led the panel to solicit the views of all active judges under a rarely invoked "mini-en-banc" internal court procedure designed to address inconsistent prior opinions.² Resort to the procedure was necessary because of the Second Circuit's decision three years earlier in *In re Terrorist Attacks on September 11, 2001*,³ which declared that the Foreign Sovereign Immunities Act (FSIA) barred suits against the government of Saudi Arabia and its officials for their alleged involvement in the 9/11 attack and specifically ruled that the FSIA's noncommercial tort exception was inapplicable. *Doe* determined, however, that the noncommercial tort exception of the FSIA actually allowed suit against a

foreign government for the 9/11 attack.

FSIA and Exceptions

The FSIA provides that a foreign state is immune from the jurisdiction of U.S. courts unless one of a limited number of exceptions to sovereign immunity applies. The two exceptions addressed in litigation involving the 9/11 attack are the noncommercial tort exception, 28 U.S.C. 1605(a)(5), and the terrorism exception, 1605(a)(7).

The noncommercial tort exception allows claims to go forward against foreign states that seek:

money damages against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of the foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment .

except for "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused."⁴

The terrorism exception was added to the FSIA by Congress in 1996 in response to a series of horrific terrorist attacks against Americans overseas, most notably the 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland. Under the FSIA prior to that amendment, suit against a foreign government such as Libya, whose agents secreted a suitcase bomb onto the Pan Am jet, was barred where an attack occurred outside the United States.⁵ Congress decided to fill this gap in the statute by adding a limited right to sue certain foreign governments for acts of terrorism abroad. The terrorism exception allows jurisdiction over foreign states in actions arising from "acts of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources" against U.S. nationals abroad only if the Department of State officially designates the foreign nation as a "state sponsor of terrorism."⁶

The Second Circuit considered these FSIA exceptions in *In re Terrorist Attacks on September 11, 2001*, which consolidated various actions filed against al Qaeda and its alleged sponsors, including the nations of

Saudi Arabia, Sudan and Iran. Early in the litigation, Saudi Arabia and several Saudi princes named as defendants moved to dismiss on various grounds, including FSIA immunity. Both the district court and the Second Circuit ruled in their favor.

The Second Circuit determined that Saudi princes named individually as defendants were entitled to dismissal because the "FSIA grants immunity to individual officials of a foreign government for their official-capacity acts"⁷ This ruling, however, was abrogated by the Supreme Court's 2010 decision in Samantar v. Yousif,⁸ which held that the FSIA did not apply to actions brought against individual defendants, even those working in their official capacity.

The Second Circuit also determined that the FSIA did not permit suit against the Saudi state. The court found that:

The State Department has never designated the Kingdom [of Saudi Arabia] a state sponsor of terrorism. As a consequence, the Terrorism Exception is inapplicable here. But to apply the Torts Exception where the conduct alleged amounts to terrorism within the meaning of the Terrorism Exception would evade and frustrate that key limitation on the Terrorism Exception.⁹

The court concluded that it would be improper to "shoehorn" a claim properly brought under the terrorism exception into the tort exception.¹⁰

Case Against Afghanistan

Three years later in *Doe*, the Second Circuit addressed similar conspiracy and wrongful death claims against Afghanistan. The complaint alleged that Afghanistan was liable for providing support to bin Laden and al Qaeda as well as a safe haven and base of operations to conduct terrorist attacks on the United States. Afghanistan did not respond to the suit for several years and then moved to vacate the entry of default and dismiss the complaint for lack of subject matter jurisdiction.

The plaintiff argued that his allegations of Afghanistan's support to al Qaeda fell well within the parameters of the FSIA's noncommercial tort exception. Afghanistan repeated the same arguments previously made by Saudi Arabia in the 9/11 litigation, namely that the only proper basis for the claims was the FSIA's terrorism exception, which permitted suit only against a designated state sponsor of terrorism. Afghanistan asserted that it was entitled to immunity because the State Department had never made the designation required by the statute.

The district court denied the motion to dismiss, concluding that the suit was properly considered under the noncommercial tort exception but that a definitive ruling could not be made because two factual disputes remained. The court instructed that limited discovery should proceed to determine whether the Taliban was acting as the sovereign nation of Afghanistan when it allegedly supported the 9/11 attacks and whether any such actions were "discretionary" under 1605(a)(5). Afghanistan filed an immediate appeal rather than conduct discovery.

The Second Circuit upheld the district court's ruling that the noncommercial tort exception was a proper basis for plaintiffs' claims. The court observed that the allegations of the complaint fell squarely within the "plain language" of the tort exception, finding that "there is no doubt that the terrorist acts giving rise to the harms at issue aircraft sabotage, extrajudicial killing, and conspiracy to support the same are all torts."¹¹

The court rejected Afghanistan's argument that the later-added terrorism exception was an implicit limitation on the already-existing jurisdiction conferred by the tort exception. The Second Circuit focused on the statute's terms, noting that Congress limited "the terrorism exception to 'any case not otherwise covered by the FSIA.'"¹² In other words, "Congress expressly stated that the terrorism exception should only apply when the preexisting exceptions failed to cover a case."¹³ The court stated that

Afghanistan's proposed narrow reading of the noncommercial tort exception would not so much be a reading of the statute as it would be a decision that the terrorism exception amounts to a partial repeal by implication of the noncommercial tort exception. Prior to the terrorism exception's enactment, several courts had allowed suits against foreign governments under the noncommercial tort exception for tortious and arguably "terrorist" acts occurring in the United States. Under the narrow reading of the noncommercial tort exception urged by Afghanistan, the enactment of the terrorism exception would therefore have constituted a repudiation of the then-prevailing interpretation of the noncommercial tort exception.¹⁴

In a footnote, the *Doe* court observed that "[w]e recognize that this holding is inconsistent with that reached by a different panel of our Court in *In re Terrorist Attacks on September 11, 2001*"¹⁵ The court stated that its opinion had been circulated to the members of the prior panel and indeed all active members of the court and that no objection was made.

The *Doe* decision removes the initial hurdle to suit against a foreign government for its alleged involvement in supporting al Qaeda, but the Second Circuit was careful to note the limitations of its ruling:

Let us be clear: we make no judgment as to whether the allegations in the complaint are sufficient to state a claim or even to provide jurisdiction. Indeed, the district court had ordered further discovery to provide for fact finding with regard to whether the alleged acts were attributable to Afghanistan and whether they were discretionary.¹⁶

Discovery is now proceeding in *Doe*. And the plaintiffs in *In re Terrorist Attacks on September 11, 2001*, have petitioned the Second Circuit to reinstate the dismissed claims against Saudi Arabia and the Saudi princes.

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Endnotes:

1. 633 F.3d 64 (2d Cir. 2011).
 2. *Id.* at 70 n.10.
 3. 538 F.3d 71 (2d. Cir. 2008).
 4. 28 U.S.C. 1605(a)(5).
 5. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 246 (2d Cir. 1996).
 6. 28 U.S.C. 1605A(a)(1),(2).
 7. 538 F.3d at 83.
 8. 130 S.Ct. 2278, 2289 (2010).
 9. 538 F.3d at 88.
 10. *Id.*
 11. 633 F.3d 67.
 12. *Id.* at 70.
 13. *Id.*
 14. *Id.* at 68-69.
 15. *Id.* at 70 n.10.
 16. *Id.* at 70-71.
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