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Aviation Law — By Steven R. Pounian and Justin T. Green

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The coordinated terrorist attacks of Sept. 11, 2001 were carried out by 19 al Qaeda terrorists, but their murderous deeds would never have occurred without substantial financial and logistical backing from other individuals and groups. As the U.S. Court of Appeals for the Seventh Circuit has found in other circumstances,

> *there would not be a trigger to pull or a bomb to blow up without the resources to acquire such tools of terrorism and to bankroll the persons who actually commit the violence....*
>
> *The only way to imperil the flow of money and discourage the financing of terrorist acts is to impose liability on those who knowingly and intentionally supply the funds to the persons who commit the violent acts.*[1]

Victims of the Sept. 11 attacks filed claims in the U.S. District Court for the Southern District of New York under the Anti-Terrorism Act, 18 U.S.C. §2331 et seq. (ATA), which establishes a civil cause of action against terrorists and those who knowingly provide support for terror attacks against America and Americans.[2] The purpose of the actions was to hold financially accountable the individuals, businesses, charities and groups allegedly responsible for the Sept. 11 attacks, and to deter future support of al Qaeda and other terrorist groups.

Plaintiffs alleged that the Saudi government, its agency, various Saudi officials and Saudi businessmen provided support for the al Qaeda attack, including support provided indirectly through "charities" that funneled money to the terrorists. Some of these contributions, plaintiffs allege, took place after Osama bin Laden issued the equivalent of a declaration of war on the United States in the mid-1990s:

> *The ruling to kill the Americans and their allies - civilians and military - is an individual duty for every Muslim who can do it in any country in which it is possible to do it....*

On Aug. 14, 2008, the Second Circuit issued its decision affirming the dismissal of claims against the Kingdom of Saudi Arabia (the Kingdom), the Saudi High Commission for Relief to Bosnia and Herzegovina (SHC), a charitable organization run by the Kingdom, and five Saudi Arabian princes.[3] The court upheld the opinion of late U.S. District Judge Richard C. Casey that the Kingdom, the SHC and four of the five named princes were entitled to sovereign immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§1330, 1602-1611, which (barring an applicable exception) grants foreign sovereigns immunity from suit in the United States. The court further held that none of the princes were subject to personal jurisdiction in the United States.

Sovereign Immunity

The Second Circuit quickly disposed of certain plaintiffs' claims against the Kingdom finding that it was immune under the FSIA. The FSIA provides the only basis for obtaining jurisdiction over a foreign state in federal court, and foreign sovereigns are presumptively immune from suit unless one of the FSIA's enumerated exceptions applies. A key exception does permit suits for terrorist acts but only against a handful of countries formally designated by the U.S. State Department as a "state sponsor of terrorism." Those countries include Iran and Sudan, but not Saudi Arabia. The court's decision focused on whether the FSIA's immunity extended to protect individual government officials and the SHC from suit.

a. The FSIA and Individuals

As four of the five named princes were government officials, the appeal presented a question of first impression in the Second Circuit: whether the FSIA protects individual officials of a foreign government for acts performed in their official capacities. The Second Circuit followed the Fourth, Fifth, Sixth, Ninth and District of Columbia circuits in holding that the FSIA immunizes the officials for their official acts, and rejected the Seventh Circuit, which had narrowly construed the FSIA to exclude protection to individuals. The FSIA provides that a "separate legal person, corporate or otherwise . . . " is considered an "agent or instrumentality" of a foreign state.[4]

The Second Circuit found that while the FSIA language more naturally applies to an "organization or collective," it did not exclude individuals. The court further noted that the pre-FSIA practice provided immunity to government officials acting in their official capacities and that there was no indication that Congress intended a substantial departure from that practice when it passed the FSIA.

For these reasons the Second Circuit joined "the majority of Circuits in holding that the FSIA grants immunity to individual officials of a foreign government for their official-capacity acts . . . "[5]

b. FSIA Exceptions

The Second Circuit held that plaintiffs' claims did not fall within any exceptions to immunity. The terrorism exception did not apply because Saudi Arabia had not been designated as a "state sponsor," and the court concluded that the FSIA's torts exception was unavailable as an alternative avenue for suit:

"[T]o 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 of the Terrorism Exception....If acts of terrorism are considered torts for the purposes of the Torts Exception, then any claim that could be brought under the Terrorism Exception could also be brought under the Torts Exception. If this were so, the Terrorism Exception would be drained of all force....[6]

The Second Circuit also rejected an argument that the defendants' charitable contributions were a form of money laundering, which plaintiffs argued would implicate the FSIA's commercial activities exception. The court held that its analysis regarding the torts exception (as an attempt to avoid the limitations of the terrorist exception) applied equally to the commercial activities exception, but also decided that the alleged conduct did not constitute commercial activity.

c. The Saudi High Commission

Certain plaintiffs challenged the district court's conclusion that the SHC is an "agency or instrumentality" of the Saudi Kingdom and was therefore entitled to immunity under the FSIA.

The Second Circuit applied the following criteria to the analysis:

> (1) whether the foreign state created the entity for a national purpose;
>
> (2) whether the foreign state actively supervises the entity;
>
> (3) whether the foreign state requires the hiring of public employees and pays their salaries;
>
> (4) whether the entity holds exclusive rights to some right in the [foreign country]; and
>
> (5) how the entity is treated under foreign state law.[7]

The SHC presented declarations that the Kingdom had formed the SHC as a governmental entity to support charitable projects in Bosnia-Herzegovnia and vested it with the "sole authority to collect and distribute charitable funds in Bosnia." According to a member of the Kingdom's Council of Ministers, the SHC, as "a government commission," is chaired by a government official, conducts itself with the domestic or foreign policy objectives of the Kingdom and can be sued in the Kingdom's administrative courts. Furthermore, many SHC employees were "seconded from the Kingdom's ministries or agencies, which continues to pay their salaries."[8]

Based on this "undisputed record," The court held as follows:

> [T]he SHC is an organ of the Kingdom. The SHC was created for a national purpose (channeling humanitarian aid to Bosnian Muslims); the Kingdom actively supervises it; many SHC workers are Kingdom employees who remain on the Kingdom's payroll; the SHC holds the "sole authority" to collect and distribute charity to Bosnia; and it can be sued in administrative courts in the Kingdom.[9]
>
> The Second Circuit further rejected plaintiffs' argument that the SHC waived its immunity by identifying itself as a "nongovernmental" entity when it registered with the Bosnian authorities finding that it did "not reflect a conscious decision for the SHC to waive its sovereign immunity in American courts."

Personal Jurisdiction

The Second Circuit held that none of the Saudi Princes were subject to jurisdiction in the United States. Plaintiffs sought an expansive view of personal jurisdiction over those who supported al Qaeda, which had declared war on America. Plaintiffs argued that U.S. courts should be able to exercise personal jurisdiction over all those who supported al Qaeda, even where the support was provided through intermediaries. The Second Circuit disagreed, finding that

> [e]ven if the Four Princes were reckless in monitoring how their donations were spent, or could and did foresee that recipients of their donations would attack targets in the United States that would be insufficient to ground the exercise of personal jurisdiction.[10]

Significantly, the court noted that the "plaintiffs do not allege that the Four Princes directed the Sept. 11 attacks or commanded an agent (or authorized al Qaeda) to commit them."[11] To have jurisdiction, the court held that plaintiffs must allege that the princes "engaged in 'intentional and allegedly tortious, actions . . . expressly aimed' at residents of the United States. Providing indirect funding to [al Qaeda] . . . does not constitute this type of intentional conduct." In the absence of such a showing, American courts lacked personal jurisdiction.

The court further held that a fifth prince's alleged provision of financial services to al Qaeda could not support the exercise of personal jurisdiction. The court found that "[i]t may be that, but for access to financial institutions, al Qaeda could not have funded its terrorist attacks. But that does not mean that the managers of those financial institutions 'purposefully directed' their activities at residents of [this] forum.[11]

The court further held that even if the fifth prince was a "primary actor" with regard to the foreign banks that conducted business with al Qaeda, none of those business dealings were alleged to have occurred in the United States and therefore would not support jurisdiction.

Conclusion

While the Second Circuit's decision was disappointing to the plaintiffs, the litigation, now assigned to U.S. District Judge George B. Daniels, continues against a series of defendants who are not protected by sovereign immunity and are alleged to have direct ties to the al Qaeda terrorists.

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Endnotes:

1. See In re Terrorist Attacks on Sept. 11, 2001, Docket No. 06319-cv(L), 2008 WL 3474167 (2nd Cir. Aug. 14, 2008).

2. See Boim v. Quranic Lit. Inst., 291 F.3d 1000, 1021 (7th Cir. 2002) (imposing ATA liability on terror sponsors).

3. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1603(b)(1).

4. Supra note one at *6.

5. Id. at *14.

6. Id. at **10-11 (quoting Filler v. Hanvit Bank, 378 F. 3d 213, 217 (2nd Cir. 2004)).

7. Id. at *11.

8. Id.

9. In re Terrorist Attacks on Sept. 11, 2001, 349 F.Supp.2d 765, 826 (S.D.N.Y. 2005).

10. Id. at 14.

11. Id. at 66 (distinguishing Kreutter v. McFadden Oil Corp., 71 NY2d 460 (1988)) ("Fiduciary shield doctrine" does not defeat personal jurisdiction under New York's long-arm statute).