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The Anti-Terrorism Act: Recent Developments Lead to Greater Clarity

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In this time of global uncertainty, courts in the Second Circuit have recently provided clarity in the application of an oft-misunderstood federal statute, the Anti-Terrorism Act (ATA). This article discusses those decisions, especially as they apply to financial institutions providing routine banking services to customers alleged to have ties to or to be affiliated with terrorist organizations. In addition, at least 13 ATA cases against financial institutions currently are winding their way through the courts in New York—eight at the district court level and five in the Second Circuit—and these cases also will provide further guidance. While this article cannot cover them all, it will address what to expect and offer a few key takeaways.

The Statute

The ATA provides a private right of action for victims of an "act of international terrorism." The statute was intended to allow victims of terrorist attacks abroad to sue in the United States the terrorists and the terrorist organizations responsible for those attacks. However, starting in the late 2000s, more than a decade after Congress enacted the ATA, courts began to allow plaintiffs to pursue claims under the ATA against banks in addition to, and often instead of, the terrorists actually responsible for the atrocities. See Lanier Saperstein, et al., "The Anti-Terrorism Act: Bad Acts Make Bad Law," N.Y.L.J. (Sept. 5, 2012).

The cases allowing for such primary liability against secondary actors relied on an interpretation untethered to the ATA's text through a complex chain of incorporations by reference to other statutes. The genesis of the problem was that the ATA did not provide for secondary liability, so the courts sought to shoehorn secondary liability into a primary liability rubric. For years, courts lumped together the four

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distinct statutory elements of an "act of international terrorism"—an activity that (1) involves a violent or dangerous act to human life; (2) violates or would violate the criminal laws of the United States or any of the states; (3) with terroristic intent; and (4) occurs primarily outside the United States—into a legal primordial soup. Courts conflated the first, second and third elements, finding that the first element was met by a plaintiff alleging a violation of the U.S. criminal laws without regard to whether the secondary actor, typically a bank, had itself engaged in a violent or dangerous act or had the requisite terrorist intent. It was like a jurisprudential game of telephone, where the resulting case law bore little resemblance to the statutory inputs.

Things began to change in 2016 when Congress passed the Justice Against Sponsors of Terrorism Act (JASTA). See Lanier Saperstein, et al., "The ATA: Some Sense Brought Back Into the Mix," N.Y.L.J. (April 17, 2018). JASTA amended the ATA to create two secondary liability causes of actions: aiding and abetting, and conspiracy. That meant litigants no longer needed to use a primary liability framework to allege claims against secondary actors.

Two years later, the Second Circuit in *Linde v. Arab Bank*, 882 F.3d 314, 326 (2d Cir. 2018) held that a plaintiff must allege each of the statutory elements of an "act of international terrorism" to state a claim for primary liability under the ATA. In other words, the Second Circuit told lower courts to no longer conflate the statutory elements and instead to assess whether a litigant had alleged facts with respect to each element to establish primary liability under the ATA, including that the act was violent or dangerous to human life and was done with terroristic intent. Similarly, *Linde* held that, under JASTA, aiding and abetting an act of international terrorism requires "more than the provision of material support to a designated terrorist organization." Id. at 329. Instead, it requires the secondary actor to be "aware" that by assisting the principal, it is itself assuming a "role" in terrorist activities, and that the secondary actor knowingly provides substantial assistance to the primary perpetrator.

Even though JASTA and 'Linde' brought structure back into the analysis, courts continued to grapple with the application of the ATA to financial institutions that provide routine banking services to customers that purportedly have ties to terrorist organizations. Recent decisions have provided more guidance.

'Siegel' and Its Progeny

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In *Siegel v. HSBC North America Holdings*, 933 F.3d 217 (2d Cir. 2019), the Second Circuit addressed the scope of secondary liability under JASTA. The court found that the aiding-and-abetting claim, based on HSBC's alleged provision of financial services to a Saudi bank alleged to have links to al-Qaeda in Iraq and other terrorist organizations, failed to state a claim. The Second Circuit clarified that allegations that a bank was aware of a customer's purported links to terrorist organizations alone did not support the conclusion that the bank knowingly played a role in the terrorist activities. The court also rejected the notion that a bank's alleged provision of "hundreds of millions of dollars" to a customer with purportedly known links to a terrorist organization satisfied the substantial assistance element of an aiding-and-abetting claim. In particular, the court noted the absence of allegations that the customer transferred any of those funds to the terrorist organization or that the bank knew or intended the organization to receive the funds.

Following *Siegel*, a number of district courts dismissed secondary liability claims against financial institutions. For example, in *Freeman v. HSBC Holdings PLC*, 413 F. Supp. 3d 67 (E.D.N.Y. 2019), the court rejected the magistrate judge's nearly 100-page pre-*Siegel* report and recommendation and found that plaintiffs had failed to state a conspiracy claim under JASTA. The *Freeman* plaintiffs alleged that the defendants had engaged in a conspiracy to evade U.S. sanctions on Iran, conducted illicit trade-finance transactions, concealed the involvement of Iranian agents in financial payments to and from U.S. dollar-denominated accounts, and facilitated Iran's provision of material support to terrorist activities and organizations such

as Hezbollah. The court found those allegations insufficient to state a conspiracy claim in the absence of allegations that any of the defendants directly conspired with a terrorist organization or that any of the defendants' alleged co-conspirators directly participated in the attacks that injured the plaintiffs. The *Freeman* court thus made clear that conspiracy requires an equally stringent assessment of the allegations, and it is not simply aiding and abetting lite.

In *Kaplan v. Lebanese Canadian Bank, SAL*, 405 F. Supp. 3d 525 (S.D.N.Y. 2019)—which, like *Freeman*, was decided shortly after the Second Circuit's decision in *Siegel*—the district court dismissed plaintiffs' JASTA claims. There, the plaintiffs alleged that Lebanese Canadian Bank (LCB) had facilitated the attacks that caused their injuries by providing banking services to Hezbollah through Hezbollah affiliates. Relying on *Siegel*, the district court found that allegations of media reports linking a bank's customers to terrorist organizations did not support the awareness element of an aiding-and-abetting claim where there were no allegations that the bank read or was aware of the sources. Even if LCB had read those sources, the *Kaplan* court found that still would not establish that element because "failure to perform due diligence on clients or to adhere to sanctions and counter-terrorism laws do not, on their own, equate to knowingly playing a role in terrorist activities." Id. at 535. And, as in *Siegel*, the *Kaplan* court found that plaintiffs failed to plead the substantial assistance element of aiding and abetting because, among other reasons, they failed to allege that Hezbollah received any of the funds purportedly processed through LCB or that LCB knew or intended Hezbollah to receive the funds.

More recent district court decisions have followed suit, dismissing aiding-and-abetting claims against two financial institutions—BLOM Bank, *Honickman v. BLOM Bank SAL*, No. 19-cv-008, 2020 WL 224552 (E.D.N.Y. Jan. 14, 2020), and Cairo Amman Bank, *Averbach v. Cairo Amman Bank*, No. 19-cv-004, 2020 WL 486860 (S.D.N.Y. Jan. 21, 2020), report & rec. adopted by 2020 WL 1130733 (S.D.N.Y. March 9, 2020). In *Honickman*, the district court granted BLOM Bank's motion to dismiss, finding that allegations of a bank providing services to charitable organizations alleged to have ties to a terrorist organization were insufficient to support an aiding-and-abetting claim. The *Averbach* court similarly dismissed aiding-and-abetting claims.

What we can say now, based on the recent decisions, is that the courts have learned from the confusion caused by the pre-JASTA and 'Linde' cases, and have taken the apparent message of 'Linde' to heart by refusing to permit claims for primary liability against secondary actors.

Takeaways

There are five ATA cases pending before the Second Circuit. Only one of those cases involves a conspiracy claim, while the others assert aiding and abetting claims. So, in the ensuing months, we can expect the Second Circuit to provide further guidance relating to aiding and abetting claims.

But what we can say now, based on the recent decisions, is that the courts have learned from the confusion caused by the pre-JASTA and *Linde* cases, and have taken the apparent message of *Linde* to heart by refusing to permit claims for primary liability against secondary actors. The role of JASTA in that shift also is important. While some might have viewed JASTA as expanding potential liability against banks and other secondary actors, it appears not to have had that effect. We believe that is because JASTA provides courts with a safety valve and in a form with which they are familiar. They now can assess the conduct of, and if applicable hold liable, secondary actors through traditional secondary liability concepts rather than having to resort to jurisprudential gymnastics to impose primary liability.

The recent decisions also indicate that courts will not find banks liable for aiding and abetting simply by providing routine financial services to customers alleged to have ties to terrorist organizations, unless there are specific allegations or evidence satisfying all of the elements of an aiding-and-abetting claim.

Congress and the courts have done much to clarify the scope of the ATA with respect to financial institutions, and we expect that the Second Circuit will provide additional guidance in the coming months.