BY JAMES P. KREINDLER AND MEGAN WOLFE BENETT

Finding Justice for Victims of State-Sponsored Terrorism

LAWSUITS AGAINST FOREIGN GOVERNMENTS accused of supporting terrorism present problems that are not routinely encountered in more conventional actions. Legislation to solve these problems has repeatedly fallen short of its goals. In light of the idiosyncrasies of terrorism tort actions, counsel for plaintiffs are well advised to think beyond the law, consider their cases in a historical context, and look for solutions that do not involve litigation.

No less an authority than Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia has reached this same conclusion. Judge Lamberth has overseen a number of private actions against the Islamic Republic of Iran and has observed, "[T]he stark reality is that the plaintiffs in these actions face continuous roadblocks and setbacks in what has been an increasingly futile exercise to hold Iran accountable for unspeakable acts of terrorist violence."[1]

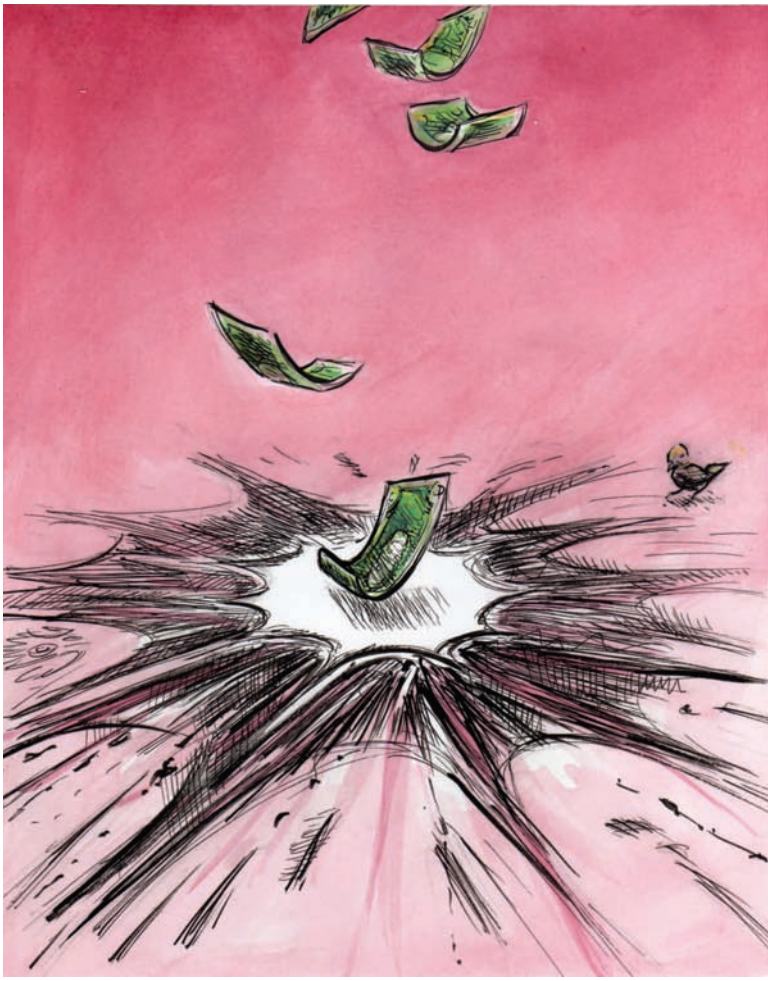
Judge Lamberth has also acknowledged that the only realistic means for victims of state-sponsored terrorism to obtain compensation are political, not judicial. The 2008 Libya Claims Resolution Act serves as an example of this process. After years of tumultuous litigation against Libya for its role in the bombing of Pan Am Flight 103 on December 21, 1988, diplomatic and judicial negotiations came to a close in 2008 with the final payment made by the Libyan government to victims of the bombing. The settlement demonstrated that the best—indeed perhaps the only—way to obtain cooperation from a foreign government that has sponsored terrorism is through diplomatic or political efforts.

The Terrorism Exception

Ordinarily, foreign governments (including government agents) are granted immunity from the jurisdiction of courts of the United States pursuant to the Foreign Sovereign Immunities Act of 1976 (FSIA).[2] Under the original FSIA, no exception to the bar on jurisdiction for acts of terrorism existed. Consequently, suits against foreign governments or agents either directly or indirectly responsible for terrorist acts causing deaths and injuries were routinely dismissed.[3]

In 1996, however, Congress created an exception to immunity under the FSIA for state-sponsored terrorist acts.[4] This provision, originally codified as 28 USC Section 1605(a)(7) and known as the "terrorism exception,"[5] eliminated foreign sovereign immunity for actions against a country that the State Department has listed as a State Sponsor of Terrorism and that either 1) engaged in a direct act of terror or 2) provided material support or resources for terrorist acts.[6]

Section 1605(a)(7) was intended to provide U.S. victims of state-sponsored terrorism judicial redress for their injuries. Predictably, substantial effort was spent defining and clarifying what it meant to provide "material support or resources" for terrorist acts,[7] but, as it turns out, the greatest obstacle for plaintiffs was not that phrase but the dispute over whether Section 1605(a)(7) provided a litigant anything more than a forum. The terrorism exception allowed a plaintiff into the courthouse, but did it give a plaintiff a way to recover money damages?



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Congress, seeking to answer in the affirmative, adopted what is commonly known as the Flatow Amendment five months after enacting Section 1605(a)(7).[8] The Flatow Amendment stated that a foreign state or an agent of a state sponsoring terrorism "shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that [party] for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28 United States Code [repealed] for money damages…[including] punitive damages."[9] The exception and the amendment gave plaintiffs not only access to federal courts but also a substantive legal right to recover punitive damages.

The cosponsors of the Flatow Amendment were buoyed by the

James P. Kreindler is a partner and Megan Wolfe Benett is an associate at Kreindler & Kreindler LLP. Kreindler & Kreindler LLP were lead counsel in the Libya terrorism litigation.

result in the first case tried under it. Stephen Flatow sued the government of Iran after his daughter was killed in a 1995 suicide bombing attack in the Gaza strip.[10] Judge Lamberth, in a bench trial, returned a compensatory damages award of $22.5 million and a punitive damages award of $225 million. After that landmark case, hope arose that victims of terrorism were going to "sue the terrorists out of business."[11] Many other plaintiffs with claims against Iran followed Flatow's lead, and, in part because Iran refused to appear, large judgments quickly accumulated.

Obtaining an initial judgment was only the beginning of the battle, however. In 2004, the Court of Appeals for the District of Columbia, in the case of *Cicippio-Puleo v. Islamic Republic of Iran*, ruled that neither Section 1605(a)(7) nor the Flatow Amendment established a cause of action against foreign state sponsors of terrorism. Rather, the appellate court explained, Section 1605(a)(7) was "merely a jurisdiction conferring provision" and the Flatow Amendment only provided a right against individual agents, officers, or employees of the foreign state, but "not against the foreign state itself."[12]

Plaintiffs were quick to begin using Section 1605(a)(7) as a mechanism to obtain jurisdiction over the foreign state while relying on state tort laws or other federal statutes for their substantive causes of action.[13] Plaintiffs had a means by which they could obtain substantial judgments under existing law, but the actions remained unwieldy and produced little actual recovery. For example, in *Peterson v. Islamic Republic of Iran*, the plaintiffs were awarded a $2.6 billion judgment for the injuries and deaths suffered in the 1983 bombing of the U.S. Marine barracks in Beirut but have yet to receive payment. Judges also quickly realized that the damages available to plaintiffs who were domiciled in different jurisdictions varied depending on the law of the plaintiff's home jurisdiction, and thus a court would be left to apply the law of dozens of different jurisdictions in a single action.[14] Added to the difficulties of recovery, with the inapplicability of the Flatow Amendment to actions against governmental entities themselves, plaintiffs lost the opportunity to claim punitive damages, and the deterrent purpose of exemplary awards disappeared.

Frustrations with Section 1605(a)(7) were not limited to the damages determinations. Perhaps the greatest disappointment arising from litigation against Iran was the inability to enforce the judgments. An issue peculiar to the plaintiffs in actions against Iran was the existence of the Algiers Accords, executed on January 19, 1981, to end the Iranian hostage crisis. Pursuant to the Algiers Accords, U.S. presidents for nearly 30 years have issued executive orders and treasury regulations by which the United States has taken control of all U.S.-based Iranian assets and either held them or returned them to Iran. Consequently, despite judgments totaling an astounding $9.6 billion, victims had recourse only to about $16.8 million of Iranian assets.[15]

A New Section 1605A

In response to these obstacles to recovery, Congress took action again, repealing Section 1605(a)(7) and replacing it with Section 1605A. While the new law's exception to foreign sovereign immunity is identical to that in the repealed legislation, Section 1605A adds new substantive rights and remedies.[16]

First, the new law expressly provides a federal right of action, eliminating the problems with the pass-through function of Section 1605(a)(7). Judge Lamberth, relying on an appellate decision that rejected the application of federal common law to terrorism exception cases under the Flatow Amendment, has concluded that in cases brought pursuant to Section 1605A, federal courts will apply, instead of federal common law, "well-established principles of law, such as those found in the Restatement (Second) of Torts and

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other leading treatises, as well as those principles that have been adopted by the majority of state jurisdictions."[17] The consistent application of legal principles and precedents in all liability and damages determinations will result in greater uniformity than before in Section 1605(a)(7) actions and will surely ease some of the burdens on courts and plaintiffs.

Other improvements from Section 1605(a)(7) include access to punitive damages (functionally unavailable after the *Cicippio-Puleo* decision), compensation for special masters appointed to assist the courts in determining damages awards, and enhanced mechanisms for the enforcement of civil judgments. This final point is important because many plaintiffs litigating actions under the old section or under the Flatow Amendment found themselves in the unhappy position of winning the battle and losing the war. They obtained sizable judgments against a state sponsor of terrorism but were without means for collecting and thus achieving their goals of accountability, deterrence, and justice.

The new Section 1605A is an improvement, but as Judge Lamberth observed, "The most difficult issues confronting this unique area of the law relate to how plaintiffs in these FSIA terrorism cases might enforce their court judgments."[18] With great frustration, he noted:

> [W]hat the Court sees in [Section 1605A] is not so much meaningful reform, but rather the continuation of a failed policy and an expansion of the empty promise that the FSIA terrorism exception has come to represent. Through the enactment of [Section 1605A], the political branches have promoted or otherwise acquiesced in subjecting Iran to sweeping liability while simultaneously overlooking the proverbial elephant in the room—and that is the fact that these judgments are largely unenforceable due to the scarcity of Iranian assets within the jurisdiction of the United States courts.[19]

The enforcement problem in Judge Lamberth's Iran litigation is specific to that defendant, but the fact is that any foreign government that falls within the terrorism exception of the FSIA will have been designated a state sponsor of terrorism by the State Department and, thus, its assets for satisfaction of judgments will be minimal. This is because the designated nations have little to no commercial assets in the United States, or because the assets of the designated nations are held in institutions that are immune from the enforcement of judgments under the FSIA. For all its good intentions, the new Section 1605A leaves plaintiffs where they were with the old Section 1605(a)(7) in terms of enforcement and collection.

The Libya Claims Resolution Act

Under either section, then, the difficulty of recovery endures. Judge Lamberth has excoriated the political branches of the federal government for continuing to authorize private litigation when "these private terrorism suits represent a novel…experiment…that has failed."[20] Plaintiffs suing Libya and Iran faced the same problem: limited access to assets in the United States. With the Libya cases, however, settlement negotiations succeeded.

Among the 22 consolidated actions filed against Libya was the Pan Am 103 suit arising from the Lockerbie, Scotland, bombing on December 21, 1988. Had the plaintiffs proceeded to trial and obtained a judgment, some Libyan assets frozen in the United States were in theory available to satisfy the claims. Those assets, however, were modest compared to the potential liability exposure and were sought by other creditors. Nevertheless, by proceeding through political and diplomatic channels, the Pan Am 103 plaintiffs obtained a global settlement of $2.7 billion fully paid by Libya.

Settlement negotiations led, after several years, to an agreement in May 2002 in which the Libyan delegation agreed to pay up to $10 million in each of the 270 decedents' cases in


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three installments upon the occurrence of three trigger events. Trigger A was that the U.N. Security Council would lift the sanctions imposed on Libya in U.N. Resolutions Numbers 731, 748, and 833, and Libya would pay $4 million to each estate representative. An additional $4 million was to be paid upon the lifting of certain U.S. commercial sanctions imposed on Libya (Trigger B). The final $2 million was to be paid upon the removal of Libya from the state sponsors of terrorism list (Trigger C).

In August 2003, Libya submitted a letter formally accepting responsibility for the Lockerbie bombing to the U.N. Security Council—the accountability that so many plaintiffs felt was of primary importance. Libya then deposited $2.7 billion in an escrow account to fund the settlement agreement. The Trigger A and Trigger B payments were distributed to the victims by 2004, but the removal of Libya from the U.S. State Department list of state sponsors of terrorism was delayed. After Libya was removed from the list in June 2006, it argued that its payment obligation had lapsed due to the expiration of the escrow account, from which it had withdrawn the remaining funds in February 2005. The plaintiffs argued that since Libya breached the good faith provision of the 2002 settlement agreement, its Trigger C obligation continued. While never conceding that point, Libya grew frustrated with the many suits filed against it. They included not only the Lockerbie bombing actions but also litigation initiated by victims of the UTA Flight 772 bombing in Africa, the LaBelle disco explosion, and Abu Nidal attacks. With the prospect of substantial liability exposure, Libya was anxious to resolve all U.S. lawsuits.

The State Department, with the assistance of counsel for the plaintiffs, was able to negotiate an agreement with Libya that would provide for the dismissal of all U.S. lawsuits when Libya deposited sufficient funds to adequately compensate all plaintiffs pursuing claims against Libya in U.S. courts. For this agreement to work, Congress had to pass extraordinary legislation, and the Senate and House of Representatives did so, passing the United States-Libya Resolution Act in August 2008. Several months after the act was passed, Libya deposited $1.5 billion to resolve all U.S. claims against it. All litigation against Libya is now terminated.

Four countries still remain on the State Sponsors of Terrorism list: Cuba, Syria, Sudan, and Iran. It is likely that eventually 1) all four countries will be removed from the list when their conduct warrants doing so, 2) each country will prefer a global resolution of all claims against it pending in U.S. courts to piecemeal resolution of each suit individ-

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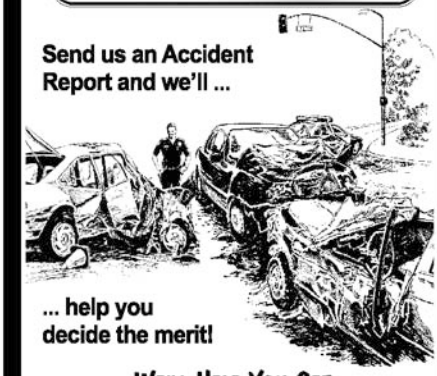

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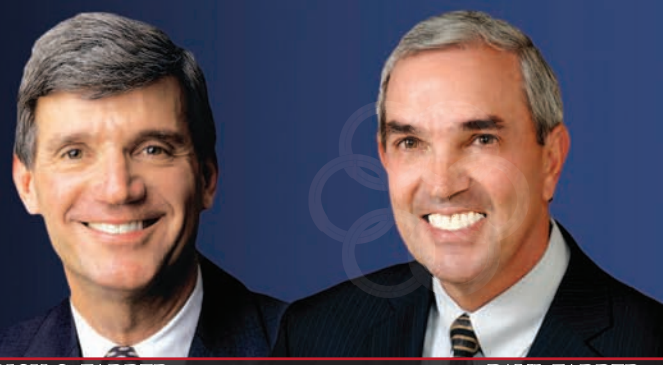

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ually, and 3) the U.S. government will also want an end to claims pending against those countries in U.S. courts. Given the experience Judge Lamberth detailed in his recent opinion, the fairest and only practical resolution for these potential future actions is the establishment of an adequate claims fund, as happened with Libya. ■

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[1] In re Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 35-36 (D. D.C. Sept. 30, 2009).

[2] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1602-1611.

[3] Two plaintiffs sued Libya for the Pan Am Flight 103 bombing and had their complaints dismissed in 1995 on the ground that "Libya's alleged terrorist actions do not fall within the enumerated exceptions to the Foreign Sovereign Immunities Act…." Smith v. Socialist People's Libyan Arab Jamhiriya, 886 F. Supp. 306, 315 (E.D. N.Y. 1995).

[4] The exception was first enacted as part of the Mandatory Victims Restitution Act of 1996, which was a part of the Anti-Terrorism and Effective Death Penalty Act of 1996. Pub. L. No. 104-132, §221(a)(1)(C), 110 Stat. 1214, 1241 (formerly codified at 28 U.S.C. §1605(a)(7)).

[5] *See, e.g.,* Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F. 3d 1123, 1126 (D.C. Cir. 2004).

[6] 28 U.S.C. §§1605(a)(1) and (a)(7) (repealed).

[7] *See* Rux v. Republic of Sudan, 461 F. 3d 461, 474 (4th Cir. 2006) (The plaintiffs' allegations were sufficient to establish jurisdiction under the FSIA.); *see also* Weiss v. National Westminster Bank PLC, 453 F. Supp. 2d 609 (E.D. N.Y. 2006) (The plaintiffs' allegations were sufficient to survive motion to dismiss.); United States v. Khan, 309 F. Supp. 2d 789 (E.D. Va. 2004) (The defendant's travel to Afghanistan to fight on behalf of al Qaeda was not providing "material support" as defined in 18 U.S.C. §2339A.).

[8] Pub. L. No. 104-208, §589, 110 (1996), 110 Stat. 3009-1, 3009-172 (codified at 28 U.S.C. §1605 note).

[9] *Id.*

[10] In re Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 43 (D. D.C. Sept. 30, 2009); 28 U.S.C. §§1330, 1602-1611.

[11] Neeley Tucker, *Pain and Suffering: Relatives of Terrorist Victims Race Each Other to the Court, but Justice and Money Are Both Hard to Find*, WASH. POST, Apr. 6, 2003, at F1.

[12] Cicippio-Puleo v. Islamic Republic of Iran, 353 F. 3d 1024, 1032-33 (D.C. Cir. 2004).

[13] *See, e.g.,* Bodoff v. Islamic Republic of Iran, 424 F. Supp. 2d 74, 83 (D. D.C. 2006). For a pre-*Cicippio-Puleo* example of the use of state substantive law in an FISA action, *see* Pescatore v. Pan Am. World Airways, Inc., 97 F. 3d 1, 12 (2d Cir. 1996).

[14] In Heiser v. Islamic Republic of Iran, 466 F. Supp. 229 (D. D.C. 2006), the court issued a nearly 150-page decision applying the laws of 11 jurisdictions. In Peterson v. Islamic Republic of Iran, 515 F. Supp. 2d 25 (D. D.C. 2007), the court applied the laws of nearly 40 jurisdictions.

[15] *See* OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPARTMENT OF THE TREASURY, TERRORIST ASSETS REPORT 14-15, tbls. 1, 3 (2007), *available at* http://www.treas.gov/offices/enforcement/ofac/reports/tar2007.pdf.

[16] *See* 28 U.S.C. §1605A.

[17] In re Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 61 (D. D.C. Sept. 20, 2009).

[18] *Id.* at 120.

[19] *Id.* at 122.

[20] *Id.* at 131.