Order Code RS22094
Updated December 12, 2007

CRS Report for Congress

Lawsuits Against State Supporters of Terrorism: An Overview

Jennifer K. Elsea
Legislative Attorney
American Law Division

Summary

A 1996 amendment to the Foreign Sovereign Immunities Act (FSIA) enables American victims of international terrorist acts supported by certain States designated by the State Department as supporters of terrorism — Cuba, Iran, North Korea, Sudan, Syria, and until recently, Iraq and Libya — to bring suit in federal court to seek monetary damages. Holders of judgments against these States, however, have encountered difficulties in their efforts to collect, despite congressional efforts to make blocked (or "frozen") assets of such States available for attachment by judgment creditors. A court decision invalidating plaintiffs' cause of action under the 1996 law raised uncertainties about the future of lawsuits against terrorist States. This report provides an overview of these issues, including a summary of a lawsuit against Iran by former hostages and a lawsuit against Iraq by former prisoners of war (POWs), as well as a brief synopsis of relevant legislative proposals (H.R. 1585, H.R. 3346, and H.R. 3369). These issues are covered in greater depth in CRS Report RL31258, *Suits Against Terrorist States By Victims of Terrorism.* The report will be updated.

Ordinarily, foreign States, including their agencies and instrumentalities, may not be sued in U.S. courts unless they waive their sovereign immunity or an exception under the Foreign Sovereign Immunities Act (FSIA) (28 U.S.C. §§ 1602 *et seq.*) applies. The FSIA provides a list of circumstances where U.S. federal and state courts will not recognize foreign sovereign immunity. In these circumstances, U.S. courts may exercise jurisdiction over a dispute and treat a foreign state as if it were a private entity. It does not establish liability or a cause of action; it merely removes foreign sovereign immunity as a defense to the courts' jurisdiction. The property of foreign States is also immune from judicial attachment to enforce judgments, unless the property is excepted under 28 U.S.C. § 1610.

In 1996 Congress amended the FSIA to allow civil suits by U.S. victims of terrorism against designated State sponsors of terrorism (DSST)[1] responsible for, or complicit in,

[1] The list, established by the State Department, currently includes Cuba, Iran, North Korea, Sudan, and Syria. Iraq was removed from the list in 2004; Libya was removed in 2006.

such terrorist acts as torture, extrajudicial killing, aircraft sabotage, and hostage taking. 28 U.S.C. § 1605(a)(7). After a court found that the abrogation of sovereign immunity did not itself create a cause of action,[2] Congress passed the "Flatow Amendment" (28 U.S.C.A. § 1605 note), to create a cause of action for such cases. Courts initially interpreted the statute as creating a cause of action against foreign States and their agencies and instrumentalities, although its plain language referred only to officials, employees, and agents of such States. Numerous court judgments, generally rendered after the defendants' default, ensued, resulting in substantial awards to plaintiffs.

The nature of lawsuits against DSSTs changed significantly after the D.C. Circuit Court of Appeals held in *Cicippio-Puleo v. Islamic Republic of Iran*[3] that neither the terrorism exception to the FSIA nor the Flatow Amendment creates a private right of action against the foreign government itself, including its agencies and instrumentalities. Despite the language in the Flatow Amendment seemingly to the contrary,[4] the court also found that agents, officials or employees retain immunity for conduct performed in their official capacity. Under this ruling, plaintiffs seeking recovery under the Flatow Amendment must name specific foreign officials or agents. Most plaintiffs have instead asserted causes of action under state law, which has resulted in some disparity in the relief available to victims injured in similar or even the same acts of terrorism. Courts have nevertheless continued to award sizable judgments, which now amount to more than $11 billion in combined compensatory and punitive damages, most of which has been assessed against Iran. (See CRS Report RL31258).

Enforcement of Judgments Against Terrorist States

While winning judgments against terrorist States has not posed insurmountable obstacles to plaintiffs, enforcing those judgments has proven more arduous, primarily due to the scarcity of assets within the jurisdiction of the United States that belong to States subject to economic sanctions. When the claimants in the initial suits against Cuba and Iran in 1997 and 1998 sought to satisfy their judgments by attaching the States' diplomatic and consular property as well as their assets in the United States that had been blocked pursuant to sanctions regulations, the Clinton Administration intervened to oppose the attachments. The Administration argued that the United States has international treaty obligations to protect all countries' diplomatic and consular properties, that the blocked assets of foreign States provide useful diplomatic leverage and should remain available for future use, that the attachment of the blocked assets by early claimants under the FSIA exception would mean that nothing would be left to compensate other claimants, and that the attachment of both kinds of assets would expose U.S. assets to reciprocal action in certain foreign States. The courts agreed with the Administration.

The plaintiffs and their attorneys then sought Congress' help in collecting on their judgments; and Congress has repeatedly responded. In section 117 of the Treasury and

---

[2] Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998).

[3] 353 F.3d 1024 (D.C. Cir. 2004)(remanding to allow plaintiffs to amend their complaint).

[4] 28 U.S.C.A. § 1605 note ("an official, employee, or agent of a [DSST] . . . while acting within the scope of his or her office, employment, or agency shall be liable . . ." for injury caused by acts for which immunity is unavailable under the terrorism exception to the FSIA).

General Government Appropriations Act for Fiscal Year 1999 (P.L. 105-277), the 105th Congress provided that victims who obtained judgments against terrorist States could attach both the terrorist States' frozen assets and their diplomatic and consular property. But because of the Administration's continuing objections, section 117 also gave the President authority to waive these provisions in the interest of national security, which President Clinton exercised on signing the bill into law.

In response, the 106th Congress enacted legislation to pay portions of selected judgments largely out of U.S. funds. Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) (P.L. 106-386), directed the Secretary of the Treasury to pay the compensatory damages portion of one judgment against Cuba out of Cuba's frozen assets. The VTVPA further directed that the compensatory damages portions of ten judgments against Iran be made out of appropriated funds (up to a maximum of about $400 million) and that the United States would then be obligated to seek reimbursement for those payments from Iran. Claimants could opt to receive an amount equal to 110 percent of their compensatory damages, but had to relinquish the right to seek to enforce the judgment in court. Claimants could also opt to receive an amount equal to 100 percent of the compensatory damages, in which case they could continue to pursue enforcement of the punitive damages, but relinquished the right to attach certain property of the DSST, including blocked assets, diplomatic property, and property at issue before an international tribunal. As a consequence, $96.7 million of the Cuban assets frozen in this country was paid to the claimants in one judgment against Cuba; and more than $380 million in U.S. funds was paid out with respect to ten judgments against Iran.

The VTVPA did not satisfy all claimants. Its *ad hoc* coverage provided relief in only eleven designated suits; it provided no compensation to other claimants who had obtained, or might obtain, judgments under the terrorist state exception to the FSIA. It did not provide any compensation for the nearly six thousand claims against Cuba, which had been determined to be legitimate by the Foreign Claims Settlement Commission (FCSC) for death, injury, and expropriation during and after Castro's 1959 takeover. But it depleted Cuba's frozen assets in the United States by half for the benefit of one group of plaintiffs. Additionally, the payment of the ten judgments against Iran out of U.S. funds seemed to some observers to contradict one of the major justifications for enacting the terrorist State exception to the FSIA in the first place, namely, to force terrorist States to pay a price for their actions and to deter them from engaging in such acts in the future. The 107th Congress added more suits to those listed as compensable under § 2002 and sought to make more frozen assets available to satisfy judgments by enacting the Terrorism Risk Insurance Act of 2002 (TRIA) (P.L. 107-297) to permit the attachment of "blocked assets," with Presidential waiver authority available only with respect to property protected by international treaty.

The Iran Hostages

In late 2000, the 52 persons who were held hostage and their families brought suit against Iran and were granted a default judgment, but before the court assessed damages, the U.S. government intervened and urged the court to dismiss the case because Iran had not been designated a terrorist State at the time of the hostage incident — one of the requirements of the FSIA exception allowing suits against terrorist States — and because one part of the Algiers Accords that led to the hostages' release in 1981 required the United States to bar any lawsuits based on the incident. Congress enacted riders to

pending appropriations bills to allow the suit to proceed. Nonetheless, the federal district court in 2002 dismissed the suit on the grounds the Algiers Accords, although entered into as a series of executive agreements, are binding on the United States and Congress had not acted with sufficient clarity to abrogate the provision precluding suit.[5] Subsequent efforts to abrogate the Algiers Accords have not succeeded.

Suits Against Iraq

The ouster of Saddam Hussein's regime raised issues with respect to whether Congress and the President can retroactively restore sovereign immunity to Iraq for causes of action that arose prior to the war. President Bush issued Executive Order 13290 providing for the confiscation and vesting of Iraq's $1.7 billion in frozen assets and directing that funds remaining after payment of existing judgments be deposited in the Development Fund for Iraq and used for Iraq's reconstruction. The Order, by vesting title to Iraq's frozen assets in the United States, effectively made those assets unavailable to those who might later obtain judgments against Iraq under the terrorist state exception to the FSIA. Subsequently, on the basis of a provision in the Supplemental Appropriations Act for Fiscal 2003 (P.L. 108-11), President Bush issued a Presidential Determination declaring a number of provisions concerning terrorist States, including the FSIA exception and the provision for payment of judgments out of blocked assets, inapplicable to Iraq. He also issued Executive Order 13303 providing that the Development Fund of Iraq cannot be attached or made subject to any other kind of judicial process.

Seventeen Americans who were held captive and tortured by Iraq during the first Gulf War and their families who were awarded nearly $1 billion in damages[6] sought to satisfy the judgment from frozen Iraqi assets. The Justice Department intervened, arguing that Iraq was entitled to sovereign immunity in court actions by terrorism victims after the President's determination, and that the funds were needed for the reconstruction of Iraq. The court held that the Iraqi assets were not subject to attachment by the plaintiffs, but declined the government's request to vacate the judgment, holding that only Iraq could assert a defense based on sovereign immunity, and that Congress and the President could not retroactively restore Iraq's previously abrogated sovereign immunity. On appeal, the appellate court reversed the President's Determination insofar as it nullified the FSIA provisions with respect to Iraq, finding that Congress had not intended to permit the President to revoke those provisions.[7] The plaintiffs were nonetheless prevented from collecting because the court of appeals vacated their judgment based on their failure to state a valid cause of action against Iraq, and because Saddam Hussein retained immunity for official conduct. The Supreme Court denied the POWs' petition for certiorari.

Proposed Legislation

H.R. 3346 would create a Hostage Victims' Fund, which would be funded by blocked assets, any funds recovered by the United States against persons for improper activity in connection with the Oil for Food Program of the United Nations, and any

---

[5] Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140 (D. D.C. 2002), *aff'd* 333 F.3d 228 (D.C. Cir. 2003), *cert. denied* 124 S.Ct. 2836 (2004).

[6] *See* Acree v. Republic of Iraq, 271 F.Supp.2d 179 (D.D.C. 2003).

[7] Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004).

amounts forfeited or paid in fines for violations of various laws. The President would be required to establish a claims procedure for victims of terrorism. Additional compensation would be available for victims of the 1979 Iranian hostage taking in Tehran, including spouses and children of persons taken captive, from a trust fund account associated with Iran's pre-revolution foreign military sales contracts with the United States. The account, known as the FMS account, is at issue before the U.S.-Iran Claims Tribunal, where Iran has filed claims seeking billions of dollars primarily for alleged overcharges and nondeliveries of military equipment. **H.R. 3369** is similar to H.R. 3346, but also specifically includes plaintiffs in *Hegna v. Islamic Republic of Iran* among the class of persons who would be eligible to seek compensation from the Hostage Victims' Fund as well as additional payments from the FMS account.

The **National Defense Authorization Act for Fiscal Year 2008, H.R. 1585 (Conference Report)**, **Section 1083** would create a new section 1605A in title 28, U.S. Code, to incorporate the terrorist State exception to sovereign immunity under the FSIA currently codified at 28 U.S.C. § 1605(a)(7) and a cause of action against designated State sponsors of terrorism, in lieu of the Flatow Amendment. The lawsuits would be subject to a statute of limitations for 10 years after April 24, 1996, or 10 years from the date on which the cause of action arose. New lawsuits would be barred six months after a defendant State has been removed from the list of DSSTs. The bill would eliminate the need for plaintiffs to assert causes of action based on state law, and would expressly permit punitive damages, as well as damages for solatium, pain and suffering, and reasonably foreseeable property damages in connection with the personal injury claims.

The bill also seeks to make more assets associated with State sponsors of terrorism available for attachment in aid of execution of terrorism judgments. Section 1803(g) would provide for the establishment of an automatic lien of lis pendens with respect to all real or tangible personal property located within the judicial district that is subject to attachment in aid of execution and is titled in the name of a defendant State or any entities listed by the plaintiff as "controlled by" that State. Ordinarily, lis pendens in civil litigation is used to put third parties on notice that the property is the subject of litigation, which effectively prevents the alienation of such property, although it is not technically a lien. In the case of State sponsors of terror, whose property for the most part is already subject to substantial limitations on transactions, the primary utility may be the establishment of a line of priority among lien-holders.

The bill would add a new subsection (g) to 28 U.S.C. § 1610 to provide that the property of a foreign State against which a judgment has been entered under section 1605A (or predecessor provision), or of an agency or instrumentality of such a foreign state, "including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity," is subject to attachment in aid of execution and execution upon that judgment, regardless of how much economic control over that property the foreign government actually exercises and whether the government derives profits or benefits from it. It would not provide the President any waiver authority. This language could allow a judgment creditor to "pierce the corporate veil"of a corporation owned, in whole or in part, by a judgment debtor State without having to demonstrate to the court that the presumption of independent status should be overridden. It could also be read as an effort to make any entity in which the judgment debtor foreign State (including its separate agencies and instrumentalities) has any interest liable for the terrorism-related judgments awarded against that State. On the other hand, the bill also states that nothing in the new § 1610(g) is to be construed as superceding the authority of

a court to prevent the impairment of an interest held by a person "who is not liable in the action giving rise to a judgment."

The bill would also make a property that is regulated by reason of U.S. sanctions available to satisfy terrorism judgments. It would not explicitly waive U.S. sovereign immunity, but appears designed to defeat provisions in the sanctions regulations that make blocked property effectively immune from court action. In this respect, it echoes language in current § 1610(f)(1), except that it applies only to *regulated* property rather than property that is *blocked or regulated* pursuant to sanctions regimes, and it would not be subject to the presidential waiver in § 1620(f)(3). Unlike § 201 of TRIA (28 U.S.C. § 1610 note), the new language would apply to *regulated* rather than *blocked* assets and it would allow assets to be attached in aid of enforcing punitive damages.

Amendments made by the bill would apply to any claim arising under them as well as to any action brought under current 28 U.S.C. § 1605(a)(7) or the Flatow Amendment that "relied on either of these provisions as creating a cause of action" and that "has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state," and that is still before the courts "in any form," including appeal or motion for post-judgment relief. In cases brought under the older provisions, the federal court in which the claim originated would be required, on motion by the plaintiffs within 60 days after enactment, to treat the case as if it had been brought under the new provisions, apparently to include reinstating a vacated judgment. The "defenses of res judicata, collateral estoppel and limitation period are waived" in any reinstated judgment or refiled action. In addition, the bill would permit the filing of new cases involving incidents that are already the subject of an action under the terrorism exceptions to the FSIA. Victims of State-supported terrorism could use this provision to bring suit notwithstanding the limitation time for filing, so long as another victim of the same terrorist act had brought suit in time and the related action is filed within sixty days after enactment or the date of entry of judgment in the original action.

Although the bill refers to "pending cases," it appears to cover finally adjudicated cases in which litigants file a motion for relief from final judgment where appeals are exhausted. To the extent the bill is read to require courts to reopen final judgments or reinstate vacated judgments, it may be vulnerable to invalidation as an improper exercise of judicial powers by Congress.[8] A similar objection may be raised with respect to the waiver of legal defenses: while it appears to be well-established that Congress can waive defenses in actions against the United States,[9] an effort to abrogate valid legal defenses of other parties could raise constitutional due process and separation of powers issues.

If the bill becomes law, the clarified federal cause of action may make judgments against DSSTs easier to obtain, but whether it will make them easier to enforce seems less certain. Its impact on foreign relations and the level of support foreign States are willing to provide for terrorists are likely to be the subjects of debate. crsphpgw

---

[8] *See* Plaut v. Spendthrift Farms, 514 U.S. 211 (1995).

[9] *See, e.g., id*. at 230 ("Congress has the power to waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States.").