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Legal Sidebar

Material Support for Terrorism Is Not Always an "Act of International Terrorism," Second Circuit Holds

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The U.S. Court of Appeals for the Second Circuit (Second Circuit) recently overturned a jury verdict deeming one of the largest financial institutions in the Middle East liable for providing financial services to Hamas and other designated foreign terrorist organizations. In *Linde v. Arab Bank, PLC*, American victims of terror attacks during the second Palestinian intifada were set to recover at least $100 million from Arab Bank under the civil liability provisions of the Antiterrorism Act (ATA). But the Second Circuit vacated the verdict, holding that the trial court incorrectly concluded that a violation of the federal law criminalizing material support to foreign terrorist organizations necessarily constitutes an "act of international terrorism" subject to civil liability under the ATA. By holding that victims of terror attacks are not always entitled to recover civil damages even if they prove the defendant committed the crime of material support, *Linde* highlights the legal complexities and obstacles that plaintiffs face when seeking civil damages under the ATA.

The *Linde* Trial and Settlement

At trial in *Linde*, the plaintiffs presented evidence that Arab Bank processed more than $30 million in wire transfers for senior Hamas leaders and charities known to funnel money to Hamas. Some transfers were identified expressly as compensation for "martyrdom operations"—meaning they were payments promised to the families of terrorists who completed suicide attacks (discussed here). The trial court also sanctioned Arab Bank for its decision not to produce bank records of some foreign account-holders. Arab Bank had argued that production could violate foreign bank secrecy laws in countries like Lebanon and Egypt. But when the trial court overruled that objection and Arab Bank still declined to provide records, the court entered a sanctions order allowing the jury to infer, among other things, that the bank "knowingly" provided financial services to terrorists.

Based on the evidence and inferences available at trial, the jury found that Arab Bank's financial services for Hamas and other terrorist groups amounted to "an act of international terrorism" under the ATA. The bank was deemed liable for injuries to hundreds of U.S. nationals in more than 20 overseas terrorist

attacks. While the amount Arab Bank owed the plaintiffs was set to be determined in later proceedings, the parties reached a partially confidential settlement just days before the first damages trial. In the settlement, Arab Bank agreed to pay a minimum of $100 million—but only if the Second Circuit affirmed the jury's verdict on appeal. If the verdict were vacated, the plaintiffs would receive a different, undisclosed amount. In either event, the parties agreed to forgo any future appeals or trial court proceedings, meaning the Second Circuit's decision is likely to dictate the ultimate outcome of *Linde*.

The Second Circuit Ruling

On appeal, the Second Circuit held that the jury's verdict was premised on a flawed interpretation of the ATA. The ATA provides a civil cause of action to U.S. nationals (or their survivors) who are injured "by reason of an act of international terrorism." The term "international terrorism," in turn, is defined as activities that "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State[.]" The underlying acts must also appear to be intended to intimidate or coerce a civilian population or affect the conduct of a government by intimidation or coercion.

In *Linde*, the trial court did not instruct the jury on each element of the statutory definition of "international terrorism." Instead, the jury instructions stated that the crime of "providing material support or resources" to a foreign terrorist organization—a separate statutory offense detailed in this CRS Report—"is itself an act of international terrorism." If Arab Bank committed the crime of material support, the jury instructions explained, the bank also must be civilly liable under the ATA for perpetrating an act of international terrorism.

The Second Circuit disagreed with this instruction and vacated the verdict. Noting that the ATA's definition of "international terrorism" requires conduct that would violate U.S. state or federal law if it were to have been committed in the United States, the Second Circuit reasoned that acts prohibited by the federal material support statute "can certainly satisfy that *part* of the statutory definition." But the Court emphasized there are other necessary elements in the ATA's definition. According to the Second Circuit, Arab Bank could have committed the crime of material support *without* satisfying the ATA's other definitional requirements—namely, proof of a violent or dangerous act and the manifest intent to influence a civilian population or government. Consequently, "provision of material support to a terrorist organization does not invariably equate to an act of international terrorism[,]" the Second Circuit held.

In many cases, an appeals court's decision to vacate a jury verdict would mean that the case is sent back to the trial court for additional proceedings and possibly a re-trial. However, in *Linde*, the parties' agreement to forgo future proceedings likely means that the Second Circuit's decision effectively brings the nearly 15-year litigation to a close. A companion case by non-U.S.-nationals arising out of the same facts, *Jesner v. Arab Bank*, is currently pending before the Supreme Court. But that case is proceeding under a different legal regime, the Alien Tort Statute, which presents its own legal obstacles that are detailed in this CRS Report and Sidebar.

***Linde*, JASTA, & Congressional Interest in Secondary Liability for Terrorism**

Congress has expressed interest in providing civil remedies to victims of terrorist attacks abroad for several decades. The ATA was passed partly out of concern that the family members of Americans killed in the 1985 hijacking of a Mediterranean cruise ship and the Pan Am Flight 103 bombing could not seek redress in U.S. courts. In recent years, this interest has expanded to permit so-called "secondary liability" for those who aid and abet—but do not directly participate in—terrorist acts. As discussed in this Sidebar, the Justice Against Sponsors of Terrorism Act (JASTA) extended ATA liability to those who conspire to commit acts of international terrorism or who aid and abet those acts by "knowingly providing substantial assistance[.]" Had the *Linde* plaintiffs not entered into a settlement agreement that barred re-trial, they may have had the option of asserting an aiding and abetting claim under JASTA after the Second Circuit's remand.

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