

The Rising Tide of Terrorism-Related Civil Litigation

What the Justice Against Sponsors of Terrorism Act (“JASTA”) may mean for your company.

Alex C. Lakatos
Partner

+1 202 263 3312
alakatos@mayerbrown.com

Daniel L. Stein
Partner

+1 212 506 2646
dstein@mayerbrown.com

Charles S. Hallab
Partner

+1 202 263 3023
challab@mayerbrown.com

The Anti-Terrorism Act (“ATA”)

- Civil liability cases against:
 - **Direct actors** (e.g., Hamas, Al Qaeda)
 - **Donors and sponsors** to direct actors (e.g., charities, certain governments)
 - **Service providers** to direct actors, donors and/or sponsors (e.g., banks, airlines, news media)
 - Claims based on both alleged intentional and negligent conduct
- Terrorism-related suits are on the rise

The Anti-Terrorism Act (“ATA”) 18 U.S.C. § 2331, *et seq.*

- A civil cause of action - 18 U.S.C. § 2333(a)

Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees

- For a US national (or his/her estate)
- Injured “by reason of” an “act of international terrorism”
- Treble damages and attorney’s fees

ATA – Successful Defenses

- Most jurisprudence has occurred at the motion to dismiss phase
- Successful ATA defenses have often focused on the remoteness of the defendant's acts from the plaintiff's injury
 - Lack of causation, *e.g.*, *Rothstein v. UBS*, 708 F.3d 82 (2d Cir. 2013)
 - Lack of knowledge, *e.g.*, *Al Jazeera*, 2011 WL 2314783 (S.D.N.Y.)
 - Lack of secondary liability under the ATA, *e.g.*, *Rothstein*

ATA – Successful Defenses

- Defenses have also succeeded for lack of jurisdiction over the defendant
 - General jurisdiction. *Waldman v. PLO*, 835 F.3d 317 (2d Cir. 2016).
 - Specific jurisdiction. *Tamam v. Fransabank SAL*, 667 F. Supp. 2d 720 (S.D.N.Y. 2010)

ATA Trends – 2016 And Beyond – Venue Battles

- Varying standards for ATA causation
 - *Boim III*, 549 F.3d 685 (7th Cir. 2008)
 - *Rothstein*, 708 F.3d 82 (2d Cir. 2013)
- Examples of CA7 filings
 - *Shaffer v. Deutsche Bank AG* (S.D. Ill. 2016)
 - *Martinez v. Deutsche Bank AG* (S.D. Ill. 2016)
- Defendants have moved to transfer these and other cases to New York
- MDL treatment of related ATA cases?

ATA Trends – 2016 And Beyond – Key Questions

- Testing the limits of “international terrorism”?
 - Florida night club shooting
 - Act of war (*Kaplan v. Central Islamic Bank of Iran*, D.D.C. 2013; *Morris v. Khadr*, D. Utah 2006)

- JASTA was first introduced in Congress in 2009-2010
 - Enacted in 2016 over Obama veto
 - Buyer’s remorse? Trump Administration?
- JASTA makes two changes to the law:
 - JASTA adds a new Foreign Sovereign Immunities Act (“FSIA”) exception
 - JASTA contains less discussed provision that expands the ATA by adding secondary liability to the ATA in some instances

- Subject to certain exceptions, FSIA generally exempts non-US government from
 - Litigation
 - Execution on assets
- Exception under JASTA
 - **Here:** injury in the United States, due to an act of international terrorism in the United States
 - **Anywhere:** due to tortious acts of foreign state or its agents, wherever they occur

How JASTA Changes the ATA

- JASTA adds claims for conspiracy and aiding and abetting to ATA
 - Only if international terrorism was committed, planned or authorized by designated Foreign Terrorist Organization (“FTO”)
 - FTO provision is significant limit on secondary liability
- Because JASTA *adds* secondary liability, it supports the conclusion that Congress did not think that the pre-JASTA ATA allowed secondary liability

Scope of Secondary Liability under JASTA

- Conspiracy

- Plaintiffs' lawyers have already taken a broad view
- However, JASTA requires conspiracy *with* the FTO
- Common law should require specific intent to advance the terrorist objective of the conspiracy

Scope of Secondary Liability under JASTA

- Aiding and abetting
 - “knowingly providing substantial assistance”
 - Abettor’s action not illegal by itself, rather it is unlawful only if it supports primary actor’s wrongdoing
 - Good argument that there must be actual knowledge that assistance is going to be used to accomplish terrorism

Scope of Secondary Liability under JASTA

- Aiding and abetting
 - Causation
 - Substantial *assistance* has proximate cause component
 - ATA still requires injury “by reason of” an act of international terrorism, and this quoted language is a term of art that requires causation

Broad Trends in ATA/JASTA Litigation

- Plaintiffs' lawyers are aggressive and creative
 - *Twitter* lawsuit
 - *Al Jazeera* lawsuit
- JASTA will exacerbate this trend
- Jousting over scope of JASTA

Broad Trends in ATA/JASTA Litigation



- Plaintiffs' lawyers like to follow the news
 - Capitalize on articles about businesses with terror links
 - Create sympathy
- Plaintiffs' lawyers like to follow enforcement actions
 - Defendants that have entered into deferred prosecution agreements (“DPAs”) or non-prosecution agreements (“NPAs”) or settlements with the government may be precluded from denying certain facts
 - Road map for allegations
 - Prosecutions not concerned with civil litigation

Mitigating ATA Risk – De-Risking

- High risk activities for industry
 - Supplying goods or services to State Sponsors of Terrorism
 - Supplying goods or services known to useful for terrorist attacks or favored by terrorists
 - Buying/selling goods allegedly favored by FTOs as a ready source of cash
 - Supplying arms or materiel to governments, organizations or individuals known to resell to FTOs
 - Offering communication services popular with terrorist groups
- Financial services companies involved in any of the above, including through wires, letters of credit, loans, insurance

Mitigating ATA Risk – De-Risking

- High risk counterparties
 - Certain charities
 - Informal money transmission businesses
 - State Sponsors of Terrorism
 - Certain Politically Exposed Parties (PEPs)

Legislative Update



- Possible legislative amendments
- Republican and Democratic perspectives

Questions



Daniel L. Stein
Partner
New York
(212) 506-2646
dstein@mayerbrown.com



Alex C. Lakatos
Partner
Washington DC
(202) 263-3312
alakatos@mayerbrown.com



Charles S. Hallab
Partner
Washington DC
(202) 263-3023
challab@mayerbrown.com

MAYER • BROWN

Mayer Brown is a global legal services organization comprising legal practices that are separate entities ("Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales; Mayer Brown JSM, a Hong Kong partnership, and its associated entities in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. "Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.