

7-29-2015

## Holding Banks Liable Under The Anti-Terrorism Act For Providing Financial Services To Terrorists: An Ineffective Legal Remedy In Need Of Reform

Jimmy Gurule

*Notre Dame Law School*, jimmy.gurule.1@nd.edu

Follow this and additional works at: <http://scholarship.law.nd.edu/jleg>

 Part of the [Legislation Commons](#)

---

### Recommended Citation

Jimmy Gurule, *Holding Banks Liable Under The Anti-Terrorism Act For Providing Financial Services To Terrorists: An Ineffective Legal Remedy In Need Of Reform*, 41 J. Legis. 184 (2015).

Available at: <http://scholarship.law.nd.edu/jleg/vol41/iss2/2>

This Article is brought to you for free and open access by the Journal of Legislation at NDLScholarship. It has been accepted for inclusion in Journal of Legislation by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# HOLDING BANKS LIABLE UNDER THE ANTI-TERRORISM ACT FOR PROVIDING FINANCIAL SERVICES TO TERRORISTS:

## AN INEFFECTIVE LEGAL REMEDY IN NEED OF REFORM

*Jimmy Gurulé†*

### I. INTRODUCTION

The Anti-terrorism Act (“ATA”), 18 U.S.C. § 2333(a), provides a private right of action for any United States national injured by an act of international terrorism.<sup>1</sup> The purpose of the statute is to deter acts of terrorism by punishing terrorists and their financial supporters “where it hurts them most: at their lifeline, their funds.”<sup>2</sup> However, the threat of a large civil monetary judgment is unlikely to have a deterrent effect on foreign terrorists or terrorist organizations that “are unlikely to have assets, much less assets in the United States.”<sup>3</sup> As a result, ATA lawsuits have been filed almost exclusively against secondary actors, such as charitable organizations<sup>4</sup> and other legal entities operating in the United States that provided material support to international terrorists.<sup>5</sup> The vast majority of ATA claims have targeted financial institutions.<sup>6</sup> However, these claims have been largely unsuccessful. To date, only

---

† Professor of Law, Notre Dame Law School. The author served as Under Secretary for Enforcement, United States Department of the Treasury, from 2001 to 2003. I would like to thank Michael Krzywicki and Alyssa Hughes for their outstanding research assistance and invaluable edits on earlier drafts of this article.

1. 18 U.S.C. § 2333 et seq., is the civil remedies provision of the Anti-Terrorism Act, added Oct. 29, 1992, Pub. L. No. 102-572, Title X, § 1003(a)(4), 106 Stat. 4506, codified as amended. For information on the legislative history of the ATA, see *infra* note 18; for the interpretation of § 2333(a) as referenced above see *United States v. Phosphorous, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 955 (7th Cir. 2003) (en banc) (Wood, J., dissenting), *overruled en banc* by *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012).

2. *Estates of Ungar ex rel. Strachman v. Palestinian Authority*, 304 F. Supp. 2d 232, 238 (D.R.I. 2004) (quoting 136 CONG. REC. S14279-01 (1990) (statement of Sen. Grassley)).

3. *Boim v. Holy Land Found. for Relief and Dev. (Boim II)*, 511 F.3d 707, 715 (7th Cir. 2007).

4. See *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 118 (2d Cir. 2013); *Boim v. Holy Land Found. for Relief and Dev. (Boim III)*, 549 F.3d 685 (7th Cir. 2008) (en banc).

5. See *Abecassis v. Wyatt (Abecassis II)*, 785 F. Supp.2d 614 (S.D. Tex. 2011); *In re Chiquita Brands Int’l, Inc. Alien Tort Statute and S’holder Derivative Litig.*, 690 F. Supp. 2d 1296 (S.D. Fla. 2010); *Stutts v. De Dietrich Group*, No. 03-CV-4058, 2006 WL 1867060 (E.D.N.Y. June 30, 2006). ATA claims have also been filed against the Palestinian Authority and Palestine Liberation Organization; see *Sokolow, v. Palestine Liberation Organization*, No. 04 Civ. 397(GBD), WL 6601023 (S.D.N.Y. Nov. 19, 2014); *Estates of Ungar ex rel.*, 304 F. Supp. 2d 232.

6. See, e.g., *Freeman v. HSBC Holdings PLC*, No. 14-CV-06601 (E.D.N.Y. Nov. 10, 2014); *In re Terrorist Attacks*, 714 F.3d 118 (suing Al Rajhi Bank and Saudi American Bank); *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013); *Wultz v. Bank of China*, 32 F. Supp. 3d 486 (S.D.N.Y. 2014); *Linde v. Arab Bank, PLC (Linde II)*, 944 F. Supp. 2d 215 (E.D.N.Y. 2013); *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp.2d 414 (E.D.N.Y. 2013); *Gill v. Arab Bank, PLC (Gill III)*, 893 F. Supp.2d 542 (E.D.N.Y. 2012); *Goldberg v. UBS AG*, 660 F. Supp.2d 410 (E.D.N.Y. 2009); *Almog v. Arab Bank*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007); *Weiss*

one bank has been held liable under the ATA.<sup>7</sup>

There are two principal reasons why the ATA has proven largely ineffective in holding banks liable. First, a bank that provides financial services to members of a terrorist organization that commits act of international terrorism is secondarily liable. The terrorists that perpetrated the violent attack are primarily responsible for killing or injuring United States nationals. At most, the bank aided and abetted the terrorist attack by transferring funds and providing other financial services to suspected terrorists. However, the ATA is silent on whether liability extends to aiders and abettors. Moreover, the courts are deeply divided on the issue. The Second and Seventh Circuit Courts of Appeal have expressly held that 18 U.S.C. § 2333(a) does not provide for aiding and abetting liability.<sup>8</sup> In contrast, several federal district courts have reached the opposite conclusion, holding that the ATA extends to secondary actors.<sup>9</sup>

In a jurisdiction that does not recognize aiding and abetting liability under the ATA, plaintiffs must prove that the provision of financial services to terrorists or terrorist sympathizers was the proximate cause of the injuries suffered by plaintiffs. More specifically, plaintiffs must prove that the provision of financial services was a “substantial factor” in the sequence of responsible causation.<sup>10</sup> The injury must also have been “reasonably foreseeable” as a natural consequence of the bank’s conduct.<sup>11</sup> Plaintiffs face a heavy burden in proving that the provision of routine banking services to a terrorist organization was a “substantial factor” in a subsequent terrorist attack. Moreover, a person would not reasonably expect or foresee that the provision of routine financial services would result in a terrorist attack killing innocent civilians.

However, if the ATA claim is filed in a jurisdiction that authorizes liability for aiders and abettors of acts of international terrorism, plaintiffs have to prove that the terrorists committed an act of international terrorism that proximately caused plaintiffs’ injuries and the provision of financial services by the bank “substantially assist[ed]” the principal violation.<sup>12</sup> The plaintiffs do not have to prove that the bank’s provision of financial services was the proximate cause of the terrorist attack. Plaintiffs therefore have an easier burden of proof in a jurisdiction that recognizes aiding and abetting liability under the ATA. Moreover, the statute’s silence

---

v. Nat’l Westminster Bank PLC, 453 F. Supp. 2d 609 (E.D.N.Y. 2006); *Stutts*, 2006 WL 1867060 (suit against international banks that provided letters of credit to Iraq, allegedly enabling it to purchase chemical weapons that injured plaintiffs).

7. Jury Verdict, *Linde v. Arab Bank*, No. 04-CV-02799 (E.D.N.Y. Sept. 22, 2014), 184 DER EE-8. See *infra* note 193.

8. See *Rothstein*, 708 F.3d at 98 (“We doubt that Congress, having included in the ATA several express provisions with respect to aiding and abetting in connection with the criminal provisions, can have intended § 2333 to authorize civil liability for aiding and abetting through its silence”); see also *Boim III*, 549 F.3d at 689 (en banc) (“[S]tatutory silence on the subject of secondary liability means there is none.”).

9. See *In re Chiquita Brands*, 690 F. Supp. 2d at 1309; *Abecassis II*, 785 F. Supp. 2d at 649.

10. *Rothstein*, 708 F.3d at 91 (citing *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 123 (2d Cir. 2003)).

11. *Id.*

12. *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 57 (D.D.C. 2010) (citing *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).

on the issue could result in disparate judgments against financial institutions. In a jurisdiction that rejects aiding and abetting liability, a bank would likely not be found liable for violating the ATA because of the difficulty in proving causation. However, in an aiding and abetting jurisdiction it would be much easier to find the bank liable because plaintiffs do not have to prove a proximate causal relationship between the banking services and terrorist attack that caused the death or injuries. Whether plaintiffs are successful in litigating an ATA claim should not turn on where the lawsuit was filed and whether the jurisdiction permits recovery based on a theory of aiding and abetting.

The second reason why the ATA has proven ineffective against banks is that the statute does not include a mens rea requirement. While the courts uniformly agree that § 2333(a) is not a strict liability statute, they disagree on the requisite mens rea to support civil liability.<sup>13</sup> Some courts hold that the ATA requires proof of scienter. Under this view, a bank is liable under the ATA if the provision of financial services was conducted with knowledge that the account holder or beneficiary of the funds transfer engages in acts of terrorism.<sup>14</sup> Other courts, like the Seventh Circuit Court of Appeals hold that the ATA requires proof of “deliberate wrongdoing.”<sup>15</sup> In *Boim v. Holy Land Foundation for Relief and Dev. (Boim III)*, the Seventh Circuit sitting en banc held that to be liable under § 2333(a), the provider of financial services or funds to foreign terrorists must have “known that the money would be used in preparation for or in carrying out the killing or attempted killing of conspiring to kill or inflicting bodily injury on, an American citizen abroad.”<sup>16</sup> Further, according to the Seventh Circuit, proof of “deliberate wrongdoing” can be satisfied by proof of criminal recklessness, meaning that that “the actor knows that the consequences are “substantially certain” to result from his act.”<sup>17</sup> The mental state required by the *Boim* court imposes a heavy burden on plaintiffs to prove that the bank had actual knowledge or that it was “substantially certain” that the provision of financial services would be used to commit a terrorist attack. Because of the ATA’s silence on mens rea and the jurisdictional split it has created, § 2333(a) does not provide an effective remedy for the victims of terrorism. Therefore, unless the ATA is amended to authorize liability for aiding and abetting and prohibit the provision of financial services in instances where the bank has knowledge that the account holder or beneficiary of the fund transfer engages in

---

13. See, e.g., *Gill v. Arab Bank, PLC (Gill II)*, 893 F. Supp. 2d 474, 522 (E.D.N.Y. 2012) (“[T]he court rejects the contention that any reckless contribution to a terrorist group or its affiliate, no matter how attenuated, will result in civil liability, without the demonstration of a proximate causal relationship to the plaintiff’s injury.”); *c.f. Boim III*, 549 F.3d at 695 (en banc) (“[The] black letter [requirement of proof of causation] is inaccurate if treated as exceptionless.”); *accord Abecassis v. Wyatt (Abecassis I)*, 704 F. Supp. 2d 623, 665 (S.D. Tex. 2010) (“The courts agree that ‘but for’ causation is not required. The courts disagree on what causal standard must be alleged and proven.”).

14. See *Weiss v. Nat’l Westminster Bank (Weiss III)*, 768 F.3d 202, 207 (2d Cir. 2014) (“While § 2333(a) does not include a mental state requirement on its face, it incorporates the knowledge requirement from § 2339B(a)(1), which prohibits the knowing provision of any material support to terrorist organizations.”) (emphasis in original)).

15. *Boim III*, 549 F.3d at 692 (7th Cir. 2008) (en banc).

16. *Id.* at 691.

17. *Id.* at 693.

acts of international terrorism, banks have little to fear from doing business with suspected terrorists.

Part II of this article discusses the organizational structure of the ATA, 18 U.S.C. §2333(a), and what must be proven to obtain a civil judgment. Part III examines the disagreement amongst the courts on whether § 2333(a) provides for aiding and abetting liability. Part IV analyzes the application of § 2333(a) in primary and secondary liability jurisdictions. More specifically, Part IV examines the difficulties plaintiffs face in holding banks liable under § 2333(a) for providing routine banking services to terrorists in jurisdictions that reject aiding and abetting liability. Part V discusses a legislative proposal to enhance the effectiveness of the ATA.

## II. THE STRUCTURE OF THE CIVIL REMEDY PROVISION OF THE ANTI-TERRORISM ACT

The ATA, 18 U.S.C. § 2333(a), affords civil remedies to United States nationals and their estates, survivors, and heirs for injuries suffered “by reason of” an act of “international terrorism.”<sup>18</sup> The ATA was enacted by Congress “to fill a gap in the law by establishing a civil counterpart to the existing criminal statutes.”<sup>19</sup> It was Congress’ intent to create impediments to terrorism by “the imposition of liability at any point along the causal chain of terrorism.”<sup>20</sup> Further, Congress sought

---

18. A prior § 2333 under § 132 of the Military Construction Appropriations Act (Antiterrorism Act of 1990, Pub. L. 101-519, § 132(b)(4), Nov. 5, 1990, 104 Stat. 2251) created several terrorism-related provisions, including 18 U.S.C. § 2333(a), which provided U.S. nationals with civil remedies for acts of international terrorism. In 1991, during Operation Desert Shield/Desert Storm, the Antiterrorism Act of 1990 was omitted from title 18 of the United States Code when Pub. L. 101-519, §§ 131, 132 Nov. 5, 1990, 104 Stat. 2251 was *repealed* by the Dire Emergency Supplemental Appropriations Act, Pub. L. No. 102-27, Title IV, § 402, Apr. 10, 1991, 105 Stat. 155, as amended by Military Construction Appropriations Act of 1992, Pub. L. No. 102-136, § 126, Oct. 25, 1991, 105 Stat. 643. The MCA Act of 1992 stated that both § 402(a), which repealed the Antiterrorism Act of 1990, and § 402(b), which appears as a note preceding 18 U.S.C. § 2331, shall provide: “Effective November 5, 1990, chapter 113A of title 18, United States Code, is amended to read as if section 132 of Public Law 101-519 [the Anti-Terrorism Act of 1990] had not been enacted.” The substantive provisions of the Antiterrorism Act of 1990 were *reenacted* by the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, Title X, § 1003, Oct. 29, 1992, 106 Stat. 4506. Section 1003(c), which appears as an 18 U.S.C. § 2331 note, retroactively applied the reenacted law to any pending case arising on or after 4 years before its enactment. In 2013, Pub. L. No. 112-239, Div. A, Title VII, Subtitle D, § 1251(c), Jan. 2, 2013, 126 Stat. 2017, extended the retroaction of civil suits under § 2333 to a 6-year period beginning on date of enactment for those civil actions “resulting from an act of international terrorism that occurred on or after September 11, 2001.” Although the substance of the 1990 provisions was retained by the FCA Act of 1992, Pub. L. No. 102-572 (codified as amended in 18 U.S.C. 2333 et seq.) the reenacted law did not designate a short title, previously the Antiterrorism Act, for the collection of its “Terrorism” provisions. However, the collection is colloquially referred to as the “Anti-Terrorism Act.” For a comprehensive review of the legislative insight and history of the ATA *see* Almog v. Arab Bank, 471 F. Supp. 2d 257, 265-66 (E.D.N.Y. 2007).

19. Estates of Ungar *ex rel.* Strachman v. Palestinian Authority, 304 F. Supp. 2d 232, 238 (D.R.I. 2004).

20. After the civil remedies sections of the original Military Construction Appropriations Act were repealed in 1991, Sen. Grassley reintroduced the bill, S. 740, in the 102d Congress, *see supra* note 18. The Senate passed this bill by voice vote on Apr. 16, 1991. On July 27, 1992 the S. Comm. on the Judiciary published its report implementing the recommendations of the Federal Courts Study Comm. It described the ATA quite briefly:

Title X would allow the law to catch up with contemporary reality by providing victims of terrorism with a remedy for a wrong that, by its nature, falls outside the usual jurisdictional categories of wrongs that national legal systems have traditionally addressed. By its provisions for compensato-

“to codify general common law tort principles and to extend civil liability for acts of international terrorism to the full reaches of traditional tort law.”<sup>21</sup> Finally, to accomplish the intended goal of deterring acts of international terrorism, in the ATA Congress conferred extraterritorial jurisdiction on federal courts for injuries and losses suffered from terrorist acts occurring anywhere in the world.<sup>22</sup>

The ATA was enacted in direct response to a hijacking and murder committed on a cruise ship by members of the Palestine Liberation Organization (“PLO”).<sup>23</sup> On October 7, 1985, terrorists hijacked the Italian cruise liner *Achille Lauro*, and murdered Leon Klinghoffer, a passenger bound to a wheelchair, who was shot and his body dumped into the Mediterranean Sea.<sup>24</sup> Klinghoffer’s wife and estate, as well as two other passengers aboard the cruise ship brought suit against the PLO, claiming that the killing was an act of international terrorism perpetrated by members of a terrorist organization.<sup>25</sup> The District Court for the Southern District of New York upheld jurisdiction under federal admiralty jurisdiction and the Death on the High Seas Act, because the tort occurred on navigable waters.<sup>26</sup> However, had the attack occurred within the territory of a foreign state, and not on international waters, the court might have lacked jurisdiction over the civil action. The ATA was intended to fill the jurisdictional gap and ensure that United States victims of international terrorism were not left without an adequate legal remedy.<sup>27</sup>

While the ATA provides victims with an express right to recover treble damag-

---

ry damages, [treble] damages, and the imposition of liability at any point along the causal chain of terrorism, it would interrupt, or at least imperil, the flow of money.

S. REP. NO. 102-342, at 22 (1992).

21. *Boim v. Quranic Literacy Inst. & Holy Land Found. (Boim I)*, 291 F.3d 1000, 1010 (7th Cir. 2002); see also 137 CONG. REC. S4511-04 (daily ed. Apr. 16, 1991) (statement of Sen. Grassley) (The ATA accords victims of terrorism “the remedies of American tort law, including treble damages and attorney’s fees.”).

22. See 18 U.S.C. § 2331(1)(C) (2012) (defining “international terrorism” to include violent acts that “occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum”).

23. Compare 138 CONG. REC. S17,260 and 33,629 (daily ed. Oct. 7, 1992) (stating respectively that the “tragedies of Pan Am 103 and the *Achilles Lauro* [sic] still burn in our minds” and that “American victims will be able to bring a claim against a terrorist group for money damages” as the inspiration for the ATA), with *Gill v. Arab Bank, PLC (Gill I)*, 891 F. Supp. 2d 355 (E.D.N.Y. 2012) (“[T]he legislative history indicates that the civil remedy provision became law in large part because of the *Klinghoffer* litigation.”) (emphasis in original), and *Weiss v. Nat’l Westminster Bank PLC (Weiss II)*, 242 F.R.D. 33, 45 (E.D.N.Y. 2007) (same).

24. *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione M/N Achille Lauro in Amm. Straordinaria*, 739 F. Supp. 854 (S.D.N.Y. 1990), vacated, 937 F.2d 44 (2d Cir. 1991).

25. *Id.* at 856. The families of victims of the terrorist bombing of Pan Am Flight 103 on December 21, 1988, which killed 270 passengers, also supported the ATA, see *Anti-Terrorism Act of 1990* (C-SPAN television broadcast July 25, 1990), available at <http://www.c-span.org/video/?13560-1/antiterrorism-act-1990> (airing testimony from families of victims in the *Achille Lauro* hijacking and the Pan Am Flight 103 terrorist bombing); accord *Gill I*, 891 F. Supp. 2d at 355 (E.D.N.Y. 2012).

26. *Klinghoffer*, 739 F. Supp. at 858-59.

27. See Geoffrey Sant, *So Banks are Terrorists Now?: The Misuse of the Civil Suit Provision of the Anti-Terrorism Act*, 45 ARIZ. ST. L.J. 534, 541 (2013) [hereinafter Sant] (“Congress rectified this gap by passing the ATA and extending jurisdiction to cover all U.S. victims of overseas terrorism.”); see also *Weiss II*, 242 F.R.D. at 45 (“To address the concern regarding federal jurisdiction, Senator Charles Grassley introduced the Anti-Terrorism Act of 1990 . . .”).

es for acts of international terrorism, the legislation imposes several important limitations. First, the ATA only creates a cause of action for United States nationals.<sup>28</sup> Foreign nationals may not sue under the statute. Second, the ATA bars civil actions against state sponsors of terrorism. It codifies the act of state doctrine by barring claims arising from official acts of foreign governments. Section 2337(2) bars suits against a “foreign state, an agency of a foreign state, or an officer or employee of a foreign state or any agency thereof acting within his or her official capacity or under color of legal authority.”<sup>29</sup> The ATA also prohibits civil actions for injury or loss suffered “by reason of” an “act of war.”<sup>30</sup> However, the courts have consistently construed the term “act of war” to exclude deliberate attacks against innocent civilians.<sup>31</sup> Finally, the Attorney General may stay any civil action brought under § 2333, or limit or stop discovery, if the court finds that the civil action would unduly interfere with a criminal prosecution or national security operation.<sup>32</sup>

To sustain an ATA claim plaintiffs must prove three essential elements: (1) the defendant committed an act of “international terrorism,” which includes “acts dangerous to human life”; (2) the defendant acted with the mens rea required to prove the predicate act that qualifies as an act international terrorism; and (3) the injury of a U.S. national was “by reason of” an act of international terrorism.<sup>33</sup>

(a) *International terrorism*

i. Acts dangerous to human life

In order to sustain a claim under § 2333(a), plaintiffs must allege that they were injured “by reason of” an act of “international terrorism.”<sup>34</sup> As used in the statute,

28. See 18 U.S.C. §2333(a) (2012).

29. 18 U.S.C. § 2337(2) (2012). The statute also prohibits actions against “the United States, an agency of the United States, or an officer or employee of the United States or any agency thereof acting within his or her official capacity or under color of legal authority.” *Id.* at § 2337(1).

30. 18 U.S.C. § 2336(a) (2012) (“No action shall be maintained under section 2333 of this title for injury or loss by reason of an act of war.”).

31. See *Sokolow v. Palestine Liberation Org.*, 583 F. Sup. 2d 451, 459 (S.D.N.Y. 2008) (targeting non-combatant civilians outside of any combat or military zone did not constitute acts of war for purposes of the ATA); *Klieman v. Palestinian Auth.*, 424 F. Supp. 2d 153, 162 (D.D.C. 2006) (attack on public bus transporting noncombatant civilians did not occur during an armed conflict); *Biton v. Palestinian Interim Self-Gov’t Auth.*, 412 F. Supp. 2d 1 (D.D.C. 2005) (attack on school bus carrying students and teachers did not occur during an armed conflict).

32. 18 U.S.C. § 2336(c).

33. *Boim III*, 549 F.3d 685, 690-702 (7th Cir. 2008) (en banc).

34. 18 U.S.C. § 2333(a). Section 2331(1) under the same title defines “international terrorism” as activities that –

- (A) 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, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
- (B) Appear to be intended –
  - (i) to intimidate or coerce a civilian population;
  - (ii) to influence the policy of a government by intimidation or coercion; or
  - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily outside the territorial jurisdiction of the United States or

the term “international terrorism” requires proof of three essential elements. First, the conduct condemned must “involve” “violent acts” or “acts dangerous to human life” that are a violation of the criminal laws of the United States or any State, or that would be a criminal violation if committed within the United States.<sup>35</sup> Second, plaintiffs must prove that the prohibited acts “appear to be intended” “(i) to intimidate or coerce a civilian population, (ii) to influence the policy of a government by intimidation or coercion, or (iii) to affect the policy of a government by mass destruction, assassination, or kidnaping.”<sup>36</sup> Third, the prohibited conduct must have an extraterritorial nexus. That is, plaintiffs must prove that the act of international terrorism occurred “primarily outside the territorial jurisdiction of the United States,” or “transcend[ed] national boundaries.”<sup>37</sup> The transnational element can be proven in one of three ways: (1) the terrorist acts were accomplished by transcending national boundaries; (2) the persons the terrorist acts were intended to intimidate or coerce transcended national boundaries; or (3) the terrorist perpetrators conducted their operations abroad or after committing their attack, they sought asylum or a safe haven in a foreign country.<sup>38</sup>

A cause of action under § 2333(a) has been likened to “a Russian matryoshka doll, with statutes nested inside statutes.”<sup>39</sup> Establishing whether a defendant has engaged in acts of “international terrorism” requires proof that the defendant violated a federal or state criminal law.<sup>40</sup> Violations of the federal material support statutes, 18 U.S.C. § 2339A, § 2339B and the terrorist financing statute, 18 U.S.C. § 2339C, have been construed by the courts to involve “acts dangerous to human life” and, therefore, qualify as acts of “international terrorism” for the purposes of § 2333(a).<sup>41</sup> Section 2339A makes it a crime to provide “material support or resources” “knowing or intending that they are to be used in preparation for, or in carrying out,” a violation of one or more of the violent crimes enumerated in the stat-

---

transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which the perpetrators operate or seek asylum.

18 U.S.C. § 2331(1) (2012).

35. *Id.* at § 2331(1)(A).

36. *Id.* at § 2331(1)(B)(i)-(iii).

37. *Id.* at § 2331(1)(C).

38. *Id.*

39. *Gill III*, 893 F. Supp. 2d 542, 553 (E.D.N.Y. 2012) (internal citations omitted).

40. 18 U.S.C. § 2331(1)(A).

41. *See Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 68-69 (2d Cir. 2012) (“The Seventh Circuit, and several district courts in this Circuit, have concluded that a defendant’s violation of the criminal material-support statutes . . . constitutes an act of ‘international terrorism’ within the meaning of section 2331(a).”); *Boim I*, 291 F.3d 1000, 1014-15 (7th Cir. 2002) (“We are using sections 2339A and 2339B not as independent sources of liability under section 2333, but to amplify what Congress meant by ‘international terrorism.’”); *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 427 (E.D.N.Y. 2009); *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 268 (E.D.N.Y. 2007) (“[V]iolations of sections 2339A, 2339B(a)(1), and 2339C can serve as predicate crimes giving rise to liability under the ATA.”); *Weiss v. National Westminster Bank PLC (Weiss I)*, 453 F. Supp. 2d 609, 613 (E.D.N.Y. 2006); *Strauss v. Credit Lyonnais, S.A.*, No. 06-CV-0702 (CPS) 2006 WL 2862704 at \*1 (E.D.N.Y. 2006) (“Violations of 18 U.S.C. § 2339B and § 2339C are recognized as international terrorism under 18 U.S.C. § 2333(a).”); *Linde v. Arab Bank (Linde I)*, 384 F. Supp. 2d 571, 581 (E.D.N.Y. 2005).

ute.<sup>42</sup> Section 2339B prohibits “knowingly” providing material support to a “foreign terrorist organization” (“FTO”).<sup>43</sup> To violate the statute, a person must act with “knowledge that the organization is a designated foreign terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged in or engages in terrorism . . . .”<sup>44</sup>

Section 2339A has a heightened mens rea not found in § 2339B. To sustain a violation of § 2339A requires proof that the defendant provided material support or resources “knowing or intending” that they are to be used to carry out certain terrorism-related crimes.<sup>45</sup> By contrast, to prove a violation of § 2339B, the defendant must have knowledge that the organization is a designated foreign terrorist organization or engages or has engaged in acts of terrorism.<sup>46</sup> There is no requirement that the defendant had knowledge or intended that the material support or resources be used to carry out a violent crime.

Finally, § 2339C punishes providing or collecting funds “with the intention that such funds be used, or with the knowledge that such funds are to be used” to carry out a statutorily enumerated predicate crime.<sup>47</sup> The statute defines “provides” to in-

42. 18 U.S.C. § 2339A (2012). Section 2339B(g)(4) in turn defines “material support” by reference to § 2339A(b), which provides:

- (1) The term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;
- (2) the term “training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and
- (3) the term “expert advice or assistance” means advice or assistance derived from scientific, technical or other specialized knowledge.

*Id.*

43. For purposes of § 2339B, a “foreign terrorist organization” (“FTO”) is an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act. Section 219 of the Immigration and Nationality Act, codified at 8 U.S.C. § 1189(a)(1), authorizes the Secretary of State to designate a group as a “foreign terrorist organization” if the group meets the following criteria:

- (A) the organization is a foreign organization;
- (B) the organization engages in terrorist activity (as defined in section 2656f(d)(2) of Title 22, or retains the capability and intent to engage in terrorist activity or terrorism); and
- (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.

Immigration and Nationality Act of June 27, 1952, ch. 477, title II, ch. 2, § 219, as added Pub. L. 104–132, title III, § 302(a), Apr. 24, 1996, 110 Stat. 1248; amended Pub. L. 104–208, div. C, title III, § 356, title VI, § 671(c)(1), Sept. 30, 1996, 110 Stat. 3009–644, 3009–722; Pub. L. 107–56, title IV, § 411(c), Oct. 26, 2001, 115 Stat. 349; Pub. L. 108–458, title VII, § 7119(a)–(c), Dec. 17, 2004, 118 Stat. 3801, 3802).

44. *Id.* at § 2339B. Section 2339B also references the definition of “terrorist activity” given in the Immigration and Nationality Act. The Act defines “terrorist activities” as involving such actions as hijacking, kidnapping, “[a] violent attack upon an internationally protected person,” an assassination and the use of any “explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger [individuals or property]”, codified at 8 U.S.C. § 1182(a)(3)(B)(iii) (2012).

45. *Id.* at § 2339A.

46. *Id.* at § 2339B.

47. Section 2339C provides in relevant part:

Whoever . . . by any means, directly or indirectly, unlawfully and willfully provides or collects

clude “giving, donating and transmitting,” and “collects” to mean both “raising and receiving” funds.<sup>48</sup> Unlike § 2339B, § 2339C requires proof that defendant provided or collected funds with the specific intent or knowledge that the funds were to be used to carry out an act of terrorism. However, § 2339C does not require “that the funds were actually used to carry out a predicate act.”<sup>49</sup>

A bank that provides financial services to a terrorist organization that kills Americans abroad may violate § 2333(a). Such a violation is based on a chain of statutory incorporations by reference.<sup>50</sup> The first link in the statutory chain is § 2333, which provides a civil cause of action for injuries suffered by reason of an act of “international terrorism.”<sup>51</sup> The second statutory link is § 2331, which defines “international terrorism” to include activities that involve “acts dangerous to human life” that are a violation of the criminal laws of the United States, and that “appear intended . . . to intimidate or coerce a civilian population” or “affect the conduct of a government by . . . assassination,” and “transcend national boundaries in terms of the means by which they are accomplished” or “the persons they appear intended to intimidate or coerce,” or “the locale in which the perpetrators operate or seek asylum.”<sup>52</sup> The next link involves the material support statutes, 18 U.S.C. §§ 2339A, 2339B, and terrorist financing statute, 18 U.S.C. § 2339C. Arguably, the provision of financial services or funds to a terrorist organization is an “act dangerous to human life,” and qualifies as an act of international terrorism for the purposes of § 2333(a).<sup>53</sup> Further, such conduct violates a federal criminal statute. The final statutory link involves 18 U.S.C. § 2332(a), which punishes whoever kills a United States national outside of the United States.<sup>54</sup> Ultimately, the courts have held that “[b]y this chain of statutory incorporations by reference to § 2333(a) to § 2331(1) to § 2339A, [§ 2339B or § 2339C], to § 2332,” the bank’s provision of financial services or funds to a terrorist organization that targets Americans outside the United States may support a claim under § 2333(a).<sup>55</sup>

However, funding *simpliciter* does not constitute a violation of § 2333(a). Charities and financial institutions are not strictly liable under § 2333(a) for the provision of funds to a terrorist organization. While Congress intended §§ 2331 and 2333 to “reach beyond those persons who themselves commit the violent act that

---

funds with the intention that such funds be used, or with the knowledge that such funds are to be used to in full or in part, in order to carry out . . . [an] act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act, shall be punished as prescribed in subsection.

18 U.S.C. § 2339C(d)(1) (2012).

48. *Id.* at § 2339C(e)(3), (4).

49. *Id.* at § 2339C(a)(3).

50. *Boim III*, 549 F.3d 685, 690 (7th Cir. 2008) (en banc); *see also* *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 426 (E.D.N.Y. 2009).

51. 18 U.S.C. § 2333; *see also* *Boim III*, 549 F.3d at 690 (en banc).

52. 18 U.S.C. § 2331(1)(A).

53. *Boim III*, 549 F.3d at 690 (en banc); *see also* *Goldberg*, 660 F. Supp. 2d at 427.

54. 18 U.S.C. § 2332(a) (2012).

55. *See, e.g., Boim III*, 549 F.3d at 690 (en banc).

directly causes the injury,” merely giving money to a terrorist organization without knowledge or intent to further its criminal activities does not constitute an act of “international terrorism” under 18 U.S.C. § 2331.<sup>56</sup> In *Boim v. Quranic Literacy Institute*, the Seventh Circuit stated that “[t]o hold the defendants liable for donating funds without knowledge of the donee’s intended criminal use of the funds would impose strict liability.”<sup>57</sup> The *Boim* Court could find nothing in the text or legislative history of the ATA to support that construction.<sup>58</sup>

ii. Appear to be intended

The definition of “international terrorism” requires that the prohibited conduct “appear to be intended” to: (1) “intimidate or coerce a civilian population”; (2) “influence the policy of a government by intimidation or coercion”; or (3) “affect the conduct of a government by mass destruction, assassination, or kidnapping.”<sup>59</sup> However, the statutory requirement has received scant attention by courts. Moreover, those cases that have examined the issue failed to discuss what factors are probative of whether a defendant’s activities “appear to be intended” for a terrorist purpose. In *Boim III*, the Seventh Circuit stated the “appear to be intended” language does not impose a state of mind requirement on the defendant. Instead, “it is a matter of external appearance rather than a subjective intent.”<sup>60</sup> Thus, plaintiffs are not required to prove that the defendant intended to facilitate a terrorist attack. Rather, “the law requires only that a defendant’s acts ‘appear to be intended’ to achieve one of the three enumerated items.”<sup>61</sup> However, when a bank provides financial services to members of a terrorist organization, the bank’s motive is likely purely economic. The bank’s intent is to generate profits for the bank rather than further the terrorist group’s political ideology or deadly agenda.

In *Boim III*, the Seventh Circuit held that if it were “foreseeable” that donations to a terrorist group would enable its members to commit a terrorist attack, and “given such foreseeable consequences, such donations would ‘appear to be intended . . . to intimidate or coerce a civilian population’ or to ‘affect the conduct or a government by . . . assassination,’ “ as required by § 2331(a).<sup>62</sup> According to *Boim III*, “foreseeability” is the dispositive factor in proving whether the defendant’s acts “appear to be intended” for a terrorist purpose. If it were reasonably foreseeable

---

56. *Boim I*, 291 F.3d 1000, 1012 (7th Cir. 2002).

57. *Id.*

58. *Id.* at 1011-12. The Seventh Circuit stated:

To say that funding *simpliciter* constitutes an act of terrorism is to give the statute an almost unlimited reach. Any act which turns out to facilitate terrorism, however remote that act may be from actual violence and regardless of the actor’s intent, could be construed to “involve” terrorism. Without also requiring the plaintiffs to show knowledge of and intent to further the payee’s violent criminal acts, such a broad definition might also lead to constitutional infirmities by punishing mere association with groups that engage in terrorism.

*Id.* at 1011.

59. 18 U.S.C. § 2331(1)(B)(i)-(iii) (2012).

60. *Boim III*, 549 F.3d at 694 (en banc).

61. *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 49 (D.D.C. 2010).

62. 549 F.3d at 694 (en banc).

that the defendant's provision of material support would facilitate the commission of a terrorist attack, then such contribution would "appear to be intended" for a terrorist-related purpose.<sup>63</sup> However, the majority in *Boim III* appears to have conflated the requirement that the defendant's acts "appear to be intended" for a terrorist purpose with the causation requirement. As discussed in the next section, foreseeability is required to prove causation. If plaintiffs prove that the defendant's conduct was the proximate cause of plaintiffs' injuries because it was "reasonably foreseeable" that the provision of financial services could be used to commit a terrorist attack, plaintiffs by extension prove the "appear to be intended" element of the statute, rendering that requirement redundant and meaningless. Proof that the defendant's acts "appear to be intended" for a terrorist purpose should require something more than reasonable foreseeability.

In *Wultz v. Islamic Republic of Iran*, the District Court for the District of Columbia found that the terrorist attacks that caused plaintiff's injuries, which were allegedly committed by members of Hamas and related terrorist organizations, appear to have been intended to intimidate or coerce the Israeli population, influence the policies of the Israeli government by intimidation and coercion, and affect the conduct of the Israeli government by mass destruction.<sup>64</sup> Moreover, the court held that the defendant Bank of China appears to have acted with a similar intent. The court stated that "[a]lthough directly attributable to the PIJ [Palestinian Islamic Jihad], a reasonable person could easily infer similar intent of [the Bank of China] by virtue of its having allegedly provided material support to PIJ despite having allegedly been aware of a substantial probability that its support would facilitate the planning, preparation for, and execution of terrorist attacks in Israel."<sup>65</sup> Thus, the court found an appearance of shared or similar intent from two factors: (1) the Bank of China was allegedly notified by Israeli counter-terrorism officials that it was providing financial services to a purported member of PIJ, and (2) despite the warning, the bank continued to provide such services and failed to close the suspect account.<sup>66</sup> According to *Wultz*, the "appears to be intended" requirement is satisfied if a bank knowingly provides funds or financial services with knowledge that the beneficiary is a member of a foreign terrorist organization. However, plaintiffs in *Wultz* maintained that the Bank of China had actual knowledge that the account holder was a member of Hamas, not merely that the Bank "should have known." It is therefore unclear if the "appears to be intended" requirement would be satisfied based on a bank's negligent conduct.

### iii. International Nexus

Section 2331 also requires proof that the acts of international terrorism transcend national boundaries. Few court decisions have examined this element of the statute in any substantive detail. The 9/11 terrorist attacks satisfied the transnation-

---

63. *Id.*

64. *Wultz*, 755 F. Supp. 2d at 49.

65. *Id.*

66. *Id.*

al element of “international terrorism.” In *Smith ex rel. Smith v. Islamic Emirate of Afghanistan*, the District Court for the Southern District of New York held that although “the acts of September 11 clearly ‘occurred primarily’ in the United States,” they were nevertheless acts of “international terrorism” in that they “transcend[ed] national boundaries in terms of the means by which they [were] accomplished . . . or the locale in which their perpetrators operate.”<sup>67</sup>

(b) *Mens Rea*

Section 2333 is silent on the mens rea standard required to establish tort liability. In enacting the ATA’s civil remedy provision, Congress did not set forth the mens rea that must be proven to sustain a judgment of liability.<sup>68</sup> Instead, it “intended to incorporate general principles of tort law . . . into the [civil] cause of action under the ATA.”<sup>69</sup> Ultimately, Congress left it to the courts, “according to the common law tradition,” to define the contours of the statute.<sup>70</sup> The courts, however, have struggled to resolve the mental state issue. At a minimum, plaintiffs must prove the level of scienter required to establish the predicate act of international terrorism alleged in support of § 2333(a) liability. “Pleading and proving the violation of a predicate criminal provision is required to satisfy the first requirement of an ATA claim—i.e.—violation of a federal or state criminal law.”<sup>71</sup> Presumably the underlying predicate offense will be one of the federal material support statutes or the anti-terrorist financing provision, and each of those statutes has its own mens rea requirements. For example, if the ATA claim is based on a theory that the bank violated 18 U.S.C. § 2339B by providing material support or resources to an FTO, the plaintiff must then prove that the bank acted with “knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism.”<sup>72</sup>

In *Holder v. Humanitarian Law Project*, the United States Supreme Court resolved the controversy over whether § 2339B requires proof that the defendant act-

---

67. *Smith ex rel. Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217, 221 (S.D.N.Y. 2003) (citing 18 U.S.C. § 2331(1)(C)).

68. See *Gill I*, 891 F. Supp. 2d 335, 353 (E.D.N.Y. 2012) (“In enacting the ATA’s civil remedy provision in 1992 Congress did not explicitly set out the elements that a private plaintiff would be required to plead and prove in order to recover.”).

69. *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 55 (D.D.C. 2010); *supra* note 20, S. Comm. on the Judiciary report, which in relevant part here states:

This section creates the right of action, allowing any U.S. national who has been injured in his person, property, or business by an act of international terrorism to bring an appropriate action in a U.S. district court. *The substance of such an action is not defined by the statute, because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts.*

This bill opens the courthouse door to victims of international terrorism.

S. REP. No. 102-342, at 45 (1992) (emphasis added).

70. *Gill II*, 893 F. Supp. 2d 474, 484 (E.D.N.Y. 2012).

71. *Gill III*, 893 F. Supp. 2d 542, 553 (E.D.N.Y. 2012).

72. 18 U.S.C. § 2339B (2012).

ed with the specific intent to further the terrorist group's illegal activities.<sup>73</sup> The Supreme Court held that § 2339B only requires knowledge of the terrorist group's status as a foreign terrorist organization or participation in terrorist-related activities, not specific intent. The Court declared: "Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities."<sup>74</sup> Therefore, when plaintiffs file a claim under the ATA on a theory that a defendant provided material support or resources to a foreign terrorist organization, plaintiffs must prove that the defendant had knowledge of the group's designation as an FTO or knowledge that the organization engages in terrorist activities.<sup>75</sup> The knowledge requirement can be demonstrated by evidence that the defendant acted with willful blindness. In *In re Terrorist Attacks on Sept. 11, 2001*, the District Court for the Southern District of New York stated:

A defendant must either know that the recipient of the material support provided by him is an organization that engages in terrorist acts, or defendant must be deliberately indifferent to whether or not the organization does so, i.e., defendant knows there is a substantial probability that the organization engages in terrorism, but does not care.<sup>76</sup>

Other courts are in agreement that plaintiffs can prevail on an ATA claim by showing that defendant knew or was deliberately indifferent to the fact that it was providing material support to a foreign terrorist organization.<sup>77</sup> However, those courts have uniformly rejected defendants' claims that proof of "knowledge" in § 2339B for purposes of a claim under § 2333(a) requires that plaintiffs show the defendant *intended* the funds, financial services, or other forms of material support to be used to carry out terrorist attacks.<sup>78</sup>

As previously noted, §§2339A and 2339C require proof of a heightened mens rea. If plaintiffs' ATA claims are based on a violation of §§ 2339A or 2339C, they must prove that the defendant acted with knowledge or intent that the funds or other forms of material support are to be used to commit a violent crime specified in the statute. However, the statutes do not require "the specific intent to aid or encourage the particular attacks that injured plaintiffs."<sup>79</sup> By contrast, courts are divided on whether § 2333(a) requires proof of a mens rea beyond that required of the underlying predicate offense of international terrorism. The Seventh Circuit in *Boim III* stated that irrespective of which statute (§ 2339A, §2339B, or § 2339C) provides

---

73. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

74. *Id.* at 17.

75. *Id.*

76. *In re Terrorist Attacks on Sept. 11, 2001*, 740 F. Supp. 2d 494, 517 (S.D.N.Y. 2010).

77. See *Boim III*, 549 F.3d 685, 693 (7th Cir 2008) (en banc); *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 428 (E.D.N.Y. 2013); *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 428 (E.D.N.Y. 2009).

78. See *Strauss*, 925 F. Supp. 2d at 427; *Goldberg*, 660 F. Supp. 2d at 427; *Weiss I*, 453 F. Supp. 2d 609, 625 (E.D.N.Y. 2006).

79. *Wultz v. Islamic Republic of Iran* 755 F. Supp. 2d 1, 45 (D.D.C. 2010) (quoting *Linde I*, 384 F.Supp.2d 571, 586, 591 n. 9 (E.D.N.Y. 2005).

the basis for finding that a defendant engaged in international terrorism, plaintiffs must still satisfy the scienter requirements of § 2333(a).<sup>80</sup> The court stated that while the statute does not contain an explicit mens rea requirement, there must be proof of some “deliberate wrongdoing” by the defendant, in light of the fact that the statute contains a punitive element, the imposition of treble damages.<sup>81</sup> The en banc majority opined:

Punitive damages are rarely if ever imposed unless the defendant is found to have engaged in *deliberate wrongdoing*. “Something more than mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or ‘malice,’ or a fraudulent or evil motive on the part of the defendant, or such conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton.”<sup>82</sup>

However, “deliberate wrongdoing” is satisfied if the defendant acted with knowledge. According to the Seventh Circuit, deliberate or intentional misconduct can be proven by evidence that the defendant either “knows that the organization engages in [acts of terrorism] or is deliberately indifferent to whether it does or not, meaning that one knows there is a substantial probability that the organization engages in terrorism but one does not care.”<sup>83</sup> The court’s reference to the defendant being “deliberately indifferent” as to whether the organization engages in terrorist activity implicates the doctrine of willful blindness, which is the legal equivalent of knowledge.<sup>84</sup> However, a defendant does not engage in “deliberate wrongdoing” whenever he knowingly provides assistance to a terrorist organization or is willfully blind in doing so. Instead, *Boim III* requires proof that the defendant knows or is deliberately indifferent to whether the provision of material support would be used to facilitate a terrorist attack. The court stated:

A knowing donor to Hamas—that is, a donor who knew the aims and activities of the organization—would know that Hamas was gunning for Israel . . . and that donations to Hamas, by augmenting Hamas’s resources, would enable Hamas to kill or wound . . . more people in Israel.<sup>85</sup>

The *Boim III* majority stated that reckless conduct might satisfy the require-

---

80. *Boim III*, 549 F.3d 685, 692 (7th Cir. 2008) (en banc) (“18 U.S.C. §§ 2339A, B, and C . . . do not require proof that the material support resulted in an actual terrorist act, or punish an attempt.”).

81. *Id.*

82. *Id.* (emphasis added).

83. *Id.* at 693.

84. See *Global-Tech Appliances, Inc., v. SEB S.A.*, 131 S.Ct. 2060, 2070-71 (2011) (holding that willful blindness has two basic requirements: “(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact”).

85. *Boim III*, 549 F.3d 685 at 694 (en banc).

ment that the defendant engaged in “deliberate wrongdoing.”<sup>86</sup> The court commented:

When the facts known to a person place him on notice of a risk, he cannot ignore the facts and plead ignorance of the risk. That is recklessness and equivalent to recklessness is wantonness, which has been defined as the conscious doing of some act or omission of some duty under knowledge of existing conditions and conscious that from the doing of such act or omission of such duty injury will likely or probably result.<sup>87</sup>

Writing for the en banc majority, Judge Posner used the example of giving a child a loaded gun, which would constitute criminal recklessness and satisfy the state of mind requirement under § 2333.<sup>88</sup> He posited that the fact defendant did not desire the child to shoot anyone is irrelevant.<sup>89</sup> In such a case, the defendant knew that by providing a child a loaded weapon there was a “substantial probability” of death or serious bodily injury and consciously disregarded the risk.

Plaintiffs are not required to show that the defendant had the specific intent to aid or encourage the particular acts that injured plaintiffs.<sup>90</sup> It is sufficient to show that the defendant “knew the entity had been designated as a terrorist organization, and deliberately disregarded that fact while continuing to provide financial services to the organization with knowledge that the services would in all likelihood assist the organization in accomplishing its violent goals.”<sup>91</sup> Thus, in addition to proving the mens rea for the predicate crime of international terrorism (§§ 2339A, 2339B, or 2339C), the Seventh Circuit requires plaintiffs to prove that the defendant had knowledge that the provision of material support or funds would assist the terrorist organization in committing a terrorist attack, or knowledge that the consequences were “substantially certain” to result from his conduct, and he deliberately disregarded the fact.<sup>92</sup>

What constitutes recklessness has generated some controversy. In *Gill v. Arab Bank, PLC*, the District Court for the Eastern District of New York adopted the *Boim III* recklessness standard, stating that to sustain a judgment under 18 U.S.C. § 2333(a) “it must be shown that the defendant’s alleged actions were reckless, knowing, or intentional.”<sup>93</sup> However, in *Strauss v. Credit Lyonnais*, the District Court

---

86. *Id.* at 693.

87. *Id.*

88. *Id.*

89. *Id.* (internal citations omitted).

90. *Id.*

91. *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 428 (E.D.N.Y. 2009).

92. *Boim III*, 549 F.3d at 693 (en banc). If the predicate act of international terrorism involves a violation of 18 U.S.C. § 2339A or § 2339C, which both require proof that the defendant acted with knowledge or intent that the provision of material support, or the collection or provision of funds, “are to be used in preparation for, or in carrying out” one of a number of specified crimes, this would constitute deliberate wrongdoing for purposes of § 2333(a). In such cases, no additional mens rea (beyond that required for the predicate crime) would need to be proven.

93. *Gill II*, 893 F. Supp. 2d 474, 506, 557 (E.D.N.Y. 2012).

for the Eastern District of New York stated that there doesn't appear to be much difference between the recklessness standard described in *Boim III* and *Gill*, and the standard of willful blindness adopted by several other courts. The court in *Credit Lyonnais* stated:

Under both formulations, it is apparent that, whether it is labeled willful blindness or recklessness, Plaintiffs must show that Defendant knew or was deliberately indifferent to the fact that CBSP was financially supporting terrorist organizations, meaning that Defendant knew there was a substantial probability that Defendant was supporting terrorists by hosting the CBSP accounts and sending money at the behest of CBSP to the 13 Charities.<sup>94</sup>

*Credit Lyonnais* requires proof that the defendant acted with knowledge, which can be satisfied if the bank was deliberately indifferent to the fact that the bank was providing financial services to a charitable entity that was financially supporting a terrorist organization.

It is not a defense that a defendant intended to support the terrorist group's humanitarian activities. *Boim III* declared: "Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities."<sup>95</sup> Finally, the courts are in agreement that acting with mere negligence is not sufficient to sustain an ATA claim. "[I]t would not be enough to impose liability on a donor for violating section 2333 . . . that the average person or a reasonable person would realize that the organization he was supporting was a terrorist organization, if the actual defendant did not realize it."<sup>96</sup> Simply stated, negligent conduct does not satisfy the requirement of knowledge or deliberate wrongdoing.

In contrast to the Seventh Circuit, the Second Circuit does not require a mens rea beyond what is required to prove a violation of the material support statute, 18 U.S.C. § 2339B. In *Weiss v. Nat'l Westminster Bank PLC*, plaintiffs brought action in the District Court for the Eastern District of New York against National Westminster Bank ("NatWest"), alleging that the bank provided material support to Hamas in violation of 18 U.S.C. §§ 2331(1), 2333(a) and 2339B(a)(1).<sup>97</sup> Plaintiffs further alleged that Hamas received funding from several Islamic charities, including the Palestinian Relief and Development Fund ("Interpal").<sup>98</sup> According to plaintiffs, Interpal was the primary clearing house for funds raised throughout Europe and the Middle East for Hamas.<sup>99</sup> Plaintiffs also claimed that for more than nine years NatWest knowingly maintained numerous bank accounts for Interpal, and transferred and received money between these accounts and various Hamas

---

94. *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 428 (E.D.N.Y. 2013).

95. *Boim III*, 549 F.3d 698-99, 709 (en banc).

96. *Id.* at 693.

97. *See Weiss I*, 453 F. Supp. 2d 609, 615 (E.D.N.Y. 2006).

98. *Id.*

99. *Id.* at 616.

front organizations.<sup>100</sup>

On appeal, the Second Circuit in *Weiss* reversed the district court's exacting standard for determining whether NatWest had acted with the requisite scienter for liability under 18 U.S.C. § 2333(a) predicated on a violation of 18 U.S.C. § 2339B(a)(1). The district court required proof that the bank had knowledge that Interpal funded terrorist activities.<sup>101</sup> The Second Circuit held instead that "in order for NatWest to be liable under § 2333(a), it must have knowledge that (or exhibited a deliberate indifference to whether) Interpal provided material support to HAMAS (an FTO), regardless of whether that support was for terrorist activities."<sup>102</sup> The appellate court stated that while § 2333(a) does not include a mental state requirement on its face –

[I]t incorporates the knowledge requirement from § 2339B(a)(1), which prohibits the knowing provision of *any* material support to terrorist organizations without regard to the types of activities supported. Its application is not limited to the provision of support to the terrorist activities of a terrorist organization.<sup>103</sup>

To sustain a claim under § 2333(a) in the Second Circuit, plaintiffs only have to prove § 2339B(a)(1)'s scienter requirement, which is incorporated into § 2333(a).<sup>104</sup> Plaintiffs must prove that a defendant knew it was providing material support to a designated FTO or knew that the organization was engaged in terrorist activity. The Second Circuit in *Weiss* stated: "Section 2339B(a)(1) does not require a showing that NatWest knew it was providing material support for terrorist activity."<sup>105</sup> In order to establish the scienter requirement of § 2339B, plaintiffs must present evidence in this case that NatWest provided financial services to Interpal with knowledge or a deliberate indifference as to whether, Interpal "solicit[ed] funds or other things of value" for HAMAS, "regardless of whether those funds

---

100. *Id.* at 618.

101. *Weiss III*, 768 F.3d 202 (2d Cir. 2014).

102. *Id.* at 206. (emphasis in original).

103. *Id.* at 207-08. (emphasis in original).

104. *Id.* at 208.

105. *Id.* The Second Circuit further held that it was not necessary to prove that NatWest provided financial services to HAMAS to be liable under § 2333(a). An ATA claim based on a violation of § 2339B could be sustained if NatWest provided financial services to an organization (Interpal) that engaged in "terrorist activity." *Id.* at 209. The Court reasoned that to violate § 2339B, a defendant must have knowledge that the organization is a designated terrorist organization, or that the organization has engaged or engages in "terrorist activity." *Id.* "Section 2339B(a)(1) explicitly incorporates the meaning of 'engage[] in terrorist activity' from § 212(a)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(iv)(IV), which defines 'engage in terrorist activity' to include 'solicit[ing] funds or other things of value for . . . a terrorist organization described in clause (vi)(I) . . .'" *Id.* at 208. Moreover, "[c]lause (vi)(I) defines 'terrorist organization' to mean 'an organization . . . designated under section 1189 of this title . . .', 8 U.S.C. § 1182(a)(3)(B)(vi)(I), and § 1189 authorizes the Secretary of State to designate an organization as a foreign terrorist organization ('FTO')." *Id.* Because "the Secretary of State designated HAMAS as an FTO," the Second Circuit concluded that "if Interpal solicited funds for HAMAS, then Interpal engaged in 'terrorist activity' within the meaning of § 212(a)(3)(B) of the Immigration and Nationality Act." *Id.*

were used for terrorist or non-terrorist activities.”<sup>106</sup> In so ruling, the Second Circuit found that plaintiffs had presented sufficient evidence to create an issue of fact regarding whether NatWest fulfilled § 2339B(a)(1)’s scienter requirement.<sup>107</sup> Plaintiffs presented evidence that NatWest was aware of OFAC’s designation of Interpal as a Specially Designated Global Terrorist (“SDGT”), and of OFAC’s press release announcing that Interpal provided material support to HAMAS.<sup>108</sup> There was also evidence that various NatWest employees suspected Interpal of providing funding to Hamas.<sup>109</sup>

Finally, the *Weiss* appellate court held that it was no defense following Interpal’s SDGT designation, that British authorities—the Charity Commission, the Special Branch, and the Bank of England—had condoned NatWest’s relationship with Interpal. The British government found no clear evidence that Interpal supported Hamas’s political or violent militant activities.<sup>110</sup> It was therefore not illegal in England for NatWest to provide financial services to Interpal. However, the Second Circuit found that such a finding was not dispositive of whether NatWest could be held liable under § 2333(a). The court stated:

Even if the British authorities had investigated whether Interpal provided support to Hamas for any purpose and had concluded that Interpal had no links to Hamas at all, the British authorities’ conclusion would not be inconsistent with liability under the United States statutes and could not justify summary judgment in the face of contrary evidence.<sup>111</sup>

Despite the fact that the British authorities had cleared Interpal of any wrongdoing in connection with Hamas, and it was thus not illegal for NatWest to provide financial services to Interpal in England, NatWest could still be found liable under § 2333(a). According to the Second Circuit, the fact that it was not illegal for NatWest to provide financial services to Interpal under British law is no defense to noncompliance with United States law, including the civil tort provision of the ATA.

Ultimately, the disagreement between the Seventh and Second Circuits on the requisite mens rea to prove a violation of § 2333(a) creates an untenable situation. If the ATA claim is filed in the Seventh Circuit, plaintiffs have to satisfy two scienter requirements. First, plaintiffs must prove the mens rea for the underlying statutory violation that plaintiffs allege constitutes an act of international terrorism. This will often involve a claim that the defendant bank provided financial services to an FTO, in violation of 18 U.S.C. § 2339B. In such a case, plaintiffs must prove that the bank had knowledge of the terrorist group’s designation as an FTO, or

---

106. *Id.*

107. *Id.* at 212.

108. *Id.*

109. *Id.*

110. *Id.* at 209.

111. *Id.* at 210.

knowledge that the terrorist organization engaged or engages in terrorist activity.<sup>112</sup> Second, in *Boim III* the Seventh Circuit stated that plaintiffs must also demonstrate “deliberate wrongdoing” by the defendant. Moreover, “[i]f the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result,” according to the en banc majority.<sup>113</sup> If, on the other hand, the ATA claim is filed in the Second Circuit, plaintiffs would only have to prove the scienter required to support a violation of the material support statute, 18 U.S.C. § 2339B. It is sufficient for plaintiffs to show that defendant had knowledge that the recipient of the material support was a designated FTO or engaged or engages in terrorist activity.<sup>114</sup> There is no requirement that plaintiffs prove the defendant had actual knowledge, or knowledge of a substantial certainty, that the funds would be used to commit a terrorist attack, according to the *Weiss* appellate court.<sup>115</sup>

The split in the courts on the mens rea issue raises at least two serious concerns. First, because the Seventh Circuit requires proof of a heightened mens rea to support a claim under the ATA, plaintiffs will likely engage in forum shopping and avoid filing such claims in that jurisdiction. Plaintiffs will file their cause of action in forums where it is easier for them to obtain a winning judgment, such as in jurisdictions where they only have to prove the mens rea required to establish a violation of the material support statute. Second, applying different mens rea standards will likely result in disparate civil judgments, depending on where the ATA tort claim has been filed. For example, a defendant could be found liable for violating § 2333(a) based on proof of knowledge that he was providing financial services to an FTO, but that same defendant would not be found liable in a jurisdiction where plaintiffs had to demonstrate that defendant acted with a heightened mens rea of knowing or intending, or with reckless disregard that the funds are to be used to finance a terrorist attack.

(c) “By reason of”

Section 2333(a) authorizes any United States national to sue if he is injured “by reason of” an act of international terrorism. The words “by reason of” have been interpreted to require a showing that the defendant’s conduct was the proximate cause of plaintiff’s injuries.<sup>116</sup> “Proof of proximate cause must be established for liability to be found under the ATA.”<sup>117</sup> Proximate cause is one of “the judicial tools used to limit a person’s responsibility for the consequences of that person’s own acts.”<sup>118</sup> In *Rothstein v. UBS AG*, the Second Circuit Court of Appeals stated:

---

112. *Boim III*, 549 F.3d 685, 692 (7th Cir. 2008) (en banc).

113. *Id.* at 693.

114. *Weiss III*, 768 F.3d 202 (2d Cir 2014).

115. *Id.* at 204.

116. See *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 118, 123 (2d Cir. 2013); *Gill III*, 893 F. Supp. 2d 542 (E.D.N.Y. 2012); *Abecassis I*, 704 F. Supp. 2d 623 (S.D. Tex. 2010).

117. *Gill III*, 893 F. Supp. 2d at 555.

118. *Id.* at 555-56.

“[H]ad [Congress] intended to allow recovery upon a showing lower than proximate cause, we think it either would have so stated expressly or would at least have chosen language that had not commonly been interpreted to require proximate cause for the prior 100 years.”<sup>119</sup> The court posited that the “by reason of” language has a “well understood meaning” and historically has been interpreted as requiring proof of causation.<sup>120</sup> In *Holmes v. Securities Investor Protection Corp.*, the Supreme Court construed the words “by reason of” in the civil provision of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, to be synonymous with “proximate cause.”<sup>121</sup> Further, section 4 of the Clayton Act, which provides a private cause of action for injuries to business or property “by reason of” a violation of the Act, requires a showing that the defendant’s violation was the proximate cause of plaintiff’s injury.<sup>122</sup> Section 2333(a) therefore requires proof of a causal nexus between the defendant’s conduct and the plaintiff’s injury.<sup>123</sup>

The civil proximate cause standard has two central components. First, the defendant’s conduct must have been a “substantial factor” in the resultant harm.<sup>124</sup> Second, the injury must have been “reasonably foreseeable” as a natural consequence.<sup>125</sup> Foreseeability is “a touchstone for proximate cause analysis.”<sup>126</sup> However, “plaintiffs who bring an ATA action are not required to trace specific dollars to specific attacks to satisfy the proximate cause standard. Such a task would be impossible and would make the ATA practically a dead letter because ‘[m]oney is fungible.’”<sup>127</sup> Further, “but-for” causation is not required under § 2333(a).<sup>128</sup> Oth-

119. Rothstein v. UBS AG, 708 F.3d 82, 95 (2d Cir. 2013).

120. *Id.*

121. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 267 (1992).

122. *Associated Gen. Contractors of Cal., Inc. v. Cal. St. Council of Contractors*, 459 U.S. 519 (1983).

123. See *Strauss v. Credit Lyonnais, S.A.*, No. 06-CV-0702 (CPS) 2006 WL 2862704 at \*18 (E.D.N.Y. Oct. 5, 2006) (“Taking into account the legislative history of these statutes and the purpose behind them, [ ] it is clear that proximate cause may be established by a showing only that defendant provided material support to, or collected funds for a terrorist organization which brought about plaintiffs’ injuries”); *Weiss I*, 453 F. Supp. 2d at 631-32 (E.D.N.Y. 2006) (same); *c.f. supra* note 20, S. REP. NO. 102-342, 102d Cong. 1st Sess. at 22 (1992); but see *Rothstein*, 708 F.3d 88, 92, 95 (acknowledging the legislative history of the ATA, and Congress’ intent to create “liability at any point along the causal chain of terrorism” but maintaining that Congress nevertheless did not intend “to allow recovery upon a showing lower than proximate cause”).

124. See *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 429 (E.D.N.Y. 2009) (quoting *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 123 (2d Cir.), *cert. denied* 540 U.S. 1012 (2003) (proximate causation requires that plaintiffs show defendant’s actions were “a substantial factor in the sequence of responsible causation,” and that the injury was “reasonably foreseeable or anticipated as a natural consequence”); *Rothstein*, 708 F.3d at 91; see also *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 432 (E.D.N.Y. 2013) (“[A] reasonable juror could conclude that the sizable amount of money sent from Defendant to Hamas front organizations was a substantial reason that Hamas was able to perpetrate the terrorist attacks at issue, and that Hamas’ increased ability to carry out deadly attacks was a foreseeable consequence of sending millions of dollars to groups controlled by Hamas.”).

125. *Id.*; see also *Gill III*, 893 F. Supp. 2d 542, 572 (E.D.N.Y. 2012) (“Assuming plaintiff could demonstrate that the Bank acted recklessly, it has not shown that his—American’s—injuries were reasonably foreseeable by the Bank as a result of the size and timing of funds transfers put in issue by plaintiff.”).

126. *Id.* at 556 (internal citations omitted).

127. *Strauss*, 925 F. Supp. 2d at 433 (quoting *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010)); see also *Gill III*, 893 F. Supp. 2d at 556 (“the money alleged to have changed hands ‘need not be shown to have been used to purchase the bullet that struck the plaintiff.’”); *Weiss I*, 453 F. Supp. 2d at 631-32.

erwise, “but-for causation would come up against the basic problem of the fungibility of money.”<sup>129</sup> The defendant would be able to avoid liability under § 2333(a) merely by claiming that if a particular contribution was not made, money from other sources could have been used to make up the shortfall, and an attack might have occurred without the defendant’s donation.<sup>130</sup>

Several factors are probative on the issue of causation. First, the amount of money provided to an FTO is highly relevant. “[A] major recent contribution with a malign state of mind would—and should—be enough.”<sup>131</sup> However, “a small contribution made long before the event—even if recklessly made—would not be.”<sup>132</sup> The courts have rejected the contention that *any* contribution knowingly or recklessly made to a terrorist organization, no matter how attenuated, will result in civil liability “without the demonstration of a proximate causal relationship to the plaintiff’s injury.”<sup>133</sup> Second, the lapse of time between the provision of material support and injury to plaintiffs may factor into the proximate cause inquiry.<sup>134</sup> The greater the passage of time between the defendant’s conduct and the terrorist attack, the less likely that defendant is the proximate cause of the death or injury. In *Gill v. Arab Bank, PLC*, the District Court for the Eastern District of New York held that the financial transactions processed by the bank that predated the terrorist attack that caused plaintiff’s injuries by several years did not satisfy the proximate cause requirement.<sup>135</sup> Finally, whether the transfer of funds occurred after the terrorist attack that caused plaintiffs’ injuries is highly relevant. “[A] transaction which occurred after a terrorist attack cannot be the proximate cause of that attack.”<sup>136</sup> Simply stated, financial services provided after the terrorist attack cannot be the proximate cause of plaintiff’s injuries.

In *Boim III*, the Seventh Circuit applied an extremely relaxed standard of causation with respect to donations given to a terrorist organization. According to the court, there is no requirement that the defendant’s monetary donations were a “substantial factor” in the chain of causation that caused the death or injury.<sup>137</sup> The court found that the provision of any financial support to a terrorist organization creates a dangerous situation and enhances the risk of harm, establishing a sufficient causal link between the defendant’s conduct and the injury.<sup>138</sup> The court used the following scenario to explain its position:

---

128. 893 F. Supp. 2d at 555; *see also Abecassis I*, 704 F. Supp. 2d at 665 (“The courts agree that ‘but for’ causation is not required.”).

129. *Gill III*, 893 F. Supp. 2d at 507-08.

130. *Id.*

131. *Id.* at 556 (internal citations omitted).

132. *Id.* at 573 (funds transferred in 2002 did not proximately cause injury to an American in 2008).

133. *Id.*

134. *Weiss I*, 453 F. Supp. 2d at 631-32 (E.D.N.Y. 2006); *see also Gill III*, 893 F. Supp. 2d at 573 (funds transferred in 2002 did not proximately cause injury that occurred in 2008).

135. *See Gill III*, 893 F. Supp. 2d 542, 560 (E.D.N.Y. 2012).

136. *Weiss I*, 453 F. Supp. 2d at 632.

137. *Boim III*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc).

138. *Id.*

[C]onsider an organization solely involved in committing terrorist attacks and a hundred people all of whom know the character of the organization and each of whom contributes \$1,000 to it, for a total of \$100,000. The organization has additional resources from other, unknown contributors of \$200,000 and it uses its total resources of \$300,000 to recruit, train, and equip, and deploy terrorists who commit a variety of terrorist acts one of which kills an American citizen. His estate brings a suit under section 2333 against one of the knowing contributors of \$1,000.<sup>139</sup>

The fact that the death could not be traced to any of the contributors would be irrelevant.<sup>140</sup> The defendant would be liable because—

[t]he knowing contributors as a whole would have significantly enhanced the risk of terrorist acts and thus the probability that the plaintiff's decedent would be a victim, and this would be true even if Hamas had incurred a cost of more than \$1,000 to kill the American, so that no defendant's contribution was a sufficient condition of his death.<sup>141</sup>

The *Boim III* majority held that any donation of funds to a terrorist organization satisfies the proximate cause requirement, regardless of the amount.<sup>142</sup> No additional causation is required.<sup>143</sup>

Other courts have raised concerns about the Seventh Circuit's view on causation. One court commented:

[The *Boim* en banc opinion] is so broad that, if taken to its logical extension, it would make any person liable if that person knows that (or is deliberately indifferent to whether) Hamas commits terrorist attacks in Israel, if even \$1 of that person's money ends up in Hamas's bank account. . . . [T]he limits of liability are unclear under [*Boim III*].<sup>144</sup>

The Seventh Circuit stands alone regarding its relaxed standard of causation.

---

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* The *Boim III* en banc majority also suggested that a financial contribution to a terrorist organization might render the donor civilly liable for murder of an American citizen committed by members of that organization fifty years later. *Id.* at 700. The court opined that “[s]eed money for terrorism can sprout acts of violence long after the investment.” *Id.*

143. *Id.* at 696-700; *see also id.* at 709 (Rovner, J., concurring in part and dissenting in part) (“the majority relieves the plaintiffs of any obligation to demonstrate a causal link between whatever support the defendants provided to Hamas and Hamas’s terrorist activities (let alone David Boim’s murder in particular)”); *id.* at 722-24 (Wood, J., concurring in part and dissenting in part) (“The en banc majority freely concedes that there are no limits at all to its rule, and that a donor who gave funds to an organization affiliated with Hamas in 1995 might still be liable under § 2333 half a century later, in 2045.”).

144. *Abecassis I*, 704 F. Supp. 2d 623, 644 (S.D. Tex. 2010) (emphasis added); *see also Sant*, *supra* note 27, at 576 (“Any bank found liable for even one wire transfer reaching terrorists would become liable for all terrorist acts committed by that terrorist group, apparently until the end of time.”).

No other court has adopted such an extreme view.<sup>145</sup>

### III. AIDING AND ABETTING LIABILITY

The courts are divided on whether 18 U.S.C. § 2333(a) allows for claims premised on a theory of aiding and abetting. In *Boim III*, the Seventh Circuit held that § 2333(a) does not provide for aiding and abetting liability.<sup>146</sup> In reaching its conclusion, the court relied on *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, where the Supreme Court held that section 10(b) of the Securities and Exchange Act of 1934 does not permit a private cause of action for aiding and abetting.<sup>147</sup> The Supreme Court found that an aiding and abetting claim does not exist under the statute unless explicitly created by Congress. Because section 10(b) made no reference to secondary liability, the Supreme Court refused to permit recovery on such a theory.<sup>148</sup> The Court stated:

Congress has not enacted a general civil aiding and abetting statute . . . Thus, when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.<sup>149</sup>

The Court posited that “an implicit congressional intent to impose . . . aiding and abetting liability” could not plausibly be inferred from “statutory silence.”<sup>150</sup>

---

145. See *Gill I*, 891 F. Supp. 2d 335, 367 (E.D.N.Y. 2012) (“Judge Posner’s opinion for the Boim en banc majority has been criticized for having essentially omitted from the elements of the section 2333(a) cause of action any requirement that a plaintiff prove even proximate cause.”); *Abecassis II*, 785 F. Supp. 2d 614, 635 (S.D. Tex. 2011) (“[I]n terms of both scienter and causation, *Boim III* stretched civil liability under the ATA more than previous courts had.”); see also 2 VED P. NANDA & DAVID K. PANSIUS, LITIG. OF INT’L DISPUTES IN U.S. COURTS § 9.18 (2d ed. 2008 & Supp. 2010 (“*Boim III* arguably advocates the broadest possible civil liability for third parties providing material assistance to terrorist organizations.”)).

146. *Boim III*, 549 F.3d 685, 689 (7th Cir. 2008) (en banc).

147. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 183 (1994). Section 10(b) provides in relevant part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered or a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe.

Securities Exchange Act of 1934, ch. 404, title 1, § 10, 48 Stat. 891 (codified as amended at 15 U.S.C. § 78j(b) (2012)).

148. *Cent. Bank of Denver*, 511 U.S. at 177-78.

149. *Id.* at 182.

150. *Id.* at 185. In *Gill I*, the District Court for the Eastern District of New York stated that the points made in *Cent. Bank* in support of their conclusion are as follows:

1. The statute’s text is the touchstone in determining whether a statute provides for secondary liability;
2. If the statute is silent, then there can be no liability for aiding and abetting since Congress knows how to provide for aiding and abetting liability if it wants to do so;
3. Policy considerations are irrelevant in determining whether a statute provides for secondary liability; and

*Central Bank's* holding is not limited to section 10(b) or the securities laws.<sup>151</sup> There is nothing in the Court's holding that turns on the particular features of securities laws. In *Boim III*, the Seventh Circuit agreed with the reasoning in *Central Bank of Denver*, holding that "statutory silence [in section 2333] on the subject of secondary liability means there is none."<sup>152</sup> The *Boim III* majority reasoned that to read secondary liability into § 2333(a) would enlarge the federal court's extraterritorial jurisdiction.<sup>153</sup> While Congress has the power to impose liability for acts committed abroad but that have effects within the United States, including acts of aiding and abetting, it must make the extraterritorial scope of a statute clear.<sup>154</sup> The court concluded that such legislative intent was not clearly manifested under the statute.<sup>155</sup>

The application of the court's ruling in *Boim III* is somewhat confusing. While explicitly holding that the ATA does not authorize civil liability based on a theory of aiding and abetting, the Seventh Circuit nonetheless upheld such a claim by simply calling secondary liability by the name of primary liability.<sup>156</sup> In dissent, Judge Wood described the majority's reasoning:

[By] working through a chain of statutes—from § 2333(a) (treble damages action for a person injured by an act of international terrorism), to § 2331(a) (definition of international terrorism), to § 2339A (providing material support for something that violates a federal criminal law is itself a crime), to § 2332 (criminalizing the killing of any American citizen outside the United States)—the en banc majority concludes that there is *primary* liability under § 2333(a) for someone who donates money "to a terrorist group that targets Americans outside the United States."<sup>157</sup>

The en banc court found that this "chain of incorporation by reference . . . impose[s] [primary] liability on a class of aiders and abettors."<sup>158</sup> Thus, if an ATA suit is brought against a secondary actor, such as a bank or charity, plaintiffs must prove liability required for primary violators. Plaintiffs must prove the ordinary tort requirements of fault, state of mind, and causation required for primary violators against a secondary actor alleged to have violated the ATA.<sup>159</sup>

The Second Circuit has also held that liability for aiding and abetting is not

---

4. There is no general presumption that federal civil statutes provide for aiding and abetting liability.

891 F. Supp. 2d at 358-59.

151. *Gill II*, 893 F. Supp. 2d at 499 (internal citations omitted).

152. *Boim III*, 549 F.3d 689 (7th Cir. 2008) (en banc).

153. *Id.* 689-90.

154. *Id.* at 690.

155. *Id.*

156. *Sant*, *supra* note 27, at 574.

157. *Boim III*, 549 F.3d at 721 (7th Cir. 2008) (en banc) (Wood, J., concurring in part and dissenting in part).

158. *Id.* at 692 (en banc majority opinion).

159. *Id.*

permitted under § 2333(a).<sup>160</sup> In *Rothstein*, plaintiff's ATA aiding-and-abetting claim was rejected on two grounds. First, the court reasoned that § 2333(a) is silent on the permissibility of aiding and abetting liability.<sup>161</sup> Second, the court observed that in related criminal provisions of the ATA, Congress explicitly authorized secondary liability. Finding that Congress excluded such authority in § 2333, but affirmatively permitted aiding and abetting liability in other related ATA statutes, meant that Congress did not intend § 2333(a) to permit recovery on such a theory.<sup>162</sup> Therefore, if a § 2333(a) claim is filed in the Second or Seventh Circuits, plaintiffs must plead a claim of primary liability. Plaintiffs must prove that the defendant committed an act of international terrorism, which caused plaintiffs' injuries.

Despite the rulings in *Boim III* and *Rothstein*, several courts have explicitly extended liability to secondary actors under the ATA.<sup>163</sup> In *Wultz v. Islamic Republic of Iran*, the federal District Court for the District of Columbia upheld plaintiff's § 2333(a) claim based on a theory of aiding and abetting.<sup>164</sup> The court distinguished *Central Bank of Denver* on several grounds. First, the court found that § 2333(a) provides an express private civil cause of action, whereas section 10(b) of the Securities Exchange Act of 1934 does not.<sup>165</sup> Second, the court stated that Congress had intended to incorporate general principles of tort law into the cause of action under § 2333(a).<sup>166</sup> The court found that generally tort law includes secondary liability.<sup>167</sup> Finally, the court concluded that Congress intended "to make civil liability at least as extensive as criminal liability," and pursuant to the federal criminal aiding and abetting statute, 18 U.S.C. § 2, criminal law "creates liability for aiding and abetting violations of any other criminal provisions."<sup>168</sup> The court reasoned that

---

160. *Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013).

161. *Id.*

162. The court in *Rothstein* stated:

Further counseling against a judicial interpretation of that section as authorizing such liability is the fact that there are sections of the ATA's criminal provisions . . . that do refer to aiding and abetting liability. For example, § 2339B, which prohibits "knowingly provid[ing] material support or resources to a foreign terrorist organization," 18 U.S.C. § 2339B(a)(1), provides that there is jurisdiction over an offense under subsection (a) if, *inter alia*, "an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a). . . . We doubt that Congress, having included in the ATA several express provisions with respect to aiding and abetting in connection with the criminal provisions, can have intended §2333 to authorize civil liability for aiding and abetting through its silence.

*Id.* at 98.

163. See, e.g., *Abecassis II*, 785 F. Supp. 2d 614, 649 (S.D. Tex. 2011) (plaintiffs sufficiently stated claims under ATA based on aiding and abetting liability and primary liability); *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 55-56 (D.D.C. 2010); *Chiquita Brands Int'l, Inc. Alien Tort Statute and S'holder Derivative Litig.*, 690 F. Supp. 2d 1296, 1309-10 (S.D. Fla. 2010) (holding that plaintiffs had stated a claim for primary liability, secondary liability, and conspiracy liability under the ATA); *Morris v. Khadr*, 413 F. Supp. 2d 1323, 1330 (D. Utah 2006) (holding that civil liability under the ATA extends to aiders and abettors).

164. *Wultz*, 755 F. Supp. 2d at 55-56.

165. *Id.* at 55.

166. *Id.*

167. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 876 (1979)).

168. *Wultz*, 755 F. Supp. 2d at 55 (citing *Boim I*, 291 F.3d 1000, 1020 (7th Cir. 2002)); see also *Linde I*, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005) (citing *Boim I*, 291 F.3d at 1019).

criminal law authorizes secondary liability, and since Congress intended civil liability under § 2333(a) to be as extensive as criminal law, the statute extends civil liability to secondary actors. Further, *Wultz* distinguished *Central Bank of Denver* based on the ATA's policy objectives.<sup>169</sup> Accordingly, the court held that to deny plaintiff's aiding and abetting claims under the ATA would "thwart[] Congress'[s] clearly expressed intent to cut off the flow of money to terrorists at every point along the causal chain of violence."<sup>170</sup>

The division in the courts as to whether § 2333(a) permits civil liability based on a theory of aiding and abetting creates an untenable situation. If plaintiffs file suit against a bank in the Second or Seventh Circuits, they must prove primary liability. In other words, plaintiffs must prove that the bank committed an act of international terrorism, which was the proximate cause of plaintiffs' injuries. Whereas in other jurisdictions, a bank may be held civilly liable for aiding and abetting by engaging in conduct that substantially assisted the principal in committing a terrorist attack.<sup>171</sup> Further, in an aiding and abetting jurisdiction proof of proximate cause is directed at the conduct of the principal actors, the terrorists themselves. Their conduct, not the bank's provision of financial services, must have been the proximate cause of the plaintiffs' injuries. Ultimately, plaintiffs have a much easier burden of proof in an aiding and abetting jurisdiction. Such disparity in the application of the ATA will serve to encourage forum shopping by plaintiffs, in turn, leading to inconsistent verdicts against secondary actors.

#### IV. PROVIDING ROUTINE BANKING SERVICES TO TERRORISTS

As previously established, whether a bank may be held liable under the ATA for the provision of routine banking services to suspected terrorists or terrorist-affiliated organizations may depend on whether the cause of action is filed in a jurisdiction that permits liability based on a theory of aiding and abetting or whether the jurisdiction requires proof of primary liability. This next section examines in greater detail how a bank could be acquitted of wrongdoing in a primary liability jurisdiction, but held civilly liable in a jurisdiction that permits aiding and abetting under § 2333(a).

---

169. *Wultz*, 755 F. Supp. 2d at 56.

170. *Id.* (citing *Boim I*, 291 F.3d 1010 (citing S. REP. No. 103-432, at 22 (1992))).

171. To support a civil aiding and abetting claim plaintiffs must prove:

- (1) The party to whom the defendant aids must perform a wrongful act that causes an injury;
- (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; and
- (3) the defendant must knowingly and substantially assist the principal violation.

*Id.* (citing *In re Chiquita Brands Int'l Inc. Alien Tort Statute and S'holder Derivative Litig.*, 690 F. Supp. 2d 1296, 1310 (S.D. Fla. 2010) (citing *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983))).

(a) *Primary Liability*

i. “act of international terrorism”

In a primary liability jurisdiction, such as the Second and Seventh Circuit, plaintiffs must prove that the bank committed an act of international terrorism, which caused plaintiffs’ injuries.<sup>172</sup> As previously discussed, “international terrorism” requires proof of three elements. First, the proscribed conduct must involve “violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States.”<sup>173</sup> Second, the act of international terrorism must have an international nexus, which can be proven by evidence that the terrorist act occurred primarily outside the territorial jurisdiction of the United States.<sup>174</sup> Finally, § 2331(1)(B) requires that the acts of international terrorism “appear to be intended” to intimidate or coerce a civilian population, influence government policy by intimidation or coercion, or affect the conduct of the government by mass destruction, assassination, or kidnapping.<sup>175</sup> Although plaintiffs are not required to prove that the bank shared the terrorist group’s intent, plaintiffs must demonstrate that the bank “appeared to” share the same or similar intent.<sup>176</sup> This latter element is critical and distinguishes terrorist acts from other violent crimes.<sup>177</sup> In most cases, the bank’s purpose was merely to make a profit from the account holder and nothing more. Because the bank did not share the intentions of the foreign terrorists, it is highly unlikely that there will be an “external appearance” that it did. Therefore, except in extreme cases, plaintiffs will have difficulty establishing that the provision of financial services “appears to be intended” for a terrorist purpose.

By contrast, evidence that the bank and terrorist organization worked together in close coordination to advance a common scheme or plan may satisfy the “appear to be intended” requirement for proving a violation of the ATA. In *Linde v. Arab Bank*, approximately 200 Americans who were victims of terrorist attacks in Israel brought suit in the District Court for the Eastern District of New York seeking more than one billion dollars in damages against Arab Bank, a Jordanian bank with a New York branch office, for knowingly providing banking services to Hamas-affiliated charities and individuals, and terrorist organizations that allegedly supported terrorist attacks against Israeli civilians.<sup>178</sup> The civil complaint alleged that

---

172. 18 U.S.C. § 2333(a) (2012).

173. 18 U.S.C. § 2331(a)(A) (2012).

174. *Id.* at § 2331(1)(C). All of the ATA claims filed to date have involved terrorist bombings or shootings committed abroad. See, e.g., *Boim III*, 549 F.3d 685, 687 (7th Cir. 2008) (en banc); *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 259-60 (E.D.N.Y. 2007); *Linde I*, 384 F. Supp. 2d 571, 575 (E.D.N.Y. 2005).

175. 18 U.S.C. § 2331(1)(B).

176. *Boim III*, 549 F.3d at 694 (stating that “it is not a state of mind requirement; it is a matter of external appearance rather than subjective intent”).

177. *Id.*

178. *Linde I*, 384 F. Supp. 2d at 571; *Almog*, 471 F. Supp. 2d at 259. The discussion herein of the Arab Bank cases is taken in large part from JIMMY GURULÉ, UNFUNDING TERROR: THE LEGAL RESPONSE TO THE FUNDING OF GLOBAL TERRORISM 332-33 (2008). Arab Bank is a Jordanian Bank headquartered in the city of Amman, and with a federally licensed branch office in New York City. See *id.* at 575.

Arab Bank administered accounts for various charities that operated as fundraising front organizations for Palestinian terrorist groups, including Hamas, the Palestinian Islamic Jihad, and the Al Aqsa Martyrs Brigade.<sup>179</sup> Specifically, plaintiffs claimed that, following the collapse of the peace negotiations between the State of Israel and Palestinian Authority, Palestinian terrorist groups launched the Al Aqsa Intifada, also known as the “Second Intifada.”<sup>180</sup> The Second Intifada called upon Palestinians to take up arms and engage in violent acts against Israelis. The Al Aqsa Intifada was intended to intimidate and coerce the civilian population of Israel and to influence the policy of the Israeli government to withdraw from the West Bank and Gaza strip.<sup>181</sup>

The most damning allegations involved Arab Bank’s involvement with the Saudi Committee for the Support of the Al Quds Intifada (“Saudi Committee”). Shortly after the commencement of the Second Intifada, the Saudi Committee was established as a private charity registered in Saudi Arabia.<sup>182</sup> According to plaintiffs, the Saudi Committee was established for the purpose of raising money for the families of Palestinian “martyrs,” killed, wounded, or imprisoned in the attacks against Israeli and other innocent civilians.<sup>183</sup> This was accomplished through a “comprehensive insurance death benefit” and “universal death and dismemberment plan” that provided payments of \$5,316.00 to the families of the martyrs.<sup>184</sup> Plaintiffs claimed that the death benefits plan operated, in effect, as a reward for committing the suicide attacks. Families allegedly claimed this reward by obtaining an official certification of their dead relative’s status as a martyr.<sup>185</sup> Further, in order to obtain this certificate, families were allegedly required to provide the Saudi Committee with the martyr’s name, personal information, and details concerning the date and manner of death.<sup>186</sup>

Plaintiffs alleged that Arab Bank was the exclusive administrator of the death and dismemberment benefits plan by which the Saudi Committee distributed the payments to the families of the deceased terrorists.<sup>187</sup> The Saudi Committee prepared a list of eligible martyrs and provided the list to the Bank. Arab Bank allegedly maintained a database of persons eligible to receive benefits under the plan.<sup>188</sup> The Saudi Committee opened an account at Arab Bank in the beneficiary’s name and then deposited U.S. dollars or Saudi riyals into the account.<sup>189</sup> Because Saudi riyals cannot be conveniently converted to Israeli currency, Arab Bank facilitated that conversion by routing those funds through its New York branch, where they

---

179. *Id.* at 576.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 576-77.

184. *Id.* at 577.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Almog v. Arab Bank*, 471 F. Supp. 2d 257, 263 (E.D.N.Y. 2007).

were converted to U.S. dollars, and then to Israeli currency.<sup>190</sup> Plaintiffs maintained that Arab Bank facilitated and provided incentives for suicide bombers who knew that “if they committed an attack, their families would be supported by the funds held in their names by Arab Bank.”<sup>191</sup> Further, plaintiffs alleged that Arab Bank maintained accounts and solicited and collected funds for other charitable organizations affiliated with Hamas, PIJ and other related terrorist organizations.<sup>192</sup> In September 2014, a federal jury in Brooklyn, New York found Arab Bank liable for violating § 2333(a) of the ATA.<sup>193</sup>

The factual allegations against Arab Bank supported a finding that the bank’s processing of payments for the Saudi Committee “appear[s] to be intended” to intimidate or coerce a civilian population. Arab Bank purportedly played a central role in a “well-published plan to reward terrorists killed and injured in suicide bombings and other attacks in Israel.”<sup>194</sup> Further, the bank “knew that the groups to which it provided services were engaged in terrorist activities.”<sup>195</sup> The Arab Bank also “knew that the funds it received as deposits and transmitted to various organizations were to be used for conducting acts of international terrorism.”<sup>196</sup> Clearly, the financial services provided by Arab Bank in this instance were not routine business services. Instead, the bank appears to have been working in close coordination with the Saudi Committee and charitable organizations acting in behalf of Hamas and other affiliated terrorist organizations supporting Hamas-related terrorist activities. The terrorist attacks perpetrated by members of Hamas and affiliated terrorist groups were clearly intended to intimidate and coerce the civilian Israeli population in the Occupied Territories. From “external appearance,” Arab Bank appears to have shared that same intent.<sup>197</sup>

In these cases against Arab Bank plaintiffs alleged a unique and aggravating set of facts showing that the bank worked in close coordination with various agents of Hamas towards a shared goal and objective—the disbursement of funds to the surviving family member of deceased terrorists. Further, Arab Bank allegedly supervised the administration of a death-benefits program for foreign terrorists. However, a different result would likely have followed if the allegations only involved the provision of routine financial services to an FTO. In such a case, it would be extremely difficult to show how the bank’s conduct created an external appearance that it shared the FTO’s purpose to intimidate and coerce a civilian population.

In *Stutts v. De Dietrich Group*, the district court dismissed the ATA complaint because plaintiffs failed to prove that the financial services provided by the bank defendants “appear to be intended” to intimidate or coerce civilians or government

---

190. *Id.*

191. *Id.*

192. *Id.* at 262.

193. *Supra* note 7; see also Stephanie Clifford, *Arab Bank Liable for Supporting Terrorist Efforts, Jury Finds*, N.Y. TIMES, Sept. 22, 2014, at A1, available at <http://nyti.ms/XP4dZT>.

194. *Almog*, 471 F. Supp. 2d at 268.

195. *Id.*

196. *Id.*

197. *Boim III*, 549 F.3d 685, 694 (7th Cir. 2008) (en banc).

entities as required under § 2331.<sup>198</sup> Plaintiffs' allegations against the bank defendants were based on their issuance of letters of credit to foreign corporations that allegedly sold chemical precursors and manufacturing equipment to Iraq that were used to develop the chemical weapons which caused plaintiff's injuries.<sup>199</sup> The complaint alleged that the provision of "financial support used to assist Saddam Hussein's Iraqi regime in the manufacture and stockpiling of chemical weapons constitutes an action of 'international terrorism' as defined in 18 U.S.C. § 2333."<sup>200</sup> However, the court found that the bank defendants were engaged in commercial banking activity and their actions were not designed to coerce civilians or government entities as required under § 2331.<sup>201</sup>

ii. Proximate cause

To prevail under an ATA claim, plaintiffs must establish that the bank's provision of financial services was the proximate cause of the terrorist attack that resulted in the plaintiff's death or injury. "Proof of proximate cause must be established for liability to be found under the ATA."<sup>202</sup> While "foreseeability" is the touchstone for proximate cause analysis, the prohibited conduct must also be a "substantial factor" resulting in the injury.<sup>203</sup> Thus, the critical inquiry is whether it was reasonably foreseeable that the financial services provided by the bank would result in a terrorist attack injuring or killing innocent civilians, and whether those services were a substantial factor in causing the attack.

In cases requiring proof of primary liability, the courts have consistently held that the provision of routine banking services was not the proximate cause of plaintiff's injuries and dismissed the ATA tort actions. In *Rothstein*, the Second Circuit found that plaintiffs' allegations were insufficient for the purposes of establishing proximate cause under a theory of primary liability.<sup>204</sup> In that case, plaintiffs alleged that UBS Bank provided funding to Iran, a known state sponsor of terrorism, which provided funding to Hezbollah and Hamas.<sup>205</sup> However, the complaint did not allege that UBS was a participant in the terrorist attacks that injured plaintiffs, or that it provided money to Hezbollah or Hamas—the terrorist groups that were responsible for the terrorist attacks.<sup>206</sup> Moreover, plaintiffs' complaint did not

---

198. *Stutts v. De Dietrich Group*, No. 03-CV-4058, 2006 WL 1867060 (E.D.N.Y. June 30, 2006). The bank defendants included Deutsche Bank AG, ABN AMRO Bank NV, Bayerische Landesbank, Gulf International Bank B.S.C., Mizuho Corporate Bank Ltd, Société Générale, Credit Lyonnais, BNP Paribas, DZ Bank AG, Bayerische Hypo-und Vereinsbank, Rabebank International, WestLB AG, State Bank of India, Banca Intesa, Arab Bank, and others.

199. *Stutts*, 2006 WL 1867060, at \*1.

200. *Id.* at \*2.

201. *Id.*

202. *Gill III*, 893 F. Supp. 2d 542, 555 (E.D.N.Y. 2012); see also *Rothstein v. UBS AG*, 708 F.3d 82, 94-95 (2d Cir. 2013); *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 118, 124 (2d Cir. 2013); *Stutts*, 2006 WL at 1867060.

203. *Gill III*, 893 F. Supp. 2d at 556.

204. *Rothstein*, 708 F.3d at 94.

205. *Id.*

206. *Id.*

claim that the U.S. currency UBS transferred to Iran was given to Hezbollah or Hamas; nor did plaintiffs assert that if UBS had not transferred U.S. currency to Iran, it would not have funded the attacks in which plaintiffs were injured.<sup>207</sup> Thus, providing funds to a third party that is associated with or supports a terrorist organization that committed the terrorist attack and caused plaintiffs' injuries may not be sufficient to establish proximate cause.

In *In re Terrorist Attacks*, the Second Circuit Court of Appeals reached a similar result.<sup>208</sup> In that case, defendants were alleged to have provided funding to purported charity organizations known to support terrorism that, in turn, provided funding to al Qaeda and other terrorist organizations.<sup>209</sup> The Second Circuit held that these allegations were insufficient to establish proximate cause absent any allegations that defendants participated in the September 11, 2001 attacks, or that they provided money directly to al Qaeda, or that the money allegedly donated to the purported charities actually was transferred to al Qaeda and aided in the September 11, 2001 terrorist attacks.<sup>210</sup> The court stated: "We are not persuaded that providing routine banking services to organizations and individuals said to be affiliated with al Qaeda . . . proximately caused the September 11, 2001 attacks or plaintiffs' injuries."<sup>211</sup> Thus, a bank is not liable "for injuries done with money that passes through its hands in the form of deposits, withdrawals, check clearing services, or any other routine banking service."<sup>212</sup>

In *Gill*, the district court dismissed the ATA complaint finding that plaintiffs had failed to prove that the bank's conduct was the proximate cause of Gill's injuries.<sup>213</sup> The size and timing of the funds did not support a finding of proximate cause. The court stated:

Assuming plaintiff could demonstrate that the Bank acted recklessly, it has not shown that his—an American's—injuries were reasonably foreseeable by the Bank as a result of the size and timing of funds transfers put in issue by plaintiff. No single or total transfer highlighted by plaintiff establishes the requisite magnitude and temporal connection to the attack required to find that the Bank's actions proximately caused plaintiff's injuries.<sup>214</sup>

The court noted that several of the financial transactions occurred approximately six years before the terrorist attack occurred, and other transactions closer to the attack were "insignificant in size and not sufficiently linked to Hamas or the gun-

---

207. *Id.*

208. *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 118, 124 (2d Cir. 2013).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 109 (D.D.C. 2003).

213. *Gill III*, 893 F. Supp. 2d 542, 572 (E.D.N.Y. 2012).

214. *Id.*

man who injured plaintiff.”<sup>215</sup> Finally, with respect to financial transactions provided by the Bank to Palestinian charities that collectively involved a large sum of money (at least \$27.5 million), the court expressed several concerns.<sup>216</sup> The court stated that “plaintiff fail[ed] to establish when the money was funneled to the ‘institutions’ through the Bank, that the charities were alter egos of Hamas, or how plaintiff has calculated the amount of the funds transferred.”<sup>217</sup>

In *Stutts*, the district court also found that engaging in commercial banking activity was not the proximate cause of plaintiffs’ injuries.<sup>218</sup> The court held that it was not “reasonably foreseeable” to the bank defendants “that issuing letters of credit to manufacturers would in any way contribute to Saddam Hussein’s use of chemical weapons or . . . the manufacture of chemical weapons in Iraq.”<sup>219</sup> However, in *Strauss v. Credit Lyonnais*, the court suggested that transferring large sums of money proximate in time to the commission of the terrorist attack could satisfy the requirement of proximate causation.<sup>220</sup> The court stated: “A reasonable juror could conclude that the sizable amount of money sent from Defendant to Hamas front organizations was a substantial reason that Hamas was able to perpetrate the terrorist attacks at issue, and that Hamas’ increased ability to carry out deadly attacks was a foreseeable consequences of sending millions of dollars to groups controlled by Hamas.”<sup>221</sup> The transfer of substantial sums of money therefore may satisfy the proximate cause requirement, but only if the wire fund transfer occurred proximate in time to the terrorist attacks that caused plaintiffs’ death or injuries.

*(b) Aiding and Abetting*

Generally, the *Restatement of the law Second-Torts*, section 876(b) provides that “[f]or harm resulting to a third person from the tortious conduct of another party, one is subject to liability if he . . . knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.”<sup>222</sup> To support a civil aiding and abetting claim, plaintiffs must show:

- (1) the party whom the defendant aids must perform a wrongful act that causes

---

215. *Id.*

216. *Id.* at 573.

217. *Id.*

218. *Stutts v. De Dietrich Group*, No. 03-CV-4058, 2006 WL 1867060 (E.D.N.Y. June 30, 2006).

219. *Id.* at \*4.

220. *Strauss v. Credit Lyonnais*, 925 F. Supp. 2d 414, 432 (E.D.N.Y. 2013).

221. *Id.*

222. The *Restatement of the law Second-Torts* recognizes three types of secondary liability. A person is subject to liability as an aider and abettor if he—

- (a) does a tortious act in concert with the other or pursuant to a common design with him, or
- (b) knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
- (c) gives substantial assistance to the other in accomplishing a tortious result and his conduct, separately considered, constitutes a breach of duty to a third person.

RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

an injury;

(2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance;

(3) the defendant must knowingly and substantially assist the principal violation.<sup>223</sup>

In applying section 876(b) of the *Restatement of the law Second-Torts* to an ATA claim, plaintiffs must prove that the foreign terrorists committed a wrongful act that caused plaintiffs' injuries. A defendant bank must be "generally aware" of its role or activities that facilitated the terrorist attack. Finally, the bank's conduct must have "substantially assist[ed]" the principal violation.

#### i. Causation

Under a theory of aiding and abetting, plaintiffs are not required to prove that the secondary actor was the proximate cause of the injury. Instead, section 876(b) requires that the "the party whom the defendant aids must perform a wrongful act that *causes* an injury."<sup>224</sup> In other words, plaintiffs must prove that the wrongful acts of the terrorists were the proximate cause of the injury, not the actions of the bank. This is an important distinction because plaintiffs need not show that the bank's actions were "a substantial factor in the sequence of responsible causation," and that the injury was "reasonably foreseeable or anticipated as a natural consequence" of the bank's conduct.<sup>225</sup> More specifically, plaintiffs do not have to prove that a terrorist attack resulting in plaintiffs' injuries was a natural and foreseeable consequence of the provision of banking services to the foreign terrorists or terrorist organization.<sup>226</sup> Under a theory of aiding and abetting, plaintiffs still have to prove proximate cause, but causation is directed at the acts of the terrorists, not the bank's conduct. Plaintiffs should have no difficulty proving that the terrorists caused plaintiffs' death or injuries. Proving causation is therefore much easier under a theory of aiding and abetting.

#### ii. Substantial Assistance

To support a claim of aiding and abetting under § 2333(a), plaintiffs must prove that defendant provided "substantial assistance" to the actual perpetrators of the terrorist attack.<sup>227</sup> Proof of "substantial assistance" requires "more than just a little aid."<sup>228</sup> It requires "knowledge of the illegal activity that is being aided and abetted, a desire to help that activity succeed, and some act to further such activity to make

---

223. Halberstam v. Welch, 705 F. 2d 472, 477 (D.C. Cir. 1983).

224. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979) (emphasis added).

225. Goldberg v. UBS AG, 660 F. Supp. 2d 410, 420 (E.D.N.Y. 2009) (quoting Lerner v. Fleet Bank, N.A., 318 F.3d 113, 123 (2d Cir. 2003)).

226. See RESTATEMENT (SECOND) TORTS, § 876(b) (1979).

227. See *Linde I*, 384 F. Supp. 2d 571, 584 (E.D.N.Y. 2005) (quoting RESTATEMENT (SECOND) OF TORTS, § 876 (1979)).

228. Goldberg v. UBS, 660 F. Supp. 2d 410, 429 (E.D.N.Y. 2009) (quoting Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490 (7th Cir. 1986)).

it succeed.”<sup>229</sup> What constitutes “substantial assistance” is largely dependent on the facts of the case. However, the courts have consistently held that the mere provision of routine financial services to a terrorist front organization, without more, does not constitute “substantial assistance.” In *Credit Lyonnais*, the court held that “[t]he maintenance of a bank account and the receipt or transfer of funds does not constitute [the] substantial assistance” necessary to sustain a claim of aiding and abetting liability.<sup>230</sup> In *Goldberg v. UBS*, the Brooklyn district court reached a similar result, holding that defendant’s actions in performing three wire transfers totaling approximately \$25,000 to a foreign terrorist organization failed to establish “substantial assistance” of the sort required to warrant aiding and abetting liability.<sup>231</sup> Likewise, in *Weiss*, the same court held that “[t]he mere maintenance of a bank account and the receipt or transfer of funds do not . . . constitute substantial assistance.”<sup>232</sup> However, the transfer of substantial sums of money to terrorists or terrorist-affiliated entities that occurred proximate in time to the commission of the terrorist attacks would likely constitute substantial assistance to support an aiding and abetting claim.<sup>233</sup>

Importantly, in a jurisdiction that recognizes a theory of aiding and abetting liability plaintiffs do not have to prove that the secondary actor committed an “act of international terrorism.” Instead, plaintiffs have to prove that the foreign terrorists committed an act of international terrorism and the bank “substantially assist[ed]” the terrorist acts. Moreover, because plaintiffs alleging aiding and abetting liability need not prove that the bank committed acts of international terrorism, there is no requirement that the bank’s conduct “appear[s] to be intended” for a terrorist purpose.<sup>234</sup> As previously discussed, the definition of “international terrorism” requires proof that the prohibited acts “appear to be intended” to (1) “intimidate or coerce a civilian population, (2) “influence the policy of a government by intimidation or coercion,” or (3) “affect the conduct of a government by mass destruction, assassination, or kidnapping.”<sup>235</sup> This could be extremely difficult to prove especially when applied to secondary actors such as banks that are not affiliated with any terrorist organization or sympathetic to the terrorist’s cause or ideology. Under a theory of aiding and abetting plaintiffs must prove that the foreign terrorists committed acts of international terrorism, which appear to be intended to advance a statutorily enumerated terrorist purpose. This should not be difficult to prove. However, there is no such requirement with respect to a bank or other secondary

---

229. *Goldberg*, 660 F. Supp. 2d at 425 (quoting *United States v. Zafiro*, 945 F.2d 881, 887 (7th Cir. 1991), *aff’d*, 506 U.S. 534 (1993)).

230. *Strauss v. Credit Lyonnais, S.A.*, No. 06-CV-0702 (CPS) 2006 WL 2862704 at \*9 (E.D.N.Y. Oct. 5, 2006).

231. *Goldberg*, 660 F. Supp. 2d at 425.

232. *Weiss I*, 453 F. Supp. 2d 609, 621 (E.D.N.Y. 2006); *but see* *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 105 (D.D.C. 2003) (finding that plaintiffs had sufficiently alleged aiding and abetting under the ATA where the complaint stated that defendant knowingly provided funds directly to a terrorist organization in furtherance of terrorist activities).

233. *See Strauss v. Credit Lyonnais*, 925 F. Supp. 2d 414, 432 (E.D.N.Y. 2013).

234. 18 U.S.C. § 2331(1)(B)(i)-(iii) (2012).

235. *Id.*

actor. In sum, plaintiffs alleging a violation of the ATA under a theory of aiding and abetting have a substantially easier burden of proof than plaintiffs alleging such violation under a theory of primary liability.

iii. Scierter

To sustain an ATA claim under a theory of aiding and abetting requires proof of knowledge of the wrongful violation by the principal and defendant's own role in the violation.<sup>236</sup> Further, defendant's knowledge may be inferred from circumstantial evidence.<sup>237</sup> Arguably, plaintiffs would satisfy the scierter requirement by evidence that the bank acted with general awareness that it was providing financial services to a terrorist organization or entity soliciting funds for a terrorist group. This is a much lower standard of scierter than the Seventh Circuit holding in *Boim III* required when attempting to prove primary liability. The en banc majority required proof that the defendant engaged in "deliberate wrongdoing" or "intentional misconduct."<sup>238</sup> The scierter standard could be satisfied if the bank knows there is a "substantial probability" that the provision of funds or financial services will be used for terrorist purposes.<sup>239</sup> Distinctly, under a theory of accessory liability, plaintiffs are not required to prove that the bank acted with the heightened mental state required by *Boim III*.

Proceeding under a theory of aiding and abetting liability affords plaintiffs another important advantage. Plaintiffs do not have to prove the mens rea for the underlying predicate offense that constitutes an "act of international terrorism." As previously discussed, a majority of the ATA cases filed against banks are based on a theory that the bank violated the material support statutes, 18 U.S.C. §§ 2339B, 2339A.<sup>240</sup> A bank may be liable under 18 U.S.C. § 2339B if it "provides material support in the form of financial services to a designated foreign terrorist organization and the bank either knows of the designation or knows that the designated organization has engaged or engages in terrorist activities."<sup>241</sup> A violation of 18 U.S.C. § 2339A requires proof that the bank had the intent or knowledge that the transfer of funds or the provision of other material support are to be used in the commission of a terrorist attack. Under a theory of aiding and abetting, plaintiffs are relieved of this burden. Instead, plaintiffs only have to prove that the bank knowingly provided substantial assistance to the terrorists with a general awareness of the bank's role in the illegal or tortious activity.

---

236. *Goldberg*, 660 F. Supp. 2d at 1310 (quoting *Schneberger v. Wheeler*, 859 F.2d 1477, 1480 (11th Cir. 1988)).

237. *Id.*

238. *Boim III*, 549 F.3d 685, 693 (7th Cir. 2008) (en banc).

239. *Id.*

240. See discussion *supra* note 41 and accompanying text.

241. *Linde I*, 384 F. Supp. 2d 571, 587 (E.D.N.Y. 2005).

## V. PROPOSED LEGISLATIVE REFORM

Because a civil cause of action under the ATA will only be effective against secondary actors, such as banks and corrupt charities with substantial assets located in the United States that could be attached to satisfy a terrorism judgment, 18 U.S.C. § 2333(a) should authorize liability for aiding and abetting. Otherwise, the statute is rendered largely meaningless, affording the victims of terrorism little more than a pyrrhic or moral victory against the perpetrators of acts of international terrorism. Furthermore, as a matter of policy, banks and charities should be prohibited from knowingly transferring funds and providing other financial services to foreign terrorists and terrorist-affiliated organizations that could be used to finance terrorist attacks and kill innocent civilians. Holding secondary actors liable under the ATA and subjecting them to multimillion or multibillion dollar judgments could prevent them from providing material support to terrorists. Providing financial support to foreign terrorists is a federal crime under the material support statutes. Banks and other secondary actors that knowingly provide financial support to terrorists and terrorist organizations should also be accountable under the civil provision of the ATA. Furthermore, there is no compelling reason to limit civil liability to the actual perpetrators of acts of international terrorism and exempt their willful accomplices from liability. The civil ATA statute should therefore be amended by Congress to explicitly provide for aiding and abetting liability.

Congress should also resolve the conflict between the courts on the mens rea required to sustain a cause of action under § 2333(a). Currently the statute does not include a mental state requirement on its face. Under the ATA, plaintiffs seek relief under a complex statutory framework. Generally, plaintiffs maintain that the defendant bank provided funds and financial services to a foreign terrorist organization and collected and provided funds for the financing of terrorism in violation of 18 U.S.C. §§ 2339A, 2339B, and 2339C.<sup>242</sup> This involves conduct considered “dangerous to human life,” and therefore constitutes “acts of international terrorism.”<sup>243</sup> The issue is whether proof of the mental state required to support a violation of the material support and terrorist financing statutes is sufficient to sustain liability under the ATA, or whether plaintiffs must prove an additional level of scienter.

At a minimum, plaintiffs must prove the mental state required under the material support statutes. For example, to prove a violation of 18 U.S.C. § 2339B, the defendant must have knowledge that the organization is a designated foreign terrorist organization or “engages in terrorist activity” (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act.<sup>244</sup> Section 2333(a) incorporates the knowledge requirement from § 2339B(a)(1), which prohibits the knowing provision of any material support, including financial services, to terrorist organizations without regard to the types of activities supported. The material support statute “is not

---

242. See *Weiss III*, 768 F.3d 202 (2d Cir. 2014).

243. *Id.* at 207; accord *supra* note 41.

244. 18 U.S.C. § 2339B(a)(1) (2012).

limited to the provision of support to the terrorist activities of a terrorist organization.”<sup>245</sup>

In *Holder*, the Supreme Court held that 18 U.S.C. § 2339B does not require specific intent to further the terrorist activities of the FTO.<sup>246</sup> Instead, a defendant violates the material support statute if he knowingly provides material support or services knowing that the recipient is a member of an FTO, or acting on behalf of an FTO. The Supreme Court explained:

Money is fungible, and when foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put. But there is reason to believe that foreign terrorist organizations do not maintain legitimate financial firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations. Thus, funds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives.<sup>247</sup>

Therefore, to fulfill § 2339B(a)(1)’s scienter requirement, incorporated into § 2333(a), plaintiffs must prove that the bank knew it was providing material support (financial services) to a foreign organization that had been designated a “foreign terrorist organization,” or an entity that it knew was engaged in terrorist activity.<sup>248</sup> Section 2339B(a)(1) does not require a showing that the bank knew it was providing material support for terrorist-related activity. Further, § 2339B(a)(1) incorporates the concept of willful blindness. Thus, “a defendant has knowledge that an organization engages in terrorist activity if the defendant has actual knowledge of such activity, or if the defendant exhibited indifference to whether the organization engages in such activity.”<sup>249</sup> A defendant acts with deliberate indifference if he “knows there is a substantial probability that the organization engages in terrorism . . . but does not care.”<sup>250</sup>

Finally, § 2339B(a)(1) plainly incorporates what it means to be “engaged in terrorist activity” from section 212(a)(3)(B) of the Immigration and Nationality Act (“INA”), which is codified at 8 U.S.C. § 1182(a)(3)(B) and wherein clause (iv)(IV)(bb) defines “engage in terrorist activity” to include “solicit[ing] funds or

---

245. *Weiss III*, 768 F.3d at 207-08.

246. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010); *see also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247, note following 18 U.S.C. § 2339B (Findings and Purpose) (“[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”).

247. *Holder*, 561 U.S. at 31 (internal quotation marks and citations omitted); *c.f. Boim III*, 549 F.3d 685, 698 (7th Cir. 2008) (Judge Posner writing for the en banc majority opined: “If Hamas budgets \$2 million for terrorism and \$2 million social services and receives a donation of \$100,000 for those services, there is nothing to prevent its using that money for them while at the same time taking \$100,000 out of its social services ‘account’ and depositing it in its terrorism ‘account’”).

248. 18 U.S.C. § 2339B(a)(1) (2012).

249. *Weiss III*, 768 F.3d at 208; *see also* *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 428-29 (E.D.N.Y. 2013); *In re Terrorist Attacks on September 11, 2001*, 740 F. Supp. 2d 494, 517 (S.D.N.Y. 2010).

250. *Weiss III*, 768 F.3d at 208 (quoting *Boim III*, 549 F.3d at 693).

other things of value for a terrorist organization described in clause (vi)(I) . . .”<sup>251</sup> Clause (vi)(I) defines “terrorist organization” to include any foreign terrorist organization designated as such by the Secretary of State under authority of 8 U.S.C. § 1189.<sup>252</sup> Thus, for example, if a charity solicits funds for an FTO, that charity has engaged in terrorist activity within the meaning of section 212(a)(3)(B) of the INA.<sup>253</sup> Further, to establish that a bank came within the scienter requirement of § 2339B(a)(1), plaintiffs must present evidence that the bank knowingly provided financial services to an FTO, or that it knowingly provided financial support to an FTO-funding charity or similar enterprise. In such an instance, it must then be shown that defendants knew or were indifferent to the fact that the charity or enterprise “solicit[ed] funds or other things of value” for an FTO, regardless of whether those funds were actually used for terrorist activities or not.<sup>254</sup>

The Seventh Circuit per *Boim III* requires proof of intentional misconduct or “deliberate wrongdoing.”<sup>255</sup> However, the requirement of intentional misconduct can be satisfied by proof that the defendant had knowledge that the foreign organization engages in international terrorism or is deliberately indifferent to whether the organization engages in such conduct. The *Boim III*, court stated:

To give money to an organization that commits terrorist acts is not intentional misconduct unless one either knows or is deliberately indifferent to whether it does or not, meaning that one knows there is a substantial probability that the organization engages in terrorism but one does not care.<sup>256</sup>

Ultimately, if a defendant can be held criminally liable and sentenced to a lengthy term of imprisonment under 18 U.S.C. § 2339B for knowingly providing material support or resources to an FTO, or knowing that the organization engages in terrorist activity, the ATA civil provision should not impose a higher mens rea standard than required for criminal prosecution. Proof of the mens rea for the predicate offense of international terrorism should be sufficient to sustain a claim under § 2333(a). Therefore, if liability under 18 U.S.C. § 2333(a) is predicated on a violation of 18 U.S.C. § 2339B, Congress should incorporate the knowledge requirement from § 2339B(a)(1), which prohibits the knowing provision of material support of any form to an FTO, regardless of whether the defendant intended to support the FTO’s terrorist or non-terrorist activities. If, on the other hand, a violation of § 2333(a) is based on violation of 18 U.S.C. §§ 2339A or 2339C, Congress should incorporate the mens rea required under those statutes.<sup>257</sup> Ultimately, Congress has

---

251. 8 U.S.C. § 1182(a)(3)(B)(iv)(IV) (2012).

252. *Id.* at § 1182(a)(3)(B)(vi)(I) (2012).

253. *Weiss III*, 768 F.3d at 208.

254. *Id.* 18 U.S.C. § 2339A (2012) imposes a higher mens rea standard, requiring a showing that defendant provided “material support or resources”, “knowing or intending” that they be used to prepare or carry out one or more of the violent crimes specified in the statute.

255. *Boim III*, 549 F.3d at 692-93.

256. *Id.* at 693.

257. Both §§ 2339A and 2339C require a heightened mens rea standard. Section 2339A makes it a crime

a duty to ensure that § 2333(a) is applied uniformly and defendants are not subjected to disparate treatment under the statute.

## VI. CONCLUSION

The civil provision of the ATA, 18 U.S.C. § 2333(a), has been an ineffective remedy for the victims of international terrorism. To date, there have been only two cases that have resulted in a verdict for plaintiffs under the statute. Moreover, only one case involved holding a bank accountable for providing funds and other financial services to a terrorist organization. Because foreign terrorists and terrorist organizations are unlikely to own property located in the United States, civil actions under the ATA have been filed almost exclusively against secondary actors such as banks for providing financial services to terrorists. However, some courts have narrowly construed the statute to prohibit liability based on a theory of aiding and abetting. As the result, plaintiffs have had to prove primary liability against secondary actors. This includes showing that the bank's provision of financial services to a terrorist organizations was the proximate cause of plaintiffs' death or injuries, and that such conduct "appear[s] to be intended" to intimidate or coerce a civilian population. These requirements have imposed a burden on plaintiffs that has proven difficult to overcome. In order to alleviate the problem confronting plaintiffs, Congress should amend § 2333(a) to explicitly authorize liability for aiding and abetting acts of international terrorism. Amending the statute would benefit plaintiffs in at least two important ways. First, plaintiffs would have to prove that the terrorists' acts, not the bank's provision of financial services, were the proximate cause of their injuries. Second, plaintiffs would no longer have to prove that the bank's conduct sought to influence or coerce a civilian population, but rather that it was the acts of terrorism that "appear to be intended" to do so. Finally, it is imperative that Congress specifies the mental state required to support a cause of action under the ATA. Congress should resolve the conflict as to whether § 2333(a) requires a showing of deliberate wrongdoing, specific intent to support the terrorist activities of the terrorist organization, recklessness, or knowledge that the organization is a foreign terrorist organization or engages in terrorist activities. Section 2333(a) should be amended to incorporate the mental state required to prove the predicate offense used to establish that the defendant committed "acts of international terrorism." Generally, this will require proof that the bank violated the material support statute, 18 U.S.C. § 2339B, which requires that the bank had knowledge it was providing financial support to an FTO, or knew that the organization was engaged in terrorist activity. This includes soliciting funds for an FTO, regardless of whether the financial services were intended for terrorist or non-terrorist activities.<sup>258</sup> Collectively these proposed amendments will provide the victims of international ter-

---

to provide "material support or resources" "knowing or intending" that it be used to carry out one or more of the violent crimes specified in the statute. 18 U.S.C. § 2339A (2012). Section 2339C requires proof that the defendant provided or collected funds with the "intention of knowledge" that the funds be used to commit one or more of the offenses enumerated in the statute. 18 U.S.C. § 2339C (2012).

258. *Weiss III*, 768 F.3d at 206.

2014 - 2015]

*Holding Banks Liable Under the Anti-Terrorism Act*

223

rorism with a more effective legal remedy, serve to hold banks and other secondary actors accountable for their role in supporting acts of international terrorism, and deter them from engaging in such conduct in the future.