

## JASTA CREATES NEW VULNERABILITIES FOR BUSINESSES AND STATES

In late 2016, the U.S. Congress enacted significant changes to U.S. law that increase the exposure of foreign states, state-owned enterprises, and international businesses to liability for damages to victims of acts of terrorism. The changes already have sparked lawsuits against countries (the Kingdom of Saudi Arabia) and businesses (Twitter, Facebook, Google, and YouTube). While the outcome of these cases is still uncertain, companies, states, charities, and government contractors should be aware of the vulnerability to suit that these legal changes have created.

The statute is titled the Justice Against Sponsors of Terrorism Act ("JASTA"). JASTA amends the Anti-Terrorism Act ("ATA"), a U.S. law that creates a cause of action for treble damages for U.S. nationals injured by acts of international terrorism. A significant question in cases brought under the ATA has been whether companies and institutions that allegedly provide services to terrorist organizations, such as financial services, communications services, and supplies, can be sued for "aiding and abetting" terrorism—JASTA says that they may. And although it was originally aimed at helping victims of the September 11th attacks overcome this question, the text of JASTA is not limited to September 11th and has spurred suits against a wide range of entities for completely different incidents.

JASTA expands the potential scope of civil liability in two ways. First, **JASTA reduces sovereign immunity protection from foreign states for claims related to international terrorism.** Under JASTA, U.S. nationals can now sue foreign states and state-owned enterprises in U.S. courts for providing "material support" for international terrorism. Previously, to be subject to suit, a foreign state could be sued for supporting terrorism only if the U.S. government had designated it as a sponsor of terrorism. JASTA has thus diminished the long-recognized protection of foreign sovereigns and their enterprises from suit—plaintiffs who allege material support for terrorism can now haul both states and state-owned entities such as sovereign wealth funds into court.

Second, and of significant concern to companies operating in the United States and abroad, **JASTA expressly allows victims of terrorist attacks to sue businesses for "aiding and abetting" and "conspiring" to commit terrorism—so-called "secondary liability."** Secondary liability is potentially broad. Under the theory of aiding and abetting, for example, plaintiffs have sued companies for providing financial services and supplying products and services to terrorists. Previously, most U.S. courts have held that such claims are too attenuated to hold entities responsible for acts of international terrorism. Now, under JASTA, a host of enterprises—including social media providers, government contractors, charities, and financial institutions—can find themselves subject to secondary liability allegations for terrorist attacks that occur in the United States or abroad.

Within weeks of JASTA's passage, plaintiffs initiated cases against Twitter, YouTube, Facebook, and Google. In these cases, plaintiffs allege that the companies aided and abetted U.S.-designated terrorist organizations such as Al Qaeda, Hamas, ISIS, and Hezbollah by providing day-to-day services. For example, in *Crosby v. Twitter*, families of victims of a mass shooting in an Orlando, Florida nightclub by a gunman who swore allegiance to ISIS allege that Twitter hosted ISIS accounts used to recruit and communicate with the gunman, and thus facilitated the attack. The Eastern District of Michigan has not yet ruled on Twitter's motion to dismiss. In *Force v. Facebook*, a case in New York's Eastern District, families of U.S. victims of Hamas terror attacks claim Facebook aided and abetted those attacks by maintaining accounts that Hamas

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operatives used to communicate with each other. In May 2017, the court initially dismissed the plaintiffs' claims, but it is currently considering plaintiffs' motions to amend their complaint and reinstate claims against Facebook.

Plaintiffs also promptly set about revising existing complaints against banks to include claims of secondary liability under JASTA. They also have filed new cases against financial services companies. In *Siegel v. HSBC Holdings*, for example, family members of victims of a hotel bombing in Jordan are suing HSBC Bank under the theory that by maintaining correspondent bank accounts for a Saudi bank that was allegedly in a "scheme" to facilitate payments to Al Qaeda, HSBC aided and abetted that scheme. In August 2017, the case was transferred from the Northern District of Illinois to the Southern District of New York. In these cases, plaintiffs propose that providing financial services to known terrorists or even maintaining correspondent accounts with a bank that holds accounts for terrorists is enough to hold a bank liable for aiding and abetting terrorism. Previously,

courts examined whether a business intended to commit or facilitate an act of terrorism; under the new standard, the barrier to liability for providing routine services to an actor that ends up being a terrorist is potentially much lower.

As it will be some time before U.S. courts render judgments on these complaints, the full legal force of JASTA remains to be seen. In the meantime, states, sovereign wealth funds, financial institutions, social media companies, and any provider of products or services may find themselves implicated in vague and attenuated allegations related to international terrorism and forced to spend substantial resources defending against those claims.

Clifford Chance has represented state owned institutions and multinational companies in litigation and provided advice regarding transactional risk in matters involving the Anti-Terrorism Act and JASTA, and is available to advise on the scope of these legal risks.

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