

Litigators of the Week: Cleary Duo Clears Banks in Terrorism Support Suits

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By Jenna Greene
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Our Litigators of the Week are Cleary Gottlieb Steen & Hamilton partners Jonathan Blackman and Larry Friedman for defeating a pair of cases against two major banks sued under the Anti-Terrorism Act.

It's a developing area of law—at what point can banks be held liable for providing material support for acts of terrorism—and the Cleary team's clients could have faced billions in damages had the plaintiffs prevailed.

After 14 years of litigation and some earlier adverse decisions by U.S. District Chief Judge Dora Irizarry in Brooklyn, Blackman and Friedman succeeded in getting the suits dismissed on summary judgment.

They discussed the case with Lit Daily.

Lit Daily: Who are your clients and what was at stake?

Blackman: Our clients are National Westminster Bank, a major retail bank in the UK and part of the Royal Bank of Scotland Group, and Crédit Lyonnais, a major retail bank in France and part of the Crédit Agricole Group.

The 200 plaintiffs in these cases are victims of terror attacks in Israel and the Palestinian Territories that occurred between 2001 and 2004. They accused the banks under the U.S. Anti-Terrorism Act of providing material support for those attacks as the result of the routine banking services that each bank provided to a Palestinian charitable organization, one in London and one in Paris.



Lawrence Friedman, left, and Jonathan Blackman, right, with Cleary Gottlieb Steen & Hamilton.

The U.S. and Israeli governments accused those charities of funding Hamas, which plaintiffs accused of committing the attacks, but each of the charities was cleared of those accusations after repeated inquiries by the UK and French governments.

We anticipated plaintiffs could seek very substantial damages from our clients. That and the fact that our clients were being accused of supporting murderous terrorism made the stakes in these cases very high.

What is the Anti-Terrorism Act? When was it passed and what was it intended to do?

Friedman: The term "Anti-Terrorism Act" refers to a collection of enactments dating back to 1992. In

addition to creating criminal liability for perpetrating international terrorism, they created in their civil provisions a private right of action for U.S. citizens who are injured by reason of acts of international terrorism.

The ATA authorizes recovery of treble damages from international terrorists and, the plaintiffs in these cases argued, those who knowingly provide material support for those acts. Recent amendments to the ATA have also created aiding and abetting and conspiracy liability under certain defined circumstances.

The purpose of the statute is to require those who are responsible for international terrorism to compensate their U.S. victims.

How did you become involved in the National Westminster Bank and Crédit Lyonnais cases?

Blackman: NatWest was sued first in these cases, and we were contacted by one of our alumni, who was then in charge of litigation for the bank in the U.S.

We were then retained by Crédit Lyonnais after it was sued. We had previously represented Crédit Lyonnais in extensive criminal and regulatory investigations and civil litigation stemming from the Executive Life matter, and we do substantial other work for the Crédit Agricole group.

ATA suits are something of a specialty for Cleary Gottlieb. What other cases have you or your firm been involved in, and how did that experience affect your strategic approach to this representation?

Friedman: We have defended more ATA and related lawsuits than any other law firm, a distinction that stems from our extensive cross-border work for leading international banks.

In addition to defending NatWest and Crédit Lyonnais, we also have won dismissals of ATA lawsuits for BNP Paribas and Commerzbank in the D.C. Circuit and the Southern District of New York, and we are defending those two banks in other cases in which they are co-defendants with other major international banks, which are pending in the Southern and Eastern Districts of New York.

Blackman: Our experience in the NatWest and Crédit Lyonnais cases impacted our work on our other cases to a greater extent than the reverse. Most of the extensive discovery and the first two rounds of summary judgment motion practice in the NatWest and Crédit Lyonnais cases preceded our defense of BNPP and Commerzbank.

We also closely observed the proceedings and the jurisprudence that was emerging from the parallel litigation against **Arab Bank**, which was prosecuted on behalf of the same plaintiffs, and by the same plaintiffs' counsel, who sued NatWest and Crédit Lyonnais.

All of that experience enabled us to master the intricacies of the ATA and the developing case law arising under that statute and the predecessor enactments on which it is based, including the civil RICO statute. That experience also equipped us for our work on behalf of BNPP and Commerzbank, including as part of the joint defense group in the suits against several major banks.

Who were the key members of your team and how did you all work together?

Friedman: We have both worked on these cases since their inception, in 2005, from our New York office and, when Jon was located in London in 2009-2012, from that office too. Over the course of the last 14 years, many Cleary Gottlieb counsel and associates, in our New York, Washington, London and Paris offices, contributed to this effort.

Currently the key members of our team are counsel Avi Luft and associates Mark McDonald – who has worked on these cases since he was a summer associate – Katherine Lynch and Rathna Ramamurthi.

There was a substantial international component to these cases, with discovery around the globe. What were some of the challenges that this presented and how did you manage them?

Blackman: Each of us has specialized in international litigation and arbitration throughout our careers, and the international aspects of these cases obviously were substantial.

Among the challenges we faced were obtaining documentary evidence and testimony relating to the banking services that our clients provided to their respective customers, the flows of funds that plaintiffs never could establish were received by Hamas for any purpose (let alone for terrorism), and determining who actually perpetrated the attacks.

This required addressing difficult issues under blocking statutes in France and other jurisdictions, and under the Hague Evidence Convention, and addressing the interest expressed in these matters by several governments. Finally, we assembled a stellar group of expert witnesses, from the U.S., the UK, France and Israel, concerning such subjects as international banking practice, relevant UK, French and Israeli law and terror financing.

This has been a long-running battle—14 years of litigation. What were some of the key turning points?

Friedman: A key turning point occurred when plaintiffs were forced to concede that there is no evidence that any of the transfers of funds that our clients executed were identified as being for any violent or terroristic purpose, that any of the transferred funds were used to finance any of the terrorist attacks underlying plaintiffs' claims, or that any of the Palestinian entities to which these transfers were made participated in or were otherwise involved with any of those attacks.

As the court ruled, the absence of any such evidence, among other factors, precluded plaintiffs from satisfying essential elements of their claims under the ATA.

The litigation also was impacted by important developments in the law, including Second Circuit rulings confirming that the mere provision of routine banking services is not sufficient to render a bank liable for terrorism without proof that the bank itself engaged in violent acts or acts dangerous to human life, and with apparent terroristic intent.

Who was opposing counsel?

Blackman: Plaintiffs were represented by numerous lawyers, led by Gary Osen of Osen Associates, Mark Werbner, then of Sayles & Werbner, and Aitan Goelman of Zuckerman Spaeder.

The plaintiffs here were victims of terror attacks in Israel and the Occupied Territories. How as an advocate do you balance being sensitive to their suffering while also vigorously defending your clients?

Friedman: Our clients and we acknowledged at all times that plaintiffs are innocent victims of terrorism, and that we have the greatest sympathy for them. The ordeals that many of them have faced are unimaginable.

Nonetheless, we have always believed that there was no valid basis for pressing claims against our clients, who are not responsible, legally or on any other basis, for the heinous acts by which plaintiffs were injured.

What passages to you stand out in Chief Judge Irizarry's two opinions dismissing the cases on summary judgment?

Blackman: The essence of Chief Judge Irizarry's reasoning is that a bank's provision of routine financial services to its customer, which is all that the evidence in these cases showed after years of discovery, does not make the bank liable under the ATA for its customer's conduct.

Rather, the bank itself must engage in "activities [that] involved violent acts, or acts dangerous to human life," with apparent terroristic intent, or be "generally... aware that it played a role" in the violent or life-threatening activities of its customer or of the recipient of its customer's funds transfers. The ATA's civil liability provisions are directed at knowing involvement in terrorist activity, which our clients did not have.

What do you hope will be the legacy of these cases?

Friedman: The court's dismissal of these cases confirms that the ATA should not be used a device to sue banks that engage merely in providing financial services involving troubled regions of the globe.