



SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

BY EDWARD M. SPIRO

Personal Jurisdiction Over Foreign Co-Conspirators

Victims of fraudulent or violent criminal activity have at their disposal a number of federal statutes in pursuing civil recovery against a broad array of often distant defendants.

In addition to the Racketeer Influenced and Corrupt Organizations Act,¹ plaintiffs can pursue remedies under the Foreign Sovereign Immunities Act,² the Torture Victim Protection Act,³ the Antiterrorism Act⁴ and the Alien Tort Claims Act.⁵

The reach of these statutes is potentially sweeping, extending far beyond the most immediate wrongdoers (who are often difficult if not impossible to locate and even less likely to pay any significant amounts in damages), to those who have lent support or assistance to the scheme or activities that form the basis of the litigation.

But, as plaintiffs in two recent cases in the U.S. District Court for the Southern District of New York have learned, obtaining personal jurisdiction over the full range of foreign defendants whose conduct may be actionable can present significant and sometimes insurmountable hurdles at the courthouse door.

Two Key Cases

In the first of those cases, *Daventree Ltd. v. Republic of Azerbaijan*,⁶ a group of



investors claimed that they were induced by fraud and extortion to invest in what turned out to be a bogus scheme involving the privatization of the oil company owned by the government of Azerbaijan. The plaintiffs asserted claims against the Republic of Azerbaijan, various government officials and Azeri individuals, a Swiss law firm and its partners, and a Swiss bank and two of its officers. In the second case, *In re: Terrorist Attacks on September 11, 2001*,⁷ survivors, family members and representatives of victims of the Sept. 11 terrorist attacks sought civil damages against over 200 defendants alleged to have connections to Osama bin Laden and Al Qaeda. Both cases asserted claims against defendants who had lent financial and other support to the primary actors and, in both cases, certain of those defendants moved to dismiss challenging the federal court's assertion of personal jurisdiction.

The *Terrorist Attacks* and the *Daventree* courts each engaged in a two-tiered jurisdictional analysis, asking first whether the defendants' contacts with New York satisfied its long-arm jurisdiction statute and, if not, whether their contacts with

the United States as a whole satisfied the due process requirements of the Fifth Amendment. Although some of the federal statutes at issue in these cases provide, in some circumstances, for nationwide service of process, the courts in both cases looked instead to Federal Rule of Civil Procedure 4(k)(2) as the alternative basis for personal jurisdiction when contacts with New York proved insufficient.⁸ Rule 4(k)(2) provides for personal jurisdiction based on the defendant's contacts with the United States in a case brought under a federal statute, where the defendant is not subject to the jurisdiction of any one state.⁹ It is designed to "fill a gap in the enforcement of federal law," permitting the exercise of jurisdiction where a defendant has sufficient contacts with the United States, but insufficient contacts with any one state in particular.¹⁰

Conspiracy or Agency Theory

Because a number of the defendants in these cases had little if any direct contact with New York or the United States and were not the immediate perpetrators of the wrongdoing, plaintiffs were required to establish jurisdiction based on those defendants' connections with the more active offenders.

New York's long-arm statute, which provides for jurisdiction over a non-domiciliary who commits a tortious act, in person or through an agent, within the state of New York,¹¹ authorizes the assertion of jurisdiction over out-of-state co-conspirators of an in-state actor. Although plaintiffs need not establish the

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existence of a formal agency relationship between the out-of-state conspirators and in-state actor, plaintiffs must offer more than conclusory allegations of conspiracy. "To establish personal jurisdiction on a conspiracy theory, [p]laintiffs must make a prima facie showing of conspiracy, allege specific facts warranting the inference that the defendant was a member of the conspiracy, and show that the defendant's co-conspirator committed a tort in New York."¹² To support the inference that the defendant was a member of the conspiracy, plaintiffs must show that the defendant was aware that the conspiracy's activity would have effects in New York; that the New York activity was for the benefit of the out-of-state co-conspirators; and that the co-conspirators acting in New York did so at the direction, under the control, at the request, or on behalf of the out-of-state defendant.

In *Davenport*, the plaintiffs argued that jurisdiction over the Swiss bank and its two officers was proper based on the actions of certain co-conspirators (officials of the Azeri government and a partner in the Swiss law firm) who had allegedly traveled to New York to solicit investment in, and take other actions in furtherance of, the bogus investment scheme. They asserted that the actions of these putative co-conspirators could be attributed to the bank defendants under New York's long-arm statute. Judge Sidney H. Stein rejected this argument, finding the allegations of an agency relationship insufficient. Specifically, he dismissed as too conclusory the plaintiffs' assertion that the bank defendants were "integral members" of the conspiracy, noting that the complaint was devoid of any allegations that the bank defendants directed, controlled or requested that the Azeri officials or the Swiss attorney travel to New York to solicit investments in the oil company privatization scheme. He also observed that the complaint similarly failed to allege that the bank defendants knew of or consented to any such conduct in New York.

- *Conspiracy-based Jurisdiction Under*

Rule 4(k)(2). The *Davenport* plaintiffs urged the court alternatively to consider the co-conspirators' actions in gauging the bank defendants' contacts with the United States under Rule 4(k)(2).

There is no uniform approach to jurisdiction based on the actions of a co-conspirator under federal rule or statute and no approach that is directly analogous to the agency theory authorized by the New York long-arm statute. Judge Stein observed that the question of whether a plaintiff can establish jurisdiction pursuant to Rule 4(k)(2) through the imputation of that defendant's co-conspirators' contacts has not been addressed extensively, but noted that courts are divided on the "conspiracy theory of jurisdiction."¹³ He declined to resolve the question, finding in this case that the lack of specific factual allegations establishing the agency relationship that was fatal to the conspiracy analysis under New York's long-arm statute, would similarly defeat any conspiracy analysis under Rule 4(k), even assuming the validity of that theory.

'Terrorist Attacks'

Judge Richard Conway Casey took a slightly different approach in framing the question of conspiracy-based jurisdiction under Rule 4(k)(2) in his decision in *Terrorist Attacks*. The plaintiffs in that case asserted that jurisdiction against the moving defendants (none of whom was alleged to have participated directly in the terrorist attacks) could be predicated on the fact that they knew that the United States was the primary target of Osama bin Laden and Al Qaeda, and that the moving defendants had thus aimed their conduct at the United States by providing assistance to those terrorists.

Judge Casey measured the adequacy of these allegations against the due process requirements of the Fifth Amendment, concluding that in addition to a finding that defendants had purposefully directed their activities at the United States, "[p]laintiffs must allege some personal or direct involvement by the [d]efendants in

the conduct giving rise to their claims." He specifically declined to apply a modified due process standard for mass torts, articulated in product liability cases in the U.S. District Court for the Eastern District of New York,¹⁴ pursuant to which "the state's interests in the litigation replace contacts with the forum as the constitutional touchstone and the 'reasonableness' inquiry is replaced with a hardship analysis."¹⁵

Individualized Inquiry

Judge Casey's decision in *Terrorist Attacks* illustrates the highly individualized nature of this type of jurisdictional analysis. The moving defendants consisted of a number of banks, business entities, charities and individuals alleged to have provided financial, logistical or other support to Osama bin Laden and Al Qaeda. In a lengthy opinion, Judge Casey methodically parses the jurisdictional allegations with respect to each of the moving defendants, finding that jurisdiction existed for some, was lacking for others and that, for a third group, jurisdictional discovery was required before a determination could be made on their motions to dismiss.

The jurisdictional allegations against some of these defendants were limited to claims that they had donated to charities that they knew, or should have known, were funneling money to Al Qaeda, and that Al Qaeda's primary target was the United States. Judge Casey found such conclusory allegations, unsupported by specific facts that these defendants purposefully directed their activities at the United States by donating to charities that they knew were supporting terrorism, were an insufficient basis for the exercise of jurisdiction.

Judge Casey found plaintiff's claims directed at individuals associated with financial institutions linked to Osama bin Laden similarly lacking a jurisdiction basis. For example, plaintiffs alleged that one defendant, Prince Mohamed, participated in a conspiracy with Al Qaeda to injure

the United States through international terrorism by providing funding, financial support and banking services through banks for which Mohamed was as an officer. Judge Casey observed that plaintiffs had not alleged that Mr. Mohamed had any knowledge or involvement in any accounts that Al Qaeda may have had at those banks, and that Mr. Mohamed's connection to another bank that was alleged to have knowingly opened accounts for Al Qaeda "too remote in time and proximity to implicate Prince Mohamed."

Some of the complaints in the consolidated *Terrorist Attacks* action asserted claims against the Saudi Binladin Group (SBG). SBG is one of the largest engineering and construction companies in the Arab world, and is managed by Osama bin Laden's half-brothers. Among the allegations proffered to back the claim that these defendants supported the terrorists were that Osama bin Laden used SBG to build an infrastructure in Afghanistan and that Osama bin Laden had worked with SBG in Jeddah and was supported by SBG when he relocated to Sudan. The plaintiffs also alleged that Osama bin Laden's name was currently listed on SBG corporate records and that he never "broke" with his family following his exile to Sudan—two assertions that the defendants specifically disputed in papers filed in support of their motions to dismiss. Finally, the plaintiffs alleged that a key Al Qaeda operative—Mohammad Jamal Khalifa—was taken in by a branch of SBG, which Mr. Khalifa later listed as his address on his visa application, and that an SBG executive had introduced a U.S.-designated terrorist to a business connection.

Judge Casey found that the plaintiffs had identified sufficient issues of jurisdictional fact to warrant jurisdictional discovery with respect to SBG. He noted that at that stage of the proceedings, disputed facts regarding Osama bin Laden's continued ties with SBG had to be resolved in the plaintiffs' favor, and that the complaints had identified some facts to bolster the contention that SBG had given

support to Osama bin Laden and other Al Qaeda operatives. Accordingly, he denied, without prejudice, SBG's motion to dismiss, authorizing jurisdictional discovery on the question of whether SBG purposefully directed its activities at the United States.

Judge Casey denied outright the motion to dismiss brought by a defendant who the plaintiffs claimed was an associate of Osama bin Laden. Plaintiffs asserted that Adel A.J. Batterjee was the chairman of a bank "instrumental" to Osama bin Laden's financial support network as well as the chairman of a charity whose United States branch, BIF, co-founded by Batterjee, was alleged to be a front for Al Qaeda sponsorship. Mr. Batterjee also allegedly served as the secretary general of another charity, WAMY, through which he commissioned a biography of Osama bin Laden which was jointly published by WAMY and BIF.

Most significantly, Mr. Batterjee had been labeled a "Specially Designated Global Terrorist" by the United States Department of the Treasury on Dec. 21, 2004, and BIF was also designated as a terrorist organization. Judge Casey reasoned that, "[w]hile perhaps not dispositive on its own, Mr. Batterjee's designation as a terrorist lends substantial weight to Plaintiffs' claims that he purposefully directed his activities at the United States...." That fact, combined with the allegations relating to Mr. Batterjee's ties to organizations linked to Mr. bin Laden and that he traveled to the United States in connection with one of those organizations, was sufficient to defeat his motion to dismiss.

Conclusion

As these cases demonstrate, plaintiffs seeking recovery from foreign defendants who are only indirectly involved in the activity giving rise to the suit must pay careful attention to jurisdictional issues in their complaints and must plead United States contacts and conspiracy allegations with specificity.

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1. 18 USC §1961 et seq.
 2. 28 USC §1602 et seq.
 3. 28 USC §1350 note.
 4. 18 USC §2331 et seq.
 5. 28 USC §1350.
 6. 349 FSupp2d 736 (SDNY 2004) (Stein, J.).
 7. 349 FSupp2d 765 (SDNY 2005) (Casey, J.).
 8. For example, the *Terrorist Attacks* plaintiffs asserted claims under the Antiterrorism Act (ATA) which contains a nationwide service of process provision, but because many of the defendants were not served in the United States, and others disputed the manner in which they were served, the court opted to rely on Rule 4(k)(2) instead of the jurisdictional provision of the ATA.
 9. Rule 4(k)(2) states:
If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.
 10. *Terrorist Attacks*, 349 FSupp2d at 807 (citing the Advisory Committee Note to Rule 4(k)(2) and *United States v. International Bhd. of Teamsters*, 945 FSupp 609 (SDNY 1996) (Edelstein, J.)).
 11. NYCPLR §302(a)(2).
 12. *Terrorist Attacks*, 349 F. Supp. 2d at 805 (citing *Chrysler Capital Corp. v. Century Power Corp.*, 778 F. Supp. 1260 (S.D.N.Y. 1991) (Patterson, J.)).
 13. 349 FSupp2d at 764 (citing *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 307 F. Supp. 2d 145 (D. Me. 2004); *Simon v. Philip Morris, Inc.*, 86 F. Supp. 2d 95 (E.D.N.Y. 2000)).
 14. See *Simon*, 86 F. Supp. 2d at 129-32; *In re DES Cases*, 789 F. Supp. 552, 587 (E.D.N.Y. 1992).
 15. *Terrorist Attacks*, 349 F. Supp. 2d at 809. It is worth noting that Judge Casey avoids the question of whether RICO would provide an alternative and less exacting basis for conspiracy-based personal jurisdiction over any of the moving defendants because, although some of the plaintiffs' claims were brought under RICO, those claims were not used as a basis for personal jurisdiction. Some circuits regard RICO as authorizing nationwide service of process on all defendants. The U.S. Court of Appeals for the Second Circuit takes a more narrow view, holding that only where "the ends of justice" so require, (such as where no one court would have jurisdiction over all defendants), once jurisdiction is established over one member of a RICO conspiracy, the court may exercise jurisdiction over all other members of that conspiracy, regardless of their contacts with the forum state. *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F3d 65, 71-2 (2d Cir. 1998).