

MONEY IS FUNGIBLE, CAUSATION SHOULDN'T BE: AN IN-DEPTH ANALYSIS OF THE PROXIMATE CAUSE STANDARD UNDER THE ANTI-TERRORISM ACT

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## I. INTRODUCTION

Over the past decade, the frequency of terrorist attacks globally has been well documented. In 2015 alone, there was a notable increase in the amount of fatal terrorist attacks against people living in countries representing the world's biggest economies.<sup>1</sup>

In the US unfortunately, the effects of terrorist attacks are felt by citizens at home and abroad. With the increased spate of terrorism globally, U.S. citizens are frequently victims of terrorism on foreign soil.<sup>2</sup> This increase in terrorism has caused numerous problems for the victims and their families, creating substantial difficulty in bringing suits against the perpetrators of crimes. The Anti-Terrorism Act (ATA) was enacted to deal with these issues.<sup>3</sup> The statute creates a cause of action for:

Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.<sup>4</sup>

This note purports to examine the standard of causation implied by the wording of the statute. Ultimately, this note will argue that strict proximate cause is too stringent a causation standard to be used when analyzing liability under the Anti-Terrorism Act and will instead endorse

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<sup>1</sup> See Kara Fox & Dave Gilbert, *Terror Attacks in Developed World Surge 650% in One Year*, CNN (Nov. 16, 2016, 7:54 AM), <http://www.cnn.com/2016/11/16/world/global-terrorism-report/index.html>.

<sup>2</sup> *Id.*; see, e.g., Elizabeth Redden, *Study Abroad and Terror*, INSIDE HIGHER ED (Mar. 30, 2016) <https://www.insidehighered.com/news/2016/03/30/terror-attacks-europe-strike-epicenter-american-study-abroad>.

<sup>3</sup> 18 U.S.C. § 2333 (2012).

<sup>4</sup> *Id.* § 2333(a).

the interpretation of proximate cause as was decided by the Seventh Circuit in *Boim v. Holy Land Foundation for Relief & Development*.<sup>5</sup>

## II. THE STATUTE

### A. Challenges with The Current Statute

The current statute has been read by numerous courts to imply a standard of proximate cause when it comes to causation in terrorism cases tried under the Anti-Terrorism Act.<sup>6</sup> The term “by reason”<sup>7</sup> has been typically interpreted to mean that Congress intended for a showing of proximate cause.<sup>8</sup> It is for this reason most courts have implied a standard of proximate cause when trying a case under the Anti-Terrorism Act.

### B. RICO Statute & Sherman Act

The Racketeer Influenced and Corrupt Organizations Act (RICO), which employs nearly identical wording to that of the Anti-Terrorism Act, has been held to impose a proximate cause standard.<sup>9</sup> The RICO statute states, “[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court.”<sup>10</sup> In *Holmes v. Securities Investor Protection Corp.*, the Supreme Court held that the “by reason of” language clearly implied a standard of proximate cause.<sup>11</sup> The Supreme Court noted that many previous courts had come to interpret the “by reason of” wording to require a showing of proximate cause and that the legislature had clearly used the same language because it contained “the judicial gloss that avoided a simple literal interpretation.”<sup>12</sup>

In creating the Sherman Anti-Trust Act, Congress again used the same “by reason of” language.<sup>13</sup> In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, the Supreme Court noted that “Congress intended the Act to be construed in the light

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<sup>5</sup> *Boim v. Holy Land Found. for Relief & Dev. (Boim III)*, 549 F.3d 685 (7th Cir. 2008) (en banc); see *infra* note 36 and accompanying text.

<sup>6</sup> See, e.g., *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013).

<sup>7</sup> See § 2333.

<sup>8</sup> See *Rothstein*, 708 F.3d at 95.

<sup>9</sup> See 18 U.S.C. § 1962 (2012).

<sup>10</sup> *Id.* § 1964.

<sup>11</sup> *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 267 (1992).

<sup>12</sup> *Id.* at 268 (citation omitted).

<sup>13</sup> 15 U.S.C. § 15(c) (2012).

of its common-law background.”<sup>14</sup> Senator Sherman stated that the bill “does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.”<sup>15</sup>

### *C. Legislative History*

Many plaintiffs in Anti-Terrorism Act cases have argued that the legislature clearly wanted to impose a broad sweeping cause of action when it enacted the statute.<sup>16</sup> The Senate Judiciary Committee report attached to the Anti-Terrorism Act statute indicates that the purpose of the statute is to allow for the “imposition of liability at any point along the causal chain of terrorism.”<sup>17</sup> It can be inferred that the legislature wanted to create a broad cause of action which would allow victims and their families to recover at any point along the causal chain. The legislature specifically and intentionally made sure to include the terminology of “any point along the causal chain of terrorism,” because they knew just how far the causal chain could stretch when it comes to terrorism.<sup>18</sup> Perhaps Congress intended to differentiate the “by reason of” language from previous instances where it used the language to connote a showing of proximate cause.

When then President Bush signed the legislation into law, he expressed his approval of a law that would ensure a remedy for Americans injured abroad in ruthless acts of terrorism.<sup>19</sup> The President stated that he was “pleased that the bill explicitly authorizes an American national to file suit in the United States for the recovery of treble damages against the perpetrators of international terrorism. This will ensure that, if needed, a remedy will be available for Americans injured abroad by senseless acts of terrorism.”<sup>20</sup> Signing of the statute signified just how important a cause of action for terrorism victims was to the administration.

Unlike other crimes, terrorism cases, more specifically Anti-Terrorism Act cases, generally involve some sort of imposition of

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<sup>14</sup> *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531 (1983) (citation omitted).

<sup>15</sup> 21 CONG. REC. 2456 (1890) (statement of Sen. Sherman).

<sup>16</sup> *See, e.g., Owens v. BNP Paribas S.A.*, 235 F. Supp. 3d 85, 95 (D.D.C. 2017).

<sup>17</sup> S. REP. NO. 102-342, at 22 (1992).

<sup>18</sup> *Id.*

<sup>19</sup> Statement on Signing the Federal Courts Administration Act of 1992, 2 PUB. PAPERS 2090, 2090-91 (Oct. 29, 1992).

<sup>20</sup> *Id.*

liability on the funders of terrorism.<sup>21</sup> Because of the tricky nature of terrorism, it is oftentimes impossible to impose liability on the first-hand perpetrators of the crime, either because they are dead or because they are involved in guerilla warfare and tracking the perpetrators down is next to impossible.<sup>22</sup> Therefore, victims and their families go after the funders of terrorism, oftentimes leading to banks, shell companies, and charity organizations that stand as a front for actual terrorist organizations.<sup>23</sup> Shell companies are particularly vexing, as finding the true owner to impose liability can prove to be nearly impossible.<sup>24</sup> However,

Though terrorists frequently launder money through financial markets and other expected channels, terrorism is also heavily financed through legitimate means, such as charities and trusts. Because of the generally unregulated nature of these funds, terrorists' exploitation of charitable and nonprofit resources presents one of the most "serious challenges" for law enforcement.<sup>25</sup>

The main issue that arises in Anti-Terrorism Act cases is as follows: If an individual gives money to a terrorist organization, there is a clear-cut proximate cause relationship. However, if one donates money to a charity organization and that organization in turns gives the money to a terrorist organization, then there is an ambiguous proximate cause case.<sup>26</sup>

Members of Congress have opined that the only way to stop terrorism is to cut off their source of funding.<sup>27</sup>

As clues from the September 11, 2001, terrorist attacks have been released to the public, it is increasingly evident that the operation was highly sophisticated and involved years of planning, intelligence, and training. Such an operation was not conducted on a shoe-string budget. It required large amounts of money for support of covert agents, bribes, logistics, supplies, and training.<sup>28</sup>

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21 See, e.g., Michael M. Wiseman, *Anti-Terrorism Act Liability for Financial Institutions*, Harvard Law School Forum on Corporate Governance and Financial Regulation (Mar. 16, 2013), <https://corpgov.law.harvard.edu/2013/03/16/anti-terrorism-act-liability-for-financial-institutions/>.

22 See Stefanie Ostfeld, *Shell Game: Hidden Owners and Motives*, CNN (Sept. 11, 2012, 2:32 PM), <http://www.cnn.com/2011/10/26/opinion/ostfeld-shell-companies/index.html>.

23 See *id.*

24 See *id.*

25 Shima Baradaran et. al., *Funding Terror*, 162 UNIV. PA. L. REV. 477, 490 (2014).

26 See e.g., *Boim v. Holy Land Found. for Relief & Dev. (Boim III)*, 549 F.3d 685, 685 (7th Cir. 2008).

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

28 John Hulsman, Brett Schaefer & Gerald O'Driscoll, *Stopping Terrorism: Follow the Money*, HERITAGE FOUND., (Sept. 25, 2001) <http://www.heritage.org/homeland-security/report/stopping-terrorism-follow-the-money>.

Most mass terrorist attacks occur with funding funneled through an illicit chain of organizations.<sup>29</sup> Imposing liability on these links in the chain is an attempt to help stop the funding of terrorism, and eventually terrorism itself.

### III. DEFINING PROXIMATE CAUSE

There are two competing camps when it comes to the definition of proximate cause. These opposing views date back to the classic case of *Palsgraf v. Long Island Railroad Co.*<sup>30</sup> Justice Cardozo's opinion explained that a defendant can only be held liable to those plaintiffs whose harm is clearly reasonably foreseeable from the defendant's actions.<sup>31</sup> In his dissent, Justice Andrews outlined a different approach which considered a plethora of factors in reaching a verdict on a finding of proximate cause:

The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or, by the exercise of prudent foresight, could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space.<sup>32</sup>

Perhaps, the Second Circuit takes an approach more akin to Justice Cardozo's, and the Seventh Circuit takes an approach more in line with Justice Andrews. The Seventh Circuit, in its approach, considered the fact that this was a terrorism case with intervening actors and an extended period in time and space.<sup>33</sup>

In *Rothstein v. UBS AG*, the Second Circuit stated:

Central to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom his *acts were a substantial factor in the sequence of responsible causation* and whose injury was reasonably foreseeable or anticipated as a natural consequence.<sup>34</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

<sup>31</sup> *Id.* at 100.

<sup>32</sup> *Id.* at 104 (Andrews, J., dissenting).

<sup>33</sup> See discussion *infra* Part IV.A.

<sup>34</sup> 708 F.3d at 91.

Meaning, a defendant's action has to be reasonably foreseeable to have caused a plaintiff's harm.<sup>35</sup> The issue turns on what a court views as reasonably foreseeable when it comes to Anti-Terrorism Act cases. Some plaintiffs would like to argue that reasonably foreseeable should encompass any time an individual donates money to terrorist organization, knowingly or without knowledge (because it is through a charity or shell organization).<sup>36</sup> However, many courts, specifically the Second Circuit, have been adamant in their position that this is not the correct standard to apply.<sup>37</sup>

#### IV. THE SECOND CIRCUIT'S POSITION ON PROXIMATE CAUSE UNDER THE ANTI-TERRORISM ACT

One of the touchstone cases when it comes to examining proximate cause under the Anti-Terrorism Act is *Rothstein v. UBS AG*.<sup>38</sup> In *Rothstein*, UBS was found to have engaged in illegal financial transactions with Iran, a state sponsor of terrorism, in violation of federal regulation.<sup>39</sup> UBS at the time was designated as an ECI in Zurich, Switzerland, taking part in the Extended Custodial Inventory (ECI) program. The purpose of the program was "to facilitate the international distribution of U.S. banknotes and to protect against sudden spikes in the international demand for U.S. currency."<sup>40</sup> It was through the ECI program that the U.S. government discovered that UBS had transferred funds to Iran and Iranian government organs.<sup>41</sup> Plaintiffs in the case were all killed in numerous bombing and rocket attacks in Israel, carried out by either Hamas or Hezbollah, between the years 1997 and 2006.<sup>42</sup> Plaintiffs alleged that the ability of Hamas and Hezbollah to engage in terrorist activity "was substantially increased by those organizations' receipt of cash dollars from Iran."<sup>43</sup>

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<sup>35</sup> *See id.*

<sup>36</sup> *See, e.g., Brill v. Chevron Corp.*, No. 15-CV-04916-JD, 2017 WL 76894, at \*4 (N.D. Cal. Jan. 9, 2017).

<sup>37</sup> *See e.g., Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013).

<sup>38</sup> 708 F.3d at 91.

<sup>39</sup> *See id.* at 86; *see also* 31 C.F.R. § 596.201(a) (2018) ("[N]o United States person, on or after [August 22, 1996], knowing or having reasonable cause to know that a country is designated under section 6(j) of the Export Administration Act . . . as a country supporting international terrorism, shall engage in a financial transaction with the government of that country.").

<sup>40</sup> *Rothstein*, 708 F.3d at 86.

<sup>41</sup> *See id.*

<sup>42</sup> *Id.* at 87

<sup>43</sup> *Id.* at 87.

In *Rothstein*, the court reasoned that if Congress “had intended to allow recovery upon a showing lower than proximate cause, we think it either would have 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>44</sup> The court held that Plaintiffs did not sufficiently prove proximate cause.<sup>45</sup> The chain of causation was too highly attenuated to adequately prove proximate cause.<sup>46</sup> Because the complaint alleged that UBS had given money to Iran which, in turn, gave money to Hamas and Hezbollah, it could not prove that UBS knew that the money would be given to those terrorist organizations and then used to carry out terror attacks.<sup>47</sup>

*A. If UBS Had a Legal Duty, Then Intervening Actors Were Foreseeable*

It is clear that UBS had a duty; there was a federal regulation which made transferring funds to Iran illegal.<sup>48</sup> It is also obvious that UBS breached that duty by then providing funds to Iran in violation of the regulation. If UBS had a legal duty not to provide funds to countries designated as state sponsors of terrorism,<sup>49</sup> can it not be said that all intervening actors thereafter should be reasonably foreseeable?

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996, which prohibits engaging in financial transactions with states that support terrorism.<sup>50</sup> President Clinton stated in his signing memo that he was proud Congress passed the legislation which “took a comprehensive approach to fighting terrorism both at home and abroad.”<sup>51</sup> Since the purpose of the regulation was to combat terrorism, can it not be inferred that terrorist activity that

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<sup>44</sup> *Id.* at 95.

<sup>45</sup> *See id.* at 97.

<sup>46</sup> *See id.*

<sup>47</sup> *See id.*

<sup>48</sup> *See* 31 C.F.R. § 596.201.

<sup>49</sup> *See id.* (“Except as authorized by regulations, orders, directives, rulings, instructions, licenses, or otherwise, no United States person, on or after the effective date, knowing or having reasonable cause to know that a country is designated under section 6(j) of the Export Administration Act, 50 U.S.C. App. 2405, as a country supporting international terrorism, shall engage in a financial transaction with the government of that country.”).

<sup>50</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.).

<sup>51</sup> Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 PUB. PAPERS 630, 630 (April 24, 1996).



came about in relation to violation of the regulation was therefore foreseeable?

UBS violated the regulation by providing U.S. dollars to Iran, a state sponsor of terrorism clearly within the scope of the regulation.<sup>52</sup> It would then follow that the subsequent intervening acts of Hezbollah and Hamas in carrying out terrorist acts using said funds, were foreseeable. Additionally, it is also clearly foreseeable that part of the funds transferred to Iran would be used to fund and further acts of terrorism worldwide, the exact outcome 31 C.F.R. § 596.201 was meant to combat.

In *Port Authority of New York and New Jersey v. Arcadian Corp.*, the Third Circuit held that a fertilizer producer owed no duty to prevent its product from being altered and used by terrorists.<sup>53</sup> In this case, the terrorist used defendant's fertilizer, altering the chemical components, and thereby incorporating it into a bomb, which was later used in the World Trade Center bombing on February 26, 1993.<sup>54</sup> Plaintiffs in the case argued "that defendants should be liable nonetheless because the New Jersey courts have held that a manufacturer's duty also encompasses objectively foreseeable misuses and alterations."<sup>55</sup> The court, however, held that just because defendant's product had been misused before to create a bomb, this was not enough to pass the objective foreseeability test, this instead was subjective foreseeability.<sup>56</sup> The court effectively ruled that because there was no duty, there was also no foreseeability as to intervening actors misusing the product.<sup>57</sup>

However, *Rothstein* can be distinguished from *Arcadian*. While in *Rothstein* there was certainly a duty on UBS not to transfer funds,<sup>58</sup> in *Arcadian*, the court opined that there could also be a finding of "objective foreseeability" regarding the dangerousness of intervening actors.<sup>59</sup> The *Arcadian* court quoted *Pedro Oquendo v. Bettcher Industries*, which explained the concept of objective foreseeability:

Objective foreseeability means reasonable foreseeability. The standard "does not affix responsibility for future events that are only theoretically, remotely, or just possibly foreseeable, or even simply subjectively foreseen by a particular manufacturer." Rather, it "applies to those future occurrences that, in light of the general

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<sup>52</sup> *Rothstein*, 708 F.3d at 93.

<sup>53</sup> 189 F.3d 305, 320 (3d Cir. 1999).

<sup>54</sup> *See id.* at 308.

<sup>55</sup> *Id.* at 314.

<sup>56</sup> *See id.* at 315.

<sup>57</sup> *See id.* at 320.

<sup>58</sup> *Rothstein*, 708 F.3d at 87.

<sup>59</sup> *Arcadian Corp.*, 189 F.3d at 318.

experience within the industry when the product was manufactured, objectively and reasonably could have been anticipated.”<sup>60</sup>

The *Rothstein* case showcases quite clearly how difficult it can be to prove proximate cause in the Second Circuit, specifically that a defendant's actions can be reasonably foreseeable to have caused a terrorist attack.<sup>61</sup> Because money is fungible, it proves difficult, if not nearly impossible, to trace it once it has gone through so many hands.

In *Brill v. Chevron Corp.*, the court stressed this same point.<sup>62</sup> Ruling that Plaintiffs could not prove proximate cause by arguing that the Chevron Corporation “should have, but didn't, take a harder look at the consequences of its payments,” to unknown entities that it purchased oil from.<sup>63</sup> Plaintiffs argued that these entities had ties to Sadaam Hussein and the money was used to reward the families of those who carried out terror attacks.<sup>64</sup>

The *Brill* court stated that the kickbacks to third parties were not enough to establish a factual allegation that terrorism was a foreseeable consequence. While Plaintiffs alleged that Chevron Corporation knew its kickbacks were being paid to Sadaam Hussein, the court found these allegations to be conclusory at best.<sup>65</sup> This case showcases the struggles that victims and their families encounter when trying to prove causation under the Anti-Terrorism Act. Here, the money was passed from Chevron Corporation in the form of illegal kickbacks to unknown third-party entities it purchased oil from, and somehow ended up in Sadaam Hussein's pockets to reward the families whose members carried out terrorist attacks.<sup>66</sup> While the chain of causation may be hard to follow, it should not follow that the victims and their families are any less deserving of restitution.

### *B. Routine Banking Services Do Not Satisfy Proximate Cause Under the Anti-Terrorism Act*

In *In re Terrorist Attacks on September 11, 2001*, the Second Circuit ruled that proximate cause was not satisfied by plaintiffs, family members of those injured in the September 11th attacks, against defendants, a

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<sup>60</sup> Pedro Oquendo v. Bettcher Industries, 939 F. Supp. 357, 362 (1996) (quoting Brown v. U.S. Stove Co., 484 A.2d 1234, 1241 (N.J. 1984)).

<sup>61</sup> *Rothstein*, 708 F.3d at 91-92.

<sup>62</sup> *Brill*, No. 15-CV-04916-JD, 2017 WL 76894.

<sup>63</sup> *Id.* at \*4.

<sup>64</sup> *Id.*

<sup>65</sup> See *Rothstein*, 708 F.3d at 97.

<sup>66</sup> *Id.*

Saudi bank and four other Saudi organizations.<sup>67</sup> Plaintiffs alleged that defendants provided funding to charity organizations that were known to give money to terrorist organizations like al Qaeda.<sup>68</sup> The court reasoned that these defendants neither participated in the September 11th attacks nor gave money directly towards al Qaeda.<sup>69</sup> The Second Circuit expanded upon this stating that they were also not persuaded that providing routine banking services to organizations and individuals said to be connected to al Qaeda proximately caused the September 11th attacks.<sup>70</sup>

Overall, the Second Circuit has not backed down from its original ruling in *Rothstein*. It has continuously reiterated case after case that in order to successfully plead a case under the Anti-Terrorism Act, plaintiff must prove proximate cause: that the injury was a reasonably foreseeable consequence of defendant's action.<sup>71</sup>

While the Second Circuit has made clear that routine banking services will not be enough by way of reasonably foreseeable consequences,<sup>72</sup> it has not outlined exactly what it deems as reasonably foreseeable when it comes to terrorist cases. This has caused remaining confusion for future cases brought under the Anti-Terrorism Act and will remain as a source of confusion until a more thorough consensus at to what is reasonably foreseeable when it comes to terrorism cases is outlined by the Second Circuit.

#### V. THE 2<sup>ND</sup> CIRCUIT'S POSITION ON PROXIMATE CAUSE IN NON-ANTI-TERRORISM ACT CASES

The Second Circuit has been known to take a tougher and more rigid stance when interpreting proximate cause under the Anti-Terrorism Act.<sup>73</sup> In *First Nationwide Bank v. Gelt Funding Corp.*, the Second Circuit examined proximate cause under the RICO statute.<sup>74</sup> The court explained its understanding of proximate cause:

Many considerations enter into the proximate cause inquiry including “the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal

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<sup>67</sup> In re Terrorist Attacks on Sept. 11, 2001, 714 F.3d 659, 665 (2d Cir. 2013).

<sup>68</sup> See *id.* at 124.

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See, e.g., *Palsgraf*, 162 N.E. at 100.

<sup>72</sup> See *Rothstein*, 708 F.3d at 95.

<sup>73</sup> See, e.g., *id.*

<sup>74</sup> *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763 (2d Cir. 1994).

connection.” We have recognized that the proximate cause determination “is not free from normative legal policy considerations,” and indeed involves a judgment based upon “some social idea of justice or policy.” The key reasons for requiring direct causation include avoiding unworkable difficulties in ascertaining what amount of the plaintiff’s injury was caused by the defendant’s wrongful action as opposed to other external factors, and in apportioning damages between causes. Although the likelihood that the injury would result from the wrongful conduct is a consideration, the rule often has as much to do with problems of proof as with foreseeability.<sup>75</sup>

The Second Circuit has been consistent in its stringency on foreseeability across cases and has thus applied the same standard of proximate cause under the Anti-Terrorism Act as any other proximate cause case.

In *First Nationwide Bank*, First Nationwide Bank, the plaintiff, alleged that defendant, Gelt Funding, had intentionally misrepresented the qualifications of its borrowers after a high proportion of Gelt Funding brokered loans had defaulted.<sup>76</sup> First Nationwide Bank brought two of its claims under the RICO statute.<sup>77</sup> The court held that First National Bank did not adequately prove proximate cause: “the complaint still falls short of pleading proximate cause because [First National Bank]’s alleged injury was insufficiently close in time to the alleged misrepresentations to warrant the inference of a nexus between the two.”<sup>78</sup> The court stressed that when a long period of time has passed between the plaintiff’s injury and the defendant’s action, it is more likely that an intervening act or actor along the way was the source of liability.<sup>79</sup> Additionally, at the time of the supposed defrauding by Gelt Funding, the real estate market collapsed; “when the plaintiff’s loss coincides with a market-wide phenomenon causing comparable losses to other investors, the prospect that the plaintiff’s loss was caused by the fraud decreases.”<sup>80</sup>

The Second Circuit has been consistent in its proximate cause pleading standards. It is hesitant to impose liability on a defendant when there are intervening factors, especially when there are multiple that span a longer period of time. Perhaps the reason the Second Circuit refused to find that proximate cause was satisfied in *Rothstein* and *In re Terrorist*

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<sup>75</sup> *Id.* at 769–70 (citations omitted).

<sup>76</sup> *See id.* at 766.

<sup>77</sup> *See id.*

<sup>78</sup> *Id.* at 772.

<sup>79</sup> *See id.*

<sup>80</sup> *Id.*

*Attacks on September 11, 2001* was because of the intervening actors in both cases. However, just because there are intervening actors, it does not follow that there was no proximate cause. Intervening actors do not immediately cut off the chain of causation.

#### VI. THE 7<sup>TH</sup> CIRCUIT'S POSITION ON PROXIMATE CAUSE AND THE *BOIM* CASES

The Seventh Circuit has had its fair share of Anti-Terrorism Act cases as well, most notably with the *Boim* cases.<sup>81</sup> The decision in *Boim III* is of primary focus when analyzing potential civil liability under the Anti-Terrorism Act.<sup>82</sup> The *Boim* cases came to the Seventh Circuit from the death of David Boim, who was a dual US and Israeli citizen, killed in an attack perpetrated by Hamas.<sup>83</sup> Boim's parents also named two non-profit organizations as defendants, the Holy Land Foundation and the Quiranic Literary Institute.<sup>84</sup> The Boims alleged that these organizations were front organizations posing as charities.<sup>85</sup>

*Boim III* created a seemingly more relaxed standard of causation.<sup>86</sup> One of the aspects of *Boim III* that created significant difficulty for the Seventh Circuit was that Hamas, the terrorist organization that the charities had donated to, was also involved in humanitarian work.<sup>87</sup> As Judge Posner explained:

This case is only a little more difficult because Hamas is (and was at the time of David Boim's death) engaged not only in terrorism but also in providing health, educational, and other social welfare services. The defendants other than Salah directed their support exclusively to those services. But if you give money to an organization that you know to be engaged in terrorism, the fact that you earmark it for the organization's nonterrorist activities does not get you off the liability hook . . . . The reasons are twofold. The first is the fungibility of money. If Hamas budgets \$2 million for terrorism and \$2 million for social services and receives a donation of \$100,000 for those services, there is nothing to prevent its [sic] using that money

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<sup>81</sup> See *Boim v. Quranic Literacy Inst. (Boim I)*, 291 F.3d 1000 (7th Cir. 2002); *Boim v. Holy Land Found. for Relief & Dev. (Boim II)*, 511 F.3d 707 (7th Cir. 2007); *Boim v. Holy Land Found. for Relief & Dev. (Boim III)*, 549 F.3d 685 (7th Cir. 2008) (en banc).

<sup>82</sup> 549 F.3d at 688.

<sup>83</sup> See *Boim I*, 291 F.3d at 1002.

<sup>84</sup> See *id.* at 1003.

<sup>85</sup> See *id.*

<sup>86</sup> 2 VED P. NANDA, DAVID K. PANSIUS & BRYAN NEIHART, *LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS* § 9:41 (2d ed. 2007 & Supp. 2018).

<sup>87</sup> See *Boim III*, 549 F.3d at 698.

for them while at the same time taking \$100,000 out of its social services “account” and depositing it in its terrorism “account.”<sup>88</sup>

As Judge Posner clearly explains, the difficulty *Boim III* arose out of the fungibility of money.<sup>89</sup> And while the issue at hand regarding Hamas (and its humanitarian efforts) is unique to *Boim III*, the fungibility of money is relevant in almost all Anti-Terrorism Act cases.<sup>90</sup>

In *Boim III*, Defendants tried to argue “that at worst they sent money to charitable organizations with some kind of link to Hamas,” and thus, liability cannot be imputed to Hamas.<sup>91</sup> Judge Posner, however, disagreed.<sup>92</sup> He reasoned that when a donor knowingly donated to the nonviolent wing of a terrorist organization, such as Hamas, the only knowledge requirement for causation could be that of knowingly contributing to the terrorist activity of the organization.<sup>93</sup> Plaintiffs argued that they should only be held liable if they intended for their donation to be used for terrorist activity which would then make the action foreseeable.<sup>94</sup> However, this argument was dismissed by the Seventh Circuit primarily because it would effectively wipe out donor liability when it comes to Anti-Terrorism Act cases, unless the donor actually admitted his or her intent to donate to a terrorist organization, which would surely never happen.<sup>95</sup>

In *Abecassis v. Wyatt*, the court summarized the legal standard set out in *Boim III*: “[i]f a plaintiff can show that a defendant made a material contribution, financial or otherwise, with awareness of or deliberate indifference to the fact that the ultimate recipient was a terrorist organization, there is no need for that plaintiff to make an additional showing of causation.”<sup>96</sup> While the *Abecassis* court criticized this approach, it missed the important distinction that Judge Posner was trying to make when it comes to Anti-Terrorism Act cases. If a defendant were to donate knowingly or with indifference to the fact that the ultimate recipient was a terrorist organization, it can be inferred that it would be reasonably foreseeable that the money would be used for a terrorist attack. If this weren't the case, every defendant would simply claim that

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<sup>88</sup> See *id.* (citations omitted).

<sup>89</sup> See *id.*

<sup>90</sup> See *e.g.*, *Brill*, No. 15-CV-04916-JD, 2017 WL 76894, at \*4; see *e.g.*, In re Terrorist Attacks on Sept. 11, 2001, 714 F.3d 659 (2d Cir. 2013).

<sup>91</sup> See *Boim III*, 549 F.3d at 724 (Wood, J., concurring in part and dissenting in part).

<sup>92</sup> *Id.* at 699 (majority opinion).

<sup>93</sup> See *id.*

<sup>94</sup> *Id.* at 694.

<sup>95</sup> 2 NANDA, PANSIUS & NEIHART, *supra* note 86, § 9:41.

<sup>96</sup> *Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 647 (S.D. Tex. 2010).

they had no awareness of the fact that the ultimate recipient was a terrorist organization, and none of these defendants would ever be held liable. Holding defendants to a different standard would allow them to escape liability every time. Additionally, defendants could attempt to escape liability each time by claiming that they earmarked their donation for the humanitarian wing of the terrorist organization, as Judge Posner stressed in *Boim III*.<sup>97</sup>

*A. Causation Is Not Obliterated Because of Long Chain of Organizations*

As was briefly discussed earlier, a serious problem that Anti-Terrorism Act plaintiffs often encounter is a long chain of donations through numerous organizations, some being shell companies and some legitimate organizations.<sup>98</sup> This circuitous and hard to follow chain creates the ultimate causation issue. If you cannot trace the money how can you trace liability? Judge Posner highlighted this issue in *Boim III* with the following example:

Donor A gives to innocent-appearing organization B which gives to innocent-appearing organization C which gives to Hamas. As long as A either knows or is reckless in failing to discover that donations to B end up with Hamas, A is liable. Equally important, however, if this knowledge requirement is not satisfied, the donor is not liable. And as the temporal chain lengthens, the likelihood that a donor has or should know of the donee's connection to terrorism shrinks.<sup>99</sup>

Judge Posner makes clear that an element of either knowledge or recklessness is necessary to find that the donation was a proximate cause of terrorism.<sup>100</sup> Because actual knowledge that the donation to A and subsequently to B would end up in Hamas' hand would be difficult to prove, recklessness as to the knowledge that the money would end up in Hamas's hand is acceptable as well as a much lower evidentiary threshold.<sup>101</sup>

*Boim III* has been noted amongst the circuits for its interpretation of the proximate cause requirement in the Anti-Terrorism Act statute. While *Boim III* does not go as far as to say that something less than a showing of proximate cause is necessary to prove liability, it does endorse a

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<sup>97</sup> *Boim III*, 549 F.3d at 698.

<sup>98</sup> See 15 U.S.C. §15(c) (2012).

<sup>99</sup> *Boim III*, 549 F.3d at 702.

<sup>100</sup> See *id.*

<sup>101</sup> *Id.*

somewhat less stringent standard of proximate cause than the Second Circuit in *Rothstein*.<sup>102</sup>

#### VII. THE 7<sup>TH</sup> CIRCUIT'S POSITION ON PROXIMATE CAUSE IN NON-ANTI-TERRORISM ACT CASES

In *Stewart v. United States*, the U.S. military maintained a stockpile of hand grenades which were packed in boxes and clearly marked as "Fireworks."<sup>103</sup> The boxes were stacked out in the open and not hidden within a building; they were covered with a tarp but the label on the box was clearly visible still.<sup>104</sup> The boxes were stacked within the Fort Magazine Area, which had a six-foot fence surrounding it, and "[a] large sign [that] was posted on the roadway leading to the Magazine Area, which read, 'Danger Military Explosives, This Road Closed to Public Traffic.'"<sup>105</sup> Additionally, "[a]nother sign on the gate of the magazine enclosure read, 'Keep Out. No Smoking No Matches No Lighters Permitted in This Area.'"<sup>106</sup> The military reservation was open to the public to people of all ages.<sup>107</sup> Three teenage boys entered the area through an unguarded portion, took four boxes of the grenades labeled "fireworks" and brought them to an empty lot to shoot them off.<sup>108</sup> They left one box of untouched grenades in the vacant lot.<sup>109</sup> About a year later, Plaintiff, an eight-year-old boy and his six-year-old brother, found the box of grenades, opened them up and took one out, at which point the grenade exploded in the young boy's hand, shattering his right hand and burning his leg, thereby leaving him permanently disabled.<sup>110</sup>

In *Stewart*, the Seventh Circuit struggled with proximate cause. While it was clear that the teenage boys' intervening act was a cause of the Plaintiff's injury, it was not clear whether this intervening act cut off the causal chain, thereby clearing the government of its liability. In a prior case, the Supreme Court of Illinois held that "[t]he test that should be applied in all cases in determining the question of proximate cause is whether the first wrongdoer might have reasonably anticipated the

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102 *See id.* at 724.

103 *Stewart v. United States*, 186 F.2d 627, 628 (7th Cir. 1951).

104 *See id.*

105 *Id.*

106 *Id.*

107 *See id.* at 628.

108 *See id.*

109 *Id.* at 629.

110 *Id.*



intervening cause as a natural and probable result of the first party's own negligence."<sup>111</sup> Furthermore,

[W]henver a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrong-doer, which could not have been foreseen by the exercise of reasonable diligence by the wrong-doer, and except for which the final injurious consequence could not have happened, then such injurious consequence must be deemed too remote to constitute the basis of a cause of action.<sup>112</sup>

The Seventh Circuit then applied this test to the facts of the *Stewart* case, ultimately finding that the government's negligence in leaving the grenades out and accessible was a proximate cause of plaintiff's injuries.<sup>113</sup> The government's actions were clearly negligent, and the intervening acts of the teenage boys were clearly foreseeable and could have been easily avoided.<sup>114</sup>

The Seventh Circuit's application and interpretation of proximate cause in non-Anti-Terrorism Act cases does not differ much from its interpretation in Anti-Terrorism Act cases. Similar to the facts in *Stewart*, in *Boim III*, there were intervening actors as well a long period of time between the defendant's action and the injury alleged. In *Boim III*, the defendants had given money to charity organizations, which in turn gave money to Hamas.<sup>115</sup> Do the intervening acts of the Hamas terrorists break the causal chain thereby ridding the defendants of liability?

Using the standard test laid out in *Stewart*,<sup>116</sup> the intervening actors in *Boim III* most definitely could have reasonably anticipated the acts of Hamas, the intervening actor. Seeing as the charity organizations were purported fronts for terrorist funds, the actions by Hamas were quite clearly the "natural and probable result" of defendant's actions in donating to the charity organizations.<sup>117</sup>

While some have argued that the Seventh Circuit in *Boim III* created a new and relaxed standard of proximate cause in Anti-Terrorism Act

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111 *Merlo v. Pub. Serv. Co.*, 45 N.E.2d 665, 675 (Ill. 1942) (citing *Seith v. Commonwealth Elec. Co.*, 89 N.E. 425, 428 (Ill. 1909)).

112 *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354, 374 (1874). The Illinois Supreme Court adopted this rule in *Illinois Central Railroad Co. v. Siler*, 82 N.E. 362, 364 (Ill. 1907).

113 See *Stewart*, 186 F.2d at 634.

114 See *id.*

115 See *Boim III*, 549 F.3d at 688.

116 See *Stewart*, 186 F.2d at 632.

117 *Id.*

cases,<sup>118</sup> this comparison proves the contrary. *Boim III* is consistent with the Seventh Circuit's interpretation of proximate cause pleading across all tort case types.

#### A. Reexamining *Rothstein* Under the *Boim III* Standard

In *Rothstein*, the Second Circuit held that the line of causation was too highly attenuated to prove that the bank transfers UBS made to Iran, a state sponsor of terrorism, were reasonably foreseeable to end up in the hands of Hamas and Hezbollah.<sup>119</sup> However, if the Second Circuit would engage in the example that Judge Posner laid out,<sup>120</sup> it would very possibly reach a different conclusion as far as proximate cause is concerned.

Following the example, UBS (A) gives money to Iran (B), and Iran gives money to Hamas and or Hezbollah (terrorist organization). UBS knows or should have known that Iran is a state sponsor of terrorism,<sup>121</sup> and therefore it would be extremely likely that money given to Iran would end up in the hands of terrorist organizations. While Posner made clear that if the knowledge and/or recklessness standard was not satisfied the original donor could not be held liable.<sup>122</sup> Here we are dealing with a state sponsor of terrorism, claiming a lack of knowledge would be a difficult task.

In *Rothstein*, the court also noted that Iran is unique because while it is a state sponsor of terrorism, it is also "a government, and as such it has many legitimate agencies, operations, and programs to fund."<sup>123</sup> Again, Judge Posner's insight in *Boim III* is helpful. One cannot donate to a terrorist organization that also provides humanitarian relief, claiming that they donated that money only for humanitarian purposes.<sup>124</sup> Quite

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118 See 2 NANDA, PANSIUS & NEIHART, *supra* note 86, § 9:41 ("Boim III's deficiency is lack of a proximate cause requirement . . . Particularly problematic is that there is no proportionality between the material act and the degree of liability. Return to Judge Posner's loaded gun analogy: Good neighbor Sam gives \$100 to gun freak Fred to buy groceries. Sam knows that Fred and his children play with guns. If Fred's child kills someone is Sam liable for providing financial assistance to Fred that at least indirectly allowed him to buy a gun for his child. Would the result change if Sam actually delivered food instead of providing money? These points do not argue that Judge Posner's approach is wrong. Indeed the Supreme Court's decision in Humanitarian Law Project supports the proposition that aid to the entity is sufficient to establish liability. These materials argue that there remains practical issues that defy ready boundaries.")

119 See *Rothstein*, 708 F.3d at 94.

120 See *Boim III*, 549 F.3d at 698.

121 See *Rothstein*, 708 F.3d at 97.

122 See *Boim III*, 549 F.3d at 702.

123 *Rothstein*, 708 F.3d at 97.

124 See *id.* at 91.

similarly it would follow, that UBS cannot donate or provide money to Iran, a state sponsor of terrorism, and claim that as a government they have numerous other functions, and therefore they did not know that the money would end up being earmarked for terrorism.

While the facts in *Rothstein* are unclear as to whether the money UBS transferred to Iran were in fact given to Hezbollah and Iran,<sup>125</sup> it is still quite plausible to infer that the Second Circuit would have come out on the other side on proximate cause had it followed the interpretation in *Boim III*.

*B. Reexamining In re Terrorist Attacks on Sept. 11, 2001 Under the Boim III Standard*

The facts and allegations in *In re Terrorist Attacks on September 11, 2001* are remarkably similar to those of *Rothstein* and therefore a similar conclusion can be reached using the relaxed standard in *Boim III*. The *In re Terrorist Attacks on September 11, 2001* court noted the similarities to *Rothstein*: “[d]efendants are 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. These allegations are insufficient for proximate causation purposes for the same reasons the allegations in *Rothstein* fell short.”<sup>126</sup>

The officials of the purported charity organizations in *In re Terrorist Attacks on September 11, 2001* were highly suspect of supporting terrorism.<sup>127</sup> There is a strong likelihood that they would pass the knowledge or recklessness standard that Judge Posner outlined in *Boim III* and liability would attach to them.<sup>128</sup> The defendants knew or should have known that donations given to these purported charity organizations would likely end up in the hands of terrorist organizations since they were known to support terrorism.<sup>129</sup> However, because the Second Circuit used the stricter standard that they set out in *Rothstein*,<sup>130</sup> the defendants in *In Re Terrorist Attacks on September 11, 2001* were not found liable.<sup>131</sup>

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<sup>125</sup> See *id.* at 84-86.

<sup>126</sup> *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 124 (2d Cir. 2013).

<sup>127</sup> *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 667 (2d Cir. 2013).

<sup>128</sup> See *Boim III*, 549 F.3d at 702 (en banc).

<sup>129</sup> See *Brill*, No. 15-CV-04916-JD, 2017 WL 76894, at \*4.

<sup>130</sup> See generally 714 F.3d.

<sup>131</sup> See generally 714 F.3d.

## VII. OTHER CASES TO BE EXAMINED

A. *Gill v. Arab Bank*

In *Gill v. Arab Bank, PLC (Gill II)*, the Eastern District Court of New York threw out an Anti-Terrorism Act case on summary judgment because Plaintiff, a US citizen who was struck by a bullet by a Hamas terrorist, could not prove the requisite elements of an Anti-Terrorism Act case.<sup>132</sup> The court addressed the issue of proving proximate cause through a monetary chain of events; in this case Plaintiff alleged that Arab Bank had proximately caused his injuries by providing routine banking services and maintaining an account for Hamas, its leaders, and affiliates.<sup>133</sup>

The court stated, that when causation must be proven through a monetary chain of action, “the money alleged to have changed hands ‘need not be shown to have been used to purchase the bullet that struck the plaintiff.’ But moral blame should only follow if the harm caused by providing bank services to terrorists is foreseeable.”<sup>134</sup> Following Justice Posner’s line of thought, any contribution to a terrorist organization would qualify as foreseeable.<sup>135</sup> However, the court in *Gill II* veers from this line of thought, choosing instead to not impose liability, asserting “Hamas is not the defendant; the Bank is[,] [a]nd the evidence does not prove that the Bank acted with an improper state of mind or proximately caused plaintiff’s injury.”<sup>136</sup>

Explaining its reasoning, the court stated, “[a] major recent contribution with a malign state of mind would—and should—be enough to satisfy the causation requirement under the ATA.”<sup>137</sup> Yet the court then went on to distinguish “major” contributions from “small” contributions, stating that those smaller contributions made long before the attack would not be seen as a proximate cause of the attack.<sup>138</sup> Additionally, “the court reject[ed] 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.”<sup>139</sup>

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132 893 F. Supp. 2d 542, 556 (E.D.N.Y. 2012).

133 *See id.* at 547.

134 *Id.* at 556 (quoting *Gill v. Arab Bank, PLC (Gill I)*, 893 F. Supp. 2d 474, 507 (E.D.N.Y. 2012)).

135 *See* 2 NANDA, PANSIUS & NEIHART, *supra* note 86, § 9:41.

136 *Gill II*, 893 F. Supp. 2d at 547.

137 *Id.* at 556 (quoting *Gill I*, 893 F. Supp. 2d at 507).

138 *See id.*

139 *Id.* (quoting *Gill I*, 893 F. Supp. 2d at 522).

The *Gill II* court's reasoning is troubling. Making a distinction between the size of the contribution does not seem to hold much weight. A contribution to a terrorist organization, especially one as well-known as Hamas, should be seen as a proximate cause regardless of the size of the contribution. Big or small, a contribution is a contribution. Donating money to Hamas cannot be looked at any other way. Hamas is a known terrorist organization who sponsors myriad acts of terror across the Middle East.<sup>140</sup> How can a contributor state that they did not know that there was even the faintest chance that their donation money would or could have been used for illicit terrorist activity? This seems inconceivable to the ordinary person, and the *Gill II* court does not say much in explaining its distinction.

The *Gill II* court also directly disagreed with Judge Posner regarding reckless contributions to terrorist organizations.<sup>141</sup> The court refused to attach liability to monetary contributions that cannot be proven to be the proximate cause of the injury.<sup>142</sup>

This goes to the heart of the problem in Anti-Terrorism Act cases. Money is fungible, no Plaintiff can ever prove that the exact dollar that was contributed by a defendant was used to buy the bullet or bomb that injured or killed the Plaintiff. This is exactly what the *Gill* court is asking the Plaintiff to do, an impossible task.

Stopping terrorism means cutting off the organizations air supply, suffocating the heart of what keeps them going, and when it comes to terrorism, that means shutting off the money faucet.<sup>143</sup> This issue was well understood by Judge Posner, who insisted in *Boim III*, that liability should attach when a donation is made to a terrorist organization. In *Boim III*, the chain of causation was far more attenuated<sup>144</sup> than in *Gill II*, where banking services and donations were given directly to Hamas.<sup>145</sup>

### B. *Strauss v. Credit Lyonnais, S.A.*

#### 1. Tracing Dollar for Dollar is Impossible as Explained by the *Strauss v. Credit Lyonnais, S.A.* Court

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<sup>140</sup> See, e.g., *Profile: Hamas Palestinian Movement*, BBC (May 12, 2017), <http://www.bbc.com/news/world-middle-east-13331522>.

<sup>141</sup> See *Gill II*, 893 F. Supp. 2d at 566.

<sup>142</sup> See *id.*

<sup>143</sup> See Ostefeld, *supra* note 22.

<sup>144</sup> *Boim III*, 549 F.3d at 702 (en banc).

<sup>145</sup> See *Gill II*, 893 F. Supp. 2d at \_\_\_.

In *Strauss v. Credit Lyonnais, S.A.*, the court understood how difficult it could be to trace money donations to specific attacks.<sup>146</sup> They explained that “[p]laintiffs 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 dead letter because ‘[m]oney is fungible.’”<sup>147</sup> The court further reasoned that Plaintiff was not responsible for proving that the money Defendant contributed was, “[u]sed to purchase the bullet that struck the plaintiff. A contribution, if not used directly, arguably would be used indirectly by substituting it for money in Hamas’ treasury; money transferred by Hamas’ political wing in place of the donation could be used to buy bullets.”<sup>148</sup> The *Strauss* court understood the reasoning behind the Anti-Terrorism Act, stating, “[t]hat is why Congress crafted the ATA to cut off all money to terrorist organizations, finding that they are fundamentally tainted even if they also have non-violent public welfare operations.”<sup>149</sup>

In *Strauss*, the court grappled with the differing standards coming out of the *Boim III* and *Rothstein* cases.<sup>150</sup> *Strauss* dealt with a French charity, Comité de Bienfaisance et de Secours aux Palestiniens (CBSP), that had opened up an account at Defendants bank, Credit Lyonnais.<sup>151</sup> CBSP was not yet on any terrorist watch list in France, yet the bank had flagged the account on two occasions due to suspicious activity and brought it to the attention of the French authorities.<sup>152</sup> Defendant argued that the issue of proximate cause was not crystal clear, the CBSP was not on a terrorist watch list and the French authorities had cleared the charity each time it was brought to their attention.

However, the court thought otherwise, believing that a jury could find based on the evidence “that Defendant sent millions of dollars to organizations controlled by Hamas, and was providing financial services to Hamas’ primary fundraiser in France.”<sup>153</sup> Additionally, the court found “[t]here also [was] evidence that, during the same period, Hamas financed and executed the attacks that injured Plaintiffs and/or Plaintiffs’ family members.”<sup>154</sup> The court continued to reason that the contributions “sent

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146 925 F. Supp. 2d 414 (E.D.N.Y. 2013).

147 *Id.* at 433 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010)).

148 *Id.* at 433-34.

149 *Id.* at 434.

150 *See id.* at 442.

151 *See id.* at 418-19.

152 *See id.* at 420.

153 *Id.* at 432.

154 *Id.*

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."<sup>155</sup>

The court emphasized that the terrorist attacks were actually carried out during the same time frame that the donations were being made by CBSP.<sup>156</sup> This helped the court create more than just an inference that the CBSP account was a proximate cause of the attacks made on Plaintiffs.<sup>157</sup> Yet, the court still stressed that no Plaintiff has to prove that it was those exact dollars that were donated to CBSP that purchased the bullet or weapon.<sup>158</sup>

*Strauss* also distinguished itself from the facts of *Rothstein*, which Defendant argued was controlling in the instant case.<sup>159</sup> The court noted "[t]he Second Circuit held that these allegations, along with conclusory allegations that the dollars the defendant provided to the Iranian government 'would be used to cause and facilitate terrorist attacks by Iranian-sponsored terrorist organizations such as Hamas [and] Hizbollah [sic],' were not adequate to plead proximate causation."<sup>160</sup>

However, in *Strauss*, CBSP was the largest donor to Hamas in France<sup>161</sup> and was essentially its "charity" money collection arm in France. Unlike in *Rothstein*, where Iran, a state sponsor of terrorism, was the defendant but also a legitimate sovereign government. In *Strauss*, "Defendant was purportedly going directly to Hamas front-groups, rather than to a government that performs myriad legitimate functions in addition to allegedly funding terrorist organizations."<sup>162</sup> Additionally, the court in *Strauss* pointed out that "[h]ere, Hamas carried out the attacks during the same period of time within which the money was transferred, which, again, is distinguishable from *Rothstein*, where Iran did not carry out the attacks at issue."<sup>163</sup>

The court in *Strauss*, while distinguishing itself from the Second Circuit and its opinion in *Rothstein*, did not align itself with the Seventh Circuit and its decision in *Boim III*. *Strauss*, emphasized the size and time

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<sup>155</sup> *Id.*

<sup>156</sup> *See id.* at 433.

<sup>157</sup> *See id.* at 432-33.

<sup>158</sup> *See id.* at 433-34.

<sup>159</sup> *See id.* at 432.

<sup>160</sup> *Id.* at 433 (quoting *Rothstein*, 708 F.3d at 97).

<sup>161</sup> *See id.* at 419.

<sup>162</sup> *Id.* at 433.

<sup>163</sup> *Id.*

of the donation and/or contribution, explaining that those two factors would be largely determinative for a finding of proximate cause.<sup>164</sup> *Boim III*, however, found that any donation to a charity, charity front organization, or terrorist group, would satisfy the proximate cause requirement regardless of the size or timing of the contribution.<sup>165</sup> As Judge Posner stressed, a donation to a terrorist group cannot be characterized as anything but.<sup>166</sup> No donor or contributor can escape liability by simply claiming their actions did not make the outcome foreseeable.<sup>167</sup>

### C. *Owens v. BNP Paribas S.A.*

#### 1. The Distinction Between State Sponsors of Terrorism and Foreign Terrorist Groups Should Be Irrelevant

The dispute between which circuit's interpretation of the proximate cause standard under the Anti-Terrorism Act should be endorsed was once again recently brought to a head in *Owens v. BNP Paribas S.A.* in the D.C. District Court.<sup>168</sup> *Owens* involved a suit against the BNP Paribas, a bank, for its involvement with Sudan, a state sponsor of terrorism, in the bombings of the U.S. embassies in Tanzania and Kenya in 1998.<sup>169</sup> Al Qaeda claimed responsibility for the attacks, which were accomplished "with the assistance of the Republic of Sudan, which provided safe harbor to al Qaeda throughout the mid-1990s, as well as financial, military, and intelligence assistance."<sup>170</sup>

Plaintiffs contended that the standard set out in *Rothstein* by the Second Circuit was too stringent and should not be followed; the standard set out by the Seventh Circuit in *Boim III*, should be adhered to instead.<sup>171</sup> However, the court in *Owens* tried to distinguish *Rothstein*, explaining, "[to] the extent that court stressed the need for a closer connection between the defendants and the plaintiffs' injuries, it is important to remember that *Rothstein*, unlike most ATA cases, involved actors who

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164 See *id.* at 432.

165 See *Boim III*, 549 F.3d at 699-72 (en banc).

166 See *id.* at 701.

167 See *id.* at 698.

168 235 F. Supp. 3d at 85.

169 See *id.* at 86-87.

170 *Id.*

171 See *id.* at 95-96.



were not directly connected to any terrorist organization or to agents of a terrorist organization.”<sup>172</sup>

The court then drew a parallel between the facts in *Rothstein* and the facts in *Owen*, qualifying that in *Rothstein*, the bank defendant had been dealing with Iran, a sovereign state.<sup>173</sup> Furthermore, the court asserted

The *Rothstein* defendants, like the bank defendants here, were thus one step further removed from the acts that caused the plaintiffs’ injuries, separated by a sovereign state that was not simply a funnel to provide money to terrorists, but that may well have used the funds processed for any number of legitimate purposes.<sup>174</sup>

The *Owens* court then concluded that as “was true in *Rothstein*, [P]laintiffs here present no facts showing, for example, that BNPP provided money to a terrorist group, that the money BNPP processed for Sudan was transferred to al Qaeda, or that Sudan would have been unable to assist al Qaeda without the funds that BNPP processed.”<sup>175</sup> The main issue for Plaintiffs in *Owens* was a lack of evidence.<sup>176</sup> This lack of evidence led the court to believe that the claim was too highly attenuated to find a showing of proximate cause between the bank’s actions and the subsequent suicide attacks.<sup>177</sup>

The court also discounted Plaintiffs argument that money is fungible and therefore it should not matter that the money may have been given for humanitarian purposes, similar to *Rothstein* as both dealt with state sponsors of terrorism.<sup>178</sup> While the court agreed that money is fungible, they argued that the rules are different when it comes to state sponsors of terrorism and foreign terrorist groups.<sup>179</sup> The distinction seems to be irrelevant. While there is a clear difference between a state sponsor of terrorism and foreign terrorist groups, the ends they purport to bring about are the same. The means with which they get to those ends should be irrelevant under the Anti-Terrorism Act.

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172 *Id.* at 97.

173 *See id.* at 97.

174 *Id.*

175 *Id.* at 99.

176 *See id.*

177 *See id.*

178 *See id.* at 100.

179 *See id.*

## IX. CONCLUSION

*A. All Circuits Should Embrace the Standard of Proximate Cause as Outlined by the Seventh Circuit in Boim III*

The confusion and differing results in Anti-Terrorism Act cases is abundant and sure to continue in the near future. All courts should embrace the standard of proximate cause that Justice Posner laid out in *Boim III*.

The Second Circuit in *Rothstein* ruled that proximate cause must be proven to plead a successful Anti-Terrorism Act case.<sup>180</sup> However, they ultimately ruled in that case that the Plaintiff could not prove proximate cause because the chain of causation was too highly attenuated to trace the dollar contribution back to UBS.<sup>181</sup> The Second Circuit felt that while Iran was a state sponsor of terrorism, the court could not definitively trace the cash contributions from UBS to Iran and then to Hezbollah.<sup>182</sup> The fact that Iran was a state sponsor of terrorism as well as sovereign nation should not detract from the proximate cause analysis.<sup>183</sup> If a state has been designated as a state sponsor of terrorism, it should not be too difficult to discern that money donated to it could be going to terrorist groups in the near future.

The analysis that Judge Posner outlined in *Boim III* is directly applicable to the *Rothstein* case. In *Boim III*, Posner made clear that liability could not be escaped by donating to Hamas or any terrorist organization and then claiming that the money was allocated to the non-terrorist functions of the organization.<sup>184</sup> Similarly in *Rothstein*, liability cannot be escaped by donating to a state sponsor of terrorism and then claiming it was completely unforeseeable for the money to be used for terrorist attacks. While it is certainly less likely in *Rothstein* because the case deals with a sovereign state, it is not unreasonably foreseeable. Furthermore, the *Rothstein* case could be arguably more foreseeable than

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<sup>180</sup> *Rothstein*, 708 F.3d at 95.

<sup>181</sup> *See id.*

<sup>182</sup> *See id.* at 97.

<sup>183</sup> *See id.* at 86 (“Since 1984, the United States Department of State . . . has continuously . . . designated Iran a state sponsor of terrorism. In 1996, a State Department report found that Iran had continued “to encourage Hizballa [sic], HAMAS [sic], [and] the PIJ” to engage in “violence and terrorism,” and that Iran was “the premier state sponsor of international terrorism.” And in 2006, the Secretary of State described Iran as “the central banker for terrorism around the world.” (quoting Amended Complaint, *Rothstein v. USB AG*, 647 F. Supp. 2d 292 (S.D.N.Y. 2009) (No. 1:08-CV-04414-JSR)).

<sup>184</sup> *Boim III*, 549 F.3d at 688.

other cases because of the restriction put in place by 31 C.F.R. § 596.201(a).<sup>185</sup>

The standard of *Boim III*, was articulated by the court in *Abecassis* “[i]f a plaintiff can show that a defendant made a material contribution, financial or otherwise, with awareness of or deliberate indifference to the fact that the ultimate recipient was a terrorist organization, there is no need for that plaintiff to make an additional showing of causation.”<sup>186</sup> This standard is the one that should be followed by all circuits. The purpose of the ATA statute is to provide not just a cause of action, but a remedy as well for victims of terrorist attacks and their family.<sup>187</sup> This standard properly articulates the proximate cause analysis for Anti-Terrorism Act cases.

The purpose of enacting the Anti-Terrorism Act was to provide a cause of action for Americans injured by acts of terrorism abroad; to provide for liability at any point along the causal chain.<sup>188</sup> The standard articulated in *Boim III*, does just that.<sup>189</sup>

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<sup>185</sup> See 31 C.F.R. § 596.201(a).

<sup>186</sup> *Abecassis*, 704 F. Supp. 2d at 647.

<sup>187</sup> S. REP. NO. 102-342, at 22 (1992).

<sup>188</sup> See *id.*

<sup>189</sup> *Boim III*, 549 F.3d at 688.