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Sokolow v. *Palestine Liberation Organization*

Second Circuit, Applying *Daimler* and *Walden*, Rejects Personal Jurisdiction Over Palestinian Entities in Suit Brought by U.S. Citizens Killed or Wounded by Terrorist Attacks in Israel

SUMMARY

The Second Circuit held yesterday in *Sokolow* v. *Palestine Liberation Organization*[1] that the district court lacked personal jurisdiction over the Palestine Liberation Organization and the Palestinian Authority in a suit charging them with responsibility for a series of terrorist attacks in Israel. Applying the Supreme Court's "at-home" test as articulated in *Daimler*,[2] the appeals court held that the defendants' maintenance of an office in Washington D.C. was insufficient to confer general personal jurisdiction on the federal courts. As for specific personal jurisdiction, the court held that under *Walden*[3] the relevant "suit-related conduct"—terrorist attacks in Israel—lacked a sufficient connection to the United States, was not "expressly aimed" at the United States, and was not connected to the activities of the defendants' domestic office. That some of the victims of the attacks were U.S. citizens was an "insufficient basis for specific jurisdiction."[4] The Second Circuit vacated the judgment below and remanded to the district court with orders to dismiss the action.

BACKGROUND

In the wake of the roiling terrorism that characterized the Second Intifada, eleven American families filed suit in the U.S. District Court for the Southern District of New York, alleging that the Palestine Liberation Organization ("PLO") and the Palestinian Authority ("PA") were responsible for various terrorist attacks in Israel that killed or wounded U.S. citizens. Over the course of the multiyear litigation, the district court repeatedly rejected the defendants' arguments that the court lacked personal jurisdiction over them. The plaintiffs' claims under the Anti-Terrorism Act[5] ("ATA") ultimately were tried to a jury, which awarded damages of $218.5 million (enhanced to $655.5 million by the ATA's automatic-trebling provision).

Both sides appealed to the Second Circuit. The defendants contended that the district court lacked general and specific personal jurisdiction over them or, alternatively, that they were entitled to a new trial because the district court erroneously admitted certain expert testimony against them. For their part, the plaintiffs requested that the appeals court reinstate certain claims that the district court had dismissed.

THE SECOND CIRCUIT'S DECISION

In a unanimous decision, a panel of the Second Circuit vacated the decision below and remanded to the district court with instructions to dismiss the action for lack of personal jurisdiction.

As a threshold matter, the Second Circuit determined that the defendants did not qualify as "foreign governments" so as to deprive them of due-process rights, since "neither the PLO nor the PA is recognized by the United States as a sovereign state."[6] The court also held that the analytical framework set forth in *Daimler* for personal jurisdiction claims sounding in the due process clause of the Fourteenth Amendment is fully applicable to analogous claims under the due process clause of the Fifth Amendment, rejecting the plaintiffs' efforts to draw a distinction between personal jurisdiction at the state and federal level.[7] Indeed, the court reiterated that the principal difference between personal jurisdiction for claims arising under federal law and those arising under state law is that, when claims arise under federal law, the defendant's contacts with the entire United States—not just the state where the suit is brought—are considered in assessing minimum contacts.

The Second Circuit next determined that the district court lacked general personal jurisdiction over the defendants. General jurisdiction permits a court to "hear any and all claims against [a] defendant" regardless of whether the claims have any connection to the forum state, but it applies only where "the defendant's affiliations with the State in which suit is brought 'are so constant and pervasive as to render [it] essentially at home in the forum State.'"[8] Here, the district court had determined that it possessed general jurisdiction over the defendants on the basis of their "substantial commercial presence in the United States," as evidenced by their "fully and continuously functional office in Washington D.C." as well as various bank accounts and commercial contracts.[9] But in the Second Circuit's view, these contacts alone were insufficient to satisfy *Daimler*'s "at-home test." Rather, the appeals court found "overwhelming evidence"—including the restriction of the defendants' geographical authority and the location of all PA governing bodies in the West Bank and Gaza—"that the defendants are 'at home' in Palestine," not the United States.[10]

The Second Circuit then proceeded to the question of specific personal jurisdiction, on which the district court had not ruled. Unlike its general counterpart, specific jurisdiction turns on the nexus between the forum state and the *suit-related* conduct of the defendants. Identifying the defendants' suit-related conduct as "their role in the six terror attacks . . . [that] occurred in and around Jerusalem," the court noted that the attacks themselves had occurred outside the territorial jurisdiction of the United States, necessitating a finding of some "other constitutionally sufficient connection [that] the commission of *these*

torts by *these* defendants ha[d] to *this* jurisdiction."[11] In the Second Circuit's view, the liability theories ultimately accepted by the jury—providing material support to terrorists, employing certain of the perpetrators, and harboring co-conspirators—offered "no basis to conclude that the defendants participated in these acts in the United States or that their liability for these acts resulted from their actions that did occur in the United States."[12]

Notwithstanding the absence of a connection between the defendants' suit-related conduct and the forum, the plaintiffs made three additional arguments in support of specific jurisdiction. First, under the "effects test," the plaintiffs argued that the attacks "target[ed]" U.S. citizens and "were intended to influence United States policy to favor the defendants' political goals."[13] Second, under the "purposeful availment" theory, the plaintiffs contended that defendants were subject to federal court jurisdiction because they had "establish[ed] a continuous presence in the United States."[14] Finally, the plaintiffs asserted that the PLO and PA had "consented to personal jurisdiction under the ATA by appointing an agent to accept process."[15]

Invoking the Supreme Court's decision in *Walden*, the Second Circuit rejected all three arguments. The effects test applies only when the defendant has "'expressly aim[ed]' [its] conduct at the United States," but the evidence adduced below "establishe[d] the random and fortuitous nature of the terror attacks" at issue here.[16] Mere knowledge that a plaintiff resides in a specific jurisdiction is insufficient for specific jurisdiction.[17] The plaintiffs' purposeful-availment argument likewise failed because, even accepting that the defendants' Washington-based office undertook activities to influence United States policy, the court could identify no connection between such lobbying in the United States and the "suit-related conduct"—terror attacks committed on foreign soil.[18] Finally, the Second Circuit held that satisfaction of a statutory service requirement does not displace the constitutional due-process inquiry governing personal jurisdiction—a test that has not been met in this case.

IMPLICATIONS

Yesterday's decision reinforces the impact of the Supreme Court's decision two terms ago in *Daimler* that substantially narrowed the circumstances under which U.S. courts can play host to litigation against foreign entities. Contacts in the United States—even those that are "commercial" and "continuous"—do not confer general personal jurisdiction unless the defendant is essentially domiciled stateside. Moreover, while not advancing beyond the doctrinal framework laid down by the Supreme Court, the Second Circuit bolstered the "at-home" test by warning district courts not to shift the burden onto defendants to show that there is an alternative forum where plaintiffs could bring their claims; it remains plaintiffs' burden to establish personal jurisdiction over the defendants. The Second Circuit also reiterated that the presence of an American victim is not sufficient to show that the challenged action was "expressly aimed" at the United States so as to confer specific personal jurisdiction. Rather, to qualify for specific jurisdiction, the defendants must have undertaken their acts either with the objective of targeting

the United States or by and through reliance on substantial contacts inside the United States. The mere maintenance of an office or branch in the United States unrelated to the conduct giving rise to the suit is insufficient to bring foreign entities within the jurisdiction of the federal courts.

While plaintiffs failed to establish personal jurisdiction on any ground here, it is clear that specific jurisdiction will generally prove the easier path to a merits disposition in the post-*Daimler* landscape. Two days before the Second Circuit decided *Sokolow*, a divided California Supreme Court issued a decision upholding the lower courts' exercise of specific—but not general—jurisdiction over out-of-state pharmaceutical manufacturer Bristol-Myers Squibb in a product-liability suit regarding its drug Plavix. Denying general jurisdiction, the court concluded that, "[a]lthough the company's ongoing activities in California are substantial, they fall far short of establishing that it is at home" there, particularly in light of its incorporation in Delaware and principal business centers in New York and New Jersey.[19] However, Bristol-Myers Squibb's promotion, marketing, and distribution of Plavix in California constituted suit-related conduct sufficiently connected to the forum state to permit specific jurisdiction.[20]

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ENDNOTES

1 No. 15-3135, slip op. at 3 (2d Cir. Aug. 31, 2016).

2 *Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014).

3 *Walden* v. *Fiore*, 134 S. Ct. 1115 (2014).

4 Slip op. at 42.

5 18 U.S.C. 2333(a).

6 Slip op. at 22.

7 *Id*. at 25.

8 *Id*. at 28 (quoting *Daimler*, 134 S. Ct. at 751).

9 *Id*. at 13-14.

10 *Id*. at 31.

11 *Id*. at 40-41 (emphasis in original).

12 *Id*. at 42.

13 *Id*. at 43.

14 *Ibid*.

15 *Ibid*.

16 Slip op. at 44.

17 *Id*. at 45-46.

18 *Id*. at 54.

19 *Bristol-Myers Squibb Co.* v. *Superior Court*, No. S221038, slip op. at 13-14 (Cal. Aug. 29, 2016).

20 In this respect, the dissent would have limited the California courts' jurisdiction to only the claims by California residents, excluding any claims by nonresident plaintiffs who "did not obtain the drug through California physicians or from a California source." *Id*. at 1 (Werdegar, J., dissenting).

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