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Libyan Terrorist Victims Argue for Retention of U.S.-Libyan Treaty Funds

Roger Alford (General Editor) (Notre Dame Law School) · Wednesday, January 6th, 2010

My former Pepperdine colleague, Kathryn Lee Boyd, has just filed a fascinating complaint relating to the distribution of funds secured by a treaty between the United States and Libya on behalf of U.S. victims of Libyan-sponsored terrorism.

The facts as alleged in the complaint of Davé v. Crowell & Moring are complex. In brief, Libya has been implicated in terrorist activities on numerous occasions, most notably the hijacking of Pan Am Flight 73 in Karachi, Pakistan on September 5, 1986 and the bombing of Pan Am Flight 103 over Lockerbie, Scotland on December 21, 1988. In 2005, victims of these terrorist attacks and their heirs—including American and non-American victims—retained the law firm of Crowell & Moring—known for representing victims of terrorism—to pursue litigation against Libya. The Davés were among those who signed the Crowell & Moring retainer agreement. As part of retaining Crowell & Moring, every client was also required to sign a joint prosecution agreement ("JPA"), a provision of which provided that the proceeds recovered by any signatory to the JPA shall be shared on a sliding scale based on type of injury with all signatories to the JPA, without distinction as to nationality. Only 23% of the victims who signed the JPA were American. A Liaison Group consisting of one American and four non-Americans was established as agents for the victims in their dealings with litigation counsel. The Liaison Group was represented by Latham & Watkins. In 2008, the United States government entered into a bilateral treaty with Libya for an award of compensation for all U.S. nationals harmed by Libyan terrorism, including the victims of the Pam Am Flight 73 hijacking, which included plaintiffs Gargi and Giatri Davé. The treaty provided for distribution of these funds through the Treasury Department's Foreign Claims Settlement Commission ("FCSC"). After the Davés successfully received notice of their entitlement to millions under the FCSC process, Crowell & Moring issued a demand letter to the Davés contending that under the retainer agreement and the JPA the funds secured by the United States government pursuant to the U.S.-Libya treaty on behalf of American victims are to be shared among all of the victims of Libyan terrorism, American and non-American alike. In other words, the vast majority of the funds secured by American nationals under the U.S.-Libya treaty are—approximately 90% according to Crowell & Moring—required to be paid to non-Americans pursuant to these private agreements.

The complaint seeks, among other things, (1) a declaratory judgment that the JPA

does not cover funds procured on behalf of American nationals by the United States government through state-to-state treaty negotiations; (2) a declaratory judgment that the JPA violates federal public policy embodied in the bilateral treaty that intended for the proceeds under the treaty to go to Americans, and only Americans; (3) that the 25% contingency fee in the retainer agreement violates the federal statutory maximum of 10% contingency fee for claims filed under the FCSC Act; (4) that Crowell & Moring has breached its obligations under the retainer agreement and the JPA; and (5) that the arbitration agreement in the JPA is unconscionable and unlawful.

The case is simply fascinating. It presents an amazing mix of terrorism compensation, treaty rights, contractual obligations, and arbitral unconscionability. Without knowing the details, my gut reaction is that the defendants will be hard pressed to argue that proceeds under the bilateral treaty intended for American nationals should be shared with non-Americans pursuant to an agreement which did not by its terms cover diplomatically-espoused claims resolved by treaty and distributed under the FCSC.

Roger Alford

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