Piercing the Shield of U.C.C. Article 4A: *Estate of Levin v. Wells Fargo Bank’s*, Implications for Terrorism Victims’ Attachment of Blocked Electronic Wire Transfers Originating from State Sponsors of Terrorism

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Piercing the Shield of U.C.C. Article 4A: Estate of Levin v. Wells Fargo Bank’s Implications for Terrorism Victims’ Attachment of Blocked Electronic Wire Transfers Originating from State Sponsors of Terrorism

Olivia Lu*

This Piece examines how ambiguity in the property interests that would be subject to attachment under section 201 of the Terrorism Risk Insurance Act (“TRIA”) and section 1610(g) of the Foreign Sovereign Immunities Act (“FSIA”) has affected efforts by victims of terrorism to fulfill their monetary judgments, especially in light of courts’ use of Article 4A of the Uniform Commercial Code to fill the definitional gap. This Piece focuses on a recent D.C. Circuit decision, Estate of Levin v. Wells Fargo Bank, N.A., analyzing its implications for terrorism victims holding monetary judgments to attach blocked electronic funds transfers (“EFTs”) originating from state sponsors of terrorism. Estate of Levin created a new circuit split with the Second Circuit.

This Piece proceeds in three parts. Part I traces the FSIA’s history and locates TRIA within a larger Congressional effort to expand terrorism victims’ access to restitution via a series of FSIA amendments. It then explains how Congress’s failure to define the property interests that would be subject to attachment under TRIA

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section 201 and FSIA section 1610(g) has resulted in divergent efforts by courts to fill in the gap using federal interstitial lawmaker and state law. Part II explains the Second Circuit’s application of the New York U.C.C. Article 4A to blocked funds. It then discusses the main points of contention arising from Estate of Levin’s split from the Second Circuit, as well as Estate of Levin’s concurring opinion. Part III argues that Congress should intervene by amending TRIA section 201 and FSIA section 1610(g) to define EFT ownership interests using tracing and agency principles.

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INTRODUCTION

On March 7, 1984 amidst the Lebanese civil war, Jeremy Levin, CNN’s Bureau Chief in Beirut, was kidnapped by Iran-sponsored Hezbollah militants intending to use him to secure the release of the

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3 See Affidavit of Dr. Patrick Clawson at ¶ 18, Levin v. Islamic Republic of Iran, 529 F. Supp. 2d 1, 7 (D.D.C. 2007) (No. 05CV02494) (“In the early and mid 1980s, Hizbollah was not equipped to carry out sophisticated operations such as hostage detention . . . Hizbollah was at that time being created by Iran, funded, supported and trained by Iranian agents . . .”); see generally Keith A. Petty, Veiled Impunity: Iran’s Use of Non-State Armed Groups, 36 DENV. J. INT’L L. & POL’Y 191, 194-99 (2007) (explaining Iran’s longstanding material, financial, and military support for Hezbollah).
4 Levin, 529 F. Supp. 2d at 6-7.
terrorists responsible for the December 1983 bombings of U.S. and French embassies in Kuwait.\(^5\) Held hostage for over 11 months, Levin was chained to the wall in an unheated room and regularly beaten.\(^6\) With barely any access to food, Levin was only allowed to use the toilet once a day, and could only shower once in his first three months of captivity.\(^7\) While Levin arrived back in the U.S. after his escape with much positive fanfare from reporters and government officials,\(^8\) he suffered lifelong negative consequences from his kidnapping.\(^9\) Levin became largely deaf due to ear infections and required multiple eardrum replacement surgeries.\(^10\) His traumatic kidnapping experience necessitated psychological treatment.\(^11\) Levin’s journalism career never recovered, and CNN let him go.\(^12\)

As part of its broader efforts to combat terrorism, the U.S. passed legislation to enable U.S. victims of terrorism to file suit against state sponsors of terrorism.\(^13\) Although Levin and his wife obtained civil monetary judgments against Iran, which was designated a state sponsor of terrorism in 1984,\(^14\) they are still owed over $15 million.\(^15\) The Levins are part of a long line of terrorism victims whose judgments against Iran have been reduced to hollow victories. Apart from the fact that Iran refuses to settle such claims with victims of terrorism,\(^16\) Iran does not have enough assets in the U.S. that could remotely satisfy the ballooning claims against it.

Hence, in a consolidated case with victims of al Qaeda’s 1998 suicide bombings of U.S. embassies in Kenya and Tanzania, the Levins brought suit in the District Court in the District of Columbia to attach a blocked Iranian electronic funds transfer (“EFT”) under section 201 of the

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\(^5\) Id.
\(^6\) Id. at 5-6.
\(^7\) Id. at 6.
\(^10\) Id.
\(^11\) See id.
\(^12\) Id.
\(^13\) See JENNIFER K. ELSEA, CONG. RSCH. SERV., RL31258, SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM 1 (2008).
\(^16\) Ordre Kittrie, Iran Still Owe $53 Billion In Unpaid U.S. Court Judgments to American Victims of Iranian Terrorism, FOUND. FOR DEF. OF DEMOCRACIES (May 6, 2016), https://www.fdd.org/analysis/2016/05/06/iran-still-owes-53-billion-in-unpaid-u-s-court-judgments-to-american-victims-of-iranian-terrorism/.
Terrorism Risk Insurance Act ("TRIA") and section 1610(g) of the Foreign Sovereign Immunities Act ("FSIA"). The blocked EFT originated from two Iranians with ties to Iranian state-owned companies National Iranian Oil Company ("NIOC") and National Iranian Tanker Company ("NITC"), in addition to the Islamic Revolutionary Guard Corps, a designated foreign terrorist organization. The Iranians established a shell company named Taif Mining Services ("Taif") in order to purchase an oil tanker, the Nautic, from the Greek company Crystal Holdings. The Iranians intended to use the Nautic to transport oil on behalf of NIOC. Taif planned to pay Crystal Holdings through Holman Fenwick Willan LLP ("HFW"), a British legal and consulting firm serving as Taif’s escrow agent. The second of two EFTs HFW sent to Crystal Holdings was blocked—a sum of $9.98 million. The blocked EFT was originally meant to proceed in the following steps: first, Taif, acting as Iran’s agent and the originator of the funds, sent money to HFW. Second, HFW instructed Lloyds Bank, the originator’s bank, to send a payment to Credit Suisse, the beneficiary’s bank. Lloyds Bank used Wells Fargo as the intermediary correspondent bank. Third, Wells Fargo was then supposed to debit Lloyds Bank’s account and credit the amount to Credit Suisse’s account. Finally, Credit Suisse would credit Crystal Holdings’ account.

But before Wells Fargo was able to pass the funds to Credit Suisse after debiting Lloyds Bank, the U.S. Treasury’s Office of Foreign Asset Control (OFAC) requested Wells Fargo to block the EFT under the International Emergency Economic Powers Act ("IEEPA"). The District Court of the District of Columbia then quashed the plaintiffs’ writs of attachment after concluding that Iran did not have a property interest in the blocked EFT. Following the Second Circuit decisions in similar cases, the District Court of the District of Columbia applied Article 4A of

18 See United States’ Verified Complaint for Forfeiture In Rem ¶ 19, United States v. $2,340,000.00 Associated With Petroleum Tanker Nautic, No. 20-1139 (D.D.C. May 1, 2020).
19 See id. ¶¶ 18-20, 24-41.
20 See id. ¶¶ 42-45.
21 Levin, 523 F. Supp. 3d at 16.
22 Id.
23 Id.
24 Id. at 17.
25 Id. at 23.
26 Id. at 17.
27 Id.
28 Id. The IEEPA grants the Executive Branch broad powers to impose economic sanctions for the protection of national security interests. See 50 U.S.C. §§ 1701-02.
29 Levin, 523 F. Supp. 3d at 15.
the Uniform Commercial Code ("U.C.C.") to determine that only Lloyds Bank, not Iran, possessed an ownership interest.\(^{30}\)

In 2022, the Levins passed away.\(^{31}\) In *Estate of Levin v. Wells Fargo Bank, N.A.*,\(^{32}\) the D.C. Circuit reversed and remanded the district court decision in favor of the Levin estate and the victims of al Qaeda’s 1998 bombings.\(^{33}\) Holding that the purpose of FSIA and OFAC’s blocking—namely, to subject terrorists’ blocked funds to attachment—precludes application of U.C.C. Article 4A,\(^{34}\) the D.C. Circuit has created a novel split with the Second Circuit.\(^{35}\) This Comment examines *Estate of Levin’s* implications for terrorism victims holding monetary judgments to attach blocked EFTs originating from state sponsors of terrorism. Part I traces the FSIA’s history and locates TRIA within a larger Congressional effort to expand terrorism victims’ access to restitution via a series of FSIA amendments. It then explains how Congress’s failure to define the property interests that would be subject to attachment under TRIA section 201 and FSIA section 1610(g) has resulted in divergent efforts by courts to fill in the gap using federal interstitial lawmaker and state law. Part II explains the Second Circuit’s application of the New York U.C.C. Article 4A to blocked funds. It then discusses the main points of contention arising from *Estate of Levin’s* split from the Second Circuit, as well as *Estate of Levin’s* concurring opinion. Part III argues that Congress should intervene by amending TRIA section 201 and FSIA section 1610(g) to define EFT ownership interests using tracing and agency principles.

\section*{I. The Development of the FSIA}

This Part provides background on the FSIA. Section I.A explains the FSIA’s origins and chronicles its evolution throughout a series of Congressional amendments—including TRIA—designed to pierce foreign sovereign immunity and make an increasingly wider range of assets available for compensating terrorism victims. It also sheds light on the push-pull relationship between Congress and the Executive Branch, which repeatedly undermined FSIA amendments to safeguard foreign

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\(^{30}\) See id. at 22-24.

\(^{31}\) Levin Appellants’ Opening Brief at 22 n.5, Estate of Levin v. Wells Fargo Bank, N.A., 45 F.4th 416 (D.C. Cir. 2022) (No. 21-7036).


\(^{33}\) See id. at 424.

\(^{34}\) See id. at 422.

sovereign immunity. Section I.B then identifies the definitional gap left by Congress in its failure to specify the property interests that would be subject to attachment under FSIA section 1610(g) and describes the various ways courts have defined property interests via interstitial lawmaking and state law.

A. The Origin of the FSIA and Its Subsequent Amendments

In 1952, Jack Tate, legal counsel to the State Department, wrote a letter—subsequently known as the Tate Letter—to the Acting Attorney General Phillip Perlman announcing the State Department’s departure from a longstanding adherence to absolute sovereign immunity.36 While absolute sovereign immunity granted foreign sovereigns broad immunity from suit in U.S. courts,37 the Tate Letter limited foreign sovereign immunity only to a state’s public acts, and not private or commercial acts.38 But the Tate Letter’s lack of guidance on parsing the public-private distinction resulted in confusion amongst U.S. courts.39 Hence, in 1976, Congress promulgated the FSIA to clearly enumerate exceptions to state immunity.40

Subsequent FSIA amendments demonstrate Congress’s commitment towards expanding terrorism victims’ access to restitution. In 1996, Congress added a terrorism exception to the FSIA via the Antiterrorism and Effective Death Penalty Act.41 The terrorism exception allows U.S.

36 Letter from Jack B. Tate, Acting Legal Advisor, Dep’t of State, to Philip B. Perlman, Acting Att’y Gen., Dep’t of Just. (May 19, 1952), in 26 DEP’T ST. BULL. 984, 984 (1952).
37 Ilana A. Drescher, Note, Seeking Justice for America’s Forgotten Victims: Reforming the Foreign Sovereign Immunities Act Terrorism Exception, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 791, 798 (2012) (“Until the mid-twentieth century, the United States followed the absolute theory of foreign sovereign immunity, which provided foreign nations with broad, but not unlimited, immunity from being sued in U.S. courts.”) (footnote omitted); see also Adam C. Belsky et al., Comment, Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law, 77 CALIF. L. REV. 365, 368 (1989) (“In 1952 the State Department, in the Tate Letter, announced that it would abandon the absolute theory of sovereign immunity . . . in considering requests by foreign states for immunity.”).
38 Letter from Jack B. Tate, supra note 36, at 984-85.
39 See Belsky et al., supra note 37, at 369 (“This change in executive policy produced great confusion among U.S. courts in applying the doctrine of sovereign immunity. Jurisdiction was frequently founded, or denied, on the basis of nonlegal factors.”).
40 See Drescher, supra note 37, at 799-800 (“FSIA starts from a presumption that states are immune from liability, then creates exceptions to that rule, most of which deal with a state’s commercial activity.”). The FSIA originally featured seven exceptions: “(1) waivers of immunity, (2) commercial activity directly or indirectly affecting the United States, (3) expropriation, (4) property rights issues, (5) noncommercial torts occurring within the United States, (6) international agreements, and (7) certain counterclaims.” Id. at 800-01.
citizens and survivors of terrorist attacks to file civil suits against foreign states and their instrumentalities that either committed or aided terrorist acts and have been designated state sponsors of terrorism, as long as the state had refused to arbitrate the claim. The terrorism exception is retroactive and includes a ten-year statute of limitations. In a simultaneous amendment to the FSIA, Congress extended the kinds of attachable state-owned property to include those unrelated to terrorist activity. The State Department strongly objected to the terrorist exception, arguing that it was inconsistent with international practice of granting broad state immunities and risked undermining the FSIA’s credibility.

Nevertheless, in the same year, Congress passed the Flatow Amendment to clarify that the terrorism exception allows for private causes of action and punitive damages against state sponsors of terrorism. However, the Executive Branch prevented courts from attaching foreign states’ OFAC-blocked assets because it deemed blocked assets useful leverage in foreign policy disputes. Hence, in 1998, Congress amended FSIA section 1610 to subject two types of blocked assets to execution and attachment: (1) “the property of a foreign state”; and (2) “the property of an agency or instrumentality of such a state.”

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42 See id.
44 HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 284 (rev. updated 3d ed. 2015) (“To overcome difficulties in obtaining execution of default judgments, a further amendment was made to the FSIA [via § 1610(a)(7)] at the same time as the [Antiterrorism and Effective Death Penalty Act] was enacted permitting execution where judgment was obtained against commercial property of a foreign State designated as a State sponsor of terrorism without requiring that the property be connected to the claim.”).
46 The Foreign Sovereign Immunities Act: Hearing on S. 825 Before the Subcomm. on Cts. and Admin. Prac. of the S. Comm. on the Judiciary, 103d Cong. 14 (1994) (prepared statement of Jamison S. Borek, Deputy Legal Adviser, U.S. Dep’t of State) (“Consistency of the FSIA with established international practice is important. If we deviate from that practice and assert jurisdiction over foreign states for acts that are generally perceived by the international community as falling within the scope of immunity, this would tend to erode the credibility of the FSIA.”).
49 Drescher, supra note 37, at 802-03.
50 Elsea, supra note 13, at 7 (“[The Clinton Administration] argued that [blocked Iranian and Cuban] assets are useful, and historically have been used, as leverage in working out foreign policy disputes with other countries (as in the Iranian hostage situation) and that they will be useful in negotiating the possible future re-establishment of normal relations with Iran and Cuba.”).
51 28 U.S.C. § 1610(g).
addition, FSIA section 1610(f)(2)(A) required the State and Treasury Departments to proactively assist terrorism victims in locating foreign state-owned property for attachment. But almost immediately after signing the bill, President Clinton exercised an executive waiver, thus frustrating terrorism victims’ ability to attach blocked assets to satisfy their judgments.

In 2000, Congress passed the Victims of Trafficking and Violence Protection Act, which enabled victims with judgments against Iran and Cuba to recover compensatory—but not punitive—damages in exchange for relinquishing their rights to attach certain property. While the Executive Branch liquidated Cuba’s frozen assets for attachment, it refused to do so for Iran’s assets.

In 2002, after the 9/11 terrorist attacks, Congress adopted TRIA, which allows judgment-holders against state sponsors of terrorism to attach “the blocked assets of that terrorist party.” Intended to disincentivize foreign governments from sponsoring anti-U.S. terrorism, TRIA voided all previous blanket waivers and limited the presidential waiver by requiring the President to conduct pre-waiver “asset-by-asset” appraisals. Congress then amended the FSIA again in 2008, expressly noting that “property of a foreign state against which a judgment is entered . . . and the property of an agency or instrumentality of such a state” are subject to attachment.

In 2016, Congress overrode a presidential veto to pass the Justice Against Sponsors of Terrorism Act (“JASTA”). While the original terrorism exception was limited to state sponsors of terrorism, JASTA

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54 Drescher, supra note 37 at 803.
55 Drescher, supra note 37, at 804.
59 Id. § 201(a).
63 Hancock, supra note 56, at 1294.
created a new expansive cause of action for terrorism victims to sue “persons, entities, or countries that knowingly or recklessly contribute material support . . . to persons or organizations that pose a significant risk of committing acts of terrorism” against the U.S. and its citizens.\(^{65}\)

**B. Courts’ Efforts to Define FSIA section 1610(g)’s Property Interests Via Federal Interstitial Lawmaking and State Law**

Because Congress has not specified the kinds of property interests that would be subject to attachment under TRIA section 201 and FSIA section 1610(g),\(^{66}\) lower courts have taken varying approaches to filling the statutory gap via federal interstitial rulemaking and state law in cases involving blocked EFTs.\(^{67}\) These inconsistent gap-filling measures, justified by different interpretations of Congressional intent, form the unstable foundation from which Second Circuit precedent arises.

*Heiser v. Islamic Republic of Iran,\(^{68}\)* whose interpretation is a major point of contention in *Estate of Levin*, is a notable example of federal interstitial rulemaking.\(^{69}\) In *Heiser*, American victims of a Hezbollah-initiated bombing at a Saudi Arabian apartment complex sought to execute a judgment against Iran under TRIA section 201 and FSIA section 1610(g) by attaching blocked EFTs held at Wells Fargo and Bank of America\(^{70}\) designated for Iranian entities acting as beneficiaries' banks—but not originators or ultimate beneficiaries.\(^{71}\) In *Heiser*, the D.C. Circuit affirmed the district court’s application of U.C.C. Article 4A as a federal rule of

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\(^{65}\) *Id.* § 2(a)(6). Despite its expansiveness, JASTA does contain some limitations. See Hancock, *supra* note 56, at 1310 (listing various limitations on JASTA’s broad applicability).

\(^{66}\) TRIA § 201(a) merely requires blocked assets to be “assets of” the sanctioned state in order to be subject to attachment. Similarly, FSIA § 1610(g) is no more specific, allowing attachment claims to “assets of” the sanctioned state. See Calderon-Cardona v. Bank of N.Y. Mellon, 770 F.3d 993, 1001 (2d Cir. 2014) (“Congress has not defined the type of property interests that may be subject to attachment under FSIA § 1610(g).”).

\(^{67}\) Congress’s failure to define ownership interests under TRIA § 201 has generated an open question as to how courts might determine ownership of blocked assets beyond EFTs. See, e.g., Bank Markazi v. Peterson, 578 U.S. 212 (2016); *Bank Markazi* specifically noted that the issue of whether TRIA § 201, on its own, authorizes terrorism victims to attach blocked central bank assets remains unresolved. See *id.* at 225 n.16.

\(^{68}\) *Heiser* v. Islamic Republic of Iran, 735 F.3d 934 (D.C. Cir. 2013).

\(^{69}\) See *Estate of Levin* v. Wells Fargo Bank, N.A., 45 F.4th 416, 420 (D.C. Cir. 2022) (“Both sides in this appeal, relying on *Heiser*, have set forth opposing views on whether, in light of U.C.C. Article 4A, Iran has a ‘sufficient property interest’ in the blocked funds.”).

\(^{70}\) *Heiser*, 735 F.3d at 935.

\(^{71}\) See *id.* at 936 (“Iranian entities were not the originators of the funds transfers. Nor were they the ultimate beneficiaries.”).
decision to conclude that Iran does not own the contested funds\textsuperscript{72} because it has been universally adopted by all states and squarely addresses EFT ownership.\textsuperscript{73} Heiser argued that “[n]othing in the legislative histories of [TRIA] § 201 or [FSIA] § 1610(g) suggests that Congress intended judgment creditors of foreign states to be able to attach property those states do not own.”\textsuperscript{74} Although the language in TRIA’s conference report “state[s] that § 201’s purpose ‘is to deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism . . . by enabling them to satisfy such judgments through the attachment of blocked assets by terrorist parties,” Heiser dismissed it as “merely repeat[ing] the language of the statute.”\textsuperscript{75} Moreover, Heiser stated that TRIA’s purpose of circumventing presidential waivers preventing terrorism victims from attaching blocked assets is “a far cry from paying Iran’s victims with assets Iran does not own.”\textsuperscript{76} Holding otherwise risks “punishing innocent third parties . . . who then unjustly bear[[] the cost of the debtor’s wrong.”\textsuperscript{77}

Unlike in Heiser, the Ninth Circuit in Bennett v. Islamic Republic of Iran\textsuperscript{78} affirmed the district court’s adoption of state law to define ownership interests under TRIA section 201 and FSIA section 1610(g)\textsuperscript{79} because most courts look to state law to determine asset ownership in the context of enforcing judgments.\textsuperscript{80} In Bennett, Iranian terrorism victims sought to attach blocked assets Visa Inc. (“Visa”) and Franklin Resources Inc. (“Franklin”) owed to Iran’s Bank Melli.\textsuperscript{81} Bennett applied the California Code of Civil Procedure, which authorizes courts to order judgment debtors to assign to judgment creditors a right to future payments.\textsuperscript{82} Because Bank Melli, as the undisputed beneficial owner, had a downstream contractual right to payments from Visa and Franklin, Bennett concluded that the blocked assets were attachable.\textsuperscript{83}

\textsuperscript{72} Id. at 941.
\textsuperscript{73} Id. at 940-41.
\textsuperscript{74} Id. at 938.
\textsuperscript{75} Id. at 938-39.
\textsuperscript{76} Id. at 939.
\textsuperscript{77} Id.
\textsuperscript{78} Bennett v. Islamic Republic of Iran, 825 F.3d 949 (9th Cir. 2016).
\textsuperscript{79} See id. at 965-66
\textsuperscript{80} Id. at 963.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 963-64 (“California law authorizes a court to order a judgment debtor to assign to the judgment creditor a right to payments that are due or will become due, even if the right is conditioned on future developments.” (citing Peterson v. Islamic Republic of Iran, 627 F.3d 1117, 1130-31 (9th Cir. 2010))).
\textsuperscript{83} Id. at 964.
But even if federal rather than state law governs the case, the Ninth Circuit contended that its holding does not conflict with federal law.\textsuperscript{84} The Ninth Circuit interpreted TRIA and FSIA’s vague language as Congressional intent for a broad definition of ownership: “Congress has used expansive wording [in TRIA and FSIA] to suggest that immediate and outright ownership of assets is not required.”\textsuperscript{85}

II. THE CIRCUIT SPLIT

This Part explains the circuit split arising from \textit{Estate of Levin}’s holding that blocked EFTs originating from state sponsors of terrorism are attachable under TRIA section 201. Section II.A describes the Second Circuit’s application of New York U.C.C. Article 4A in \textit{Calderon-Cardona v. Bank of New York Mellon}\textsuperscript{86} to find that terrorist parties have no property interests in blocked EFTs under TRIA section 201 and FSIA section 1610(g) unless they are the immediate transferor. Section II.B highlights Second Circuit Judge Denny Chin’s dissent in \textit{Doe v. JPMorgan Chase Bank, N.A.}\textsuperscript{87} where he notably objects to \textit{Calderon-Cardona} as flawed precedent inapplicable in the context of blocked EFTs originating from terrorist parties. Section II.C then describes \textit{Estate of Levin}’s majority opinion, which draws from Judge Chin’s dissent in contention with Second Circuit precedent. Section II.C describes \textit{Estate of Levin}’s concurring opinion.

A. The Second Circuit’s Opinion

In \textit{Calderon-Cardona}, family members and estate representatives of two American victims of a terrorist attack carried out by North Korea-supported affiliates of the Japanese Red Army and the Popular Front for the Liberation of Palestine sought to attach blocked EFTs belonging to North Korea.\textsuperscript{88} The victims’ families and representatives held unsatisfied judgments consisting of $78 million in compensatory damages and $300 million in punitive damages.\textsuperscript{89} While North Korea was once designated a state sponsor of terrorism, the State Department rescinded that status prior to the victims’ judgments.\textsuperscript{90} \textit{Calderon-Cardona} held that: (1) North

\begin{itemize}
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Calderon-Cardona v. Bank of N.Y. Mellon}, 770 F.3d 993 (2d Cir. 2014).
\item \textsuperscript{87} \textit{Doe v. JPMorgan Chase Bank, N.A.}, 899 F.3d 152, 160-61 (2d Cir. 2018) (Chin, J., dissenting).
\item \textsuperscript{88} \textit{Calderon-Cardona}, 770 F.3d at 995-96.
\item \textsuperscript{89} \textit{Id.} at 997.
\item \textsuperscript{90} \textit{Id.} at 999.
\end{itemize}
Korea’s blocked EFTs cannot be attached under TRIA section 201 because North Korea is no longer a terrorist party;91 and (2) the only circumstance that would trigger attachment under FSIA section 1610(g) is when the entity preceding the bank holding the blocked EFT is a North Korean agent or instrumentality.92

The Calderon-Cardona court disposed of the victims’ TRIA section 201 claim because the victims’ judgment against North Korea was not one against a state sponsor of terrorism, thus failing TRIA section 201’s state sponsor of terrorism requirement.93 Although the victims claimed prior status as a state sponsor of terrorism should satisfy TRIA section 201, the Calderon-Cardona court noted that the statutory context of the FSIA demonstrates a clear congressional intent to distinguish between current and former state sponsors of terrorism.94 For instance, Congress expressly included former state sponsors of terrorism in creating a private right of action against foreign states under FSIA section 1605A(c).95 Given that TRIA amends FSIA, the Calderon-Cardona court stated that “[i]t would be discordant to hold that Congress believed it needed to provide expressly that a former state sponsor of terrorism could be held liable in one part of FSIA, but that it only needed to do so impliedly in a later-enacted statute it codified as a note to FSIA.”96

In contrast, Calderon-Cardona found congressional intent to define foreign states’ property interest under FSIA section 1610(g) to be unclear even though the statute’s dispositive question turns on whether the blocked EFTs belong to the foreign state against whom judgment has been sought: “FSIA § 1610(g) is silent as to what interest in property the foreign state, or agency or instrumentality thereof, must have in order for that property to be subject to execution.”97 Calderon-Cardona specifically cited Heiser and Bennett’s district court opinions in recognizing the “myriad approaches” applying the U.C.C. and state law to define property interests under TRIA section 201 and FSIA section 1610(g).98

In an approach that appears to merge both the U.C.C. and state law, Calderon-Cardona applied New York U.C.C. Article 4A99 as a framework to conceptualize EFTs as a “chained series of debits and credits between

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91 Id. at 1000.
92 See id. at 1002.
93 Id. at 999-1000.
94 See id. at 1000.
95 Id.
96 Id.
97 Id. at 1001.
98 Id. at 1001 n.2; Both Heiser and Bennett affirmed the decisions of their respective district courts. Heiser v. Islamic Republic of Iran, 735 F.3d 934, 941 (D.C. Cir. 2013); Bennett v. Islamic Republic of Iran, 825 F.3d 949, 954 (9th Cir. 2016).
99 New York has incorporated U.C.C. Art. 4A into its state law. N.Y. U.C.C. § 4A.
the originator, the originator’s bank, any intermediary banks, the beneficiary’s bank, and the beneficiary.”

In this transaction chain where each transaction consists of a separate set of rights and obligations, *Calderon-Cardona* concluded that blocked EFTs belong neither to the originator nor the beneficiary. Instead, blocked EFTs’ property interests lie in the entity immediately preceding the bank holding the blocked funds. Hence, in the context of *Calderon-Cardona*’s facts, the blocked North Korean EFTs are only subject to attachment under FSIA section 1610(g) if its immediate preceding transferor is a North Korean agent or instrumentality. Because the record did not contain information about the entities involved in transmitting the blocked EFTs, the court in *Calderon-Cardona* remanded the case to the district court for further discovery.

**B. Judge Denny Chin’s Dissent in Doe**

However, the Second Circuit’s precedent did not come without meaningful dissent. In *Doe*, a judgment creditor sought to attach blocked EFTs initiated by agents and instrumentalities of the Fuerzas Armadas Revolucion de Colombia (“FARC”), a designated terrorist organization. The EFTs were routed through a series of banks before being blocked at the beneficiary’s New York bank. The upstream banks had all disclaimed their interest in the blocked EFTs. *Doe* followed *Calderon-Cardona* in applying the New York U.C.C., holding that the blocked EFTs are not attachable under TRIA section 201 because the FARC, the judgment debtor, did not transmit the EFT directly to JPMorgan, the bank subject to blocking regulations.

But in a forceful dissent, Judge Denny Chin argued that “attachment [of the blocked EFTs] is consistent with the plain language and purpose of the TRIA.” Unlike the *Heiser* court, Judge Chin deemed TRIA’s conference report illustrative of the fact that TRIA section 201’s purpose is to “deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the

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100 *Calderon-Cardona*, 770 F.3d at 1001.
101 See id. (quoting *Shipping Corp. of India Ltd.* v. *Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 71 (2d Cir. 2009)).
102 Id. at 1002.
103 Id.
105 Id.
106 Id. at 160 (Chin, J., dissenting).
107 See id. at 156 (majority opinion).
108 Id. at 159 (Chin, J., dissenting).
attachment of blocked assets by terrorist parties.”

Judge Chin also noted that even Calderon-Cardona recognized TRIA’s purpose is to “aid victims of terrorism to satisfy their judgments” by authorizing judgment holders to attach the blocked assets of liable terrorist parties.” Leaving the EFTs to be “frozen indefinitely in a blocked account at JPMorgan . . . does nothing to further the purpose of the TRIA.”

Judge Chin further argued that New York law’s conception of blocked assets as “neither the property of the originator nor the beneficiary” is fundamentally incompatible with OFAC regulations specifically sanctioning terrorist-owned property: “If [a terrorist group’s] interest in funds is, in effect, entirely extinguished while temporarily midstream, there would be no authorization to block those midstream funds as ‘property [or] interests in property’ of a designated terrorist party because that property would belong solely to the intermediary bank.” Therefore, New York law would have precluded JPMorgan from blocking the EFTs in the first place. Because most banking activity takes place via EFTs routed not directly to the beneficiary but rather through a series of intermediary banks, Judge Chin warned that adhering to Calderon-Cardona would in effect de-sanction high-risk terror financing.

C. Estate of Levin’s Majority Opinion

In contrast to the Second Circuit, Estate of Levin deemed statutory gap-filling via U.C.C. Article 4A inappropriate because TRIA and FSIA are situated in a larger federal scheme of OFAC sanctions, where ownership interests take on a broader meaning exceeding that of the U.C.C. Holding that blocked EFTs originating from terrorist parties are already attachable under TRIA section 201, Estate of Levin declined to decide on attachability under FSIA section 1610(g).

Estate of Levin distinguished Heiser by emphasizing that, unlike Taif, the sanctioned Iranian bank in Heiser was neither the beneficiary nor the originator of the EFTs. As a result, Heiser’s holding rested on the fact

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109 Id. (quoting Weininger v. Castro, 462 F. Supp. 2d 457, 483 (S.D.N.Y. 2006)).
110 Id. (quoting Calderon-Cardona v. Bank of N.Y. Mellon, 770 F.3d 993, 998 (2d Cir. 2014)).
111 Id. at 161.
112 See 31 C.F.R. § 594.201(a) (2022).
113 Doe, 899 F.3d at 161 (Chin. J., dissenting).
114 Id.
115 Id. at 161-62.
117 See id. at 423-24.
118 Id. at 423 n.19 (“Because the funds can be attached using the TRIA, we need not decide whether attachment is permissible under § 1610(g) of the FSIA.”).
119 Id. at 421.
that under U.C.C. Article 4A, the sanctioned Iranian banks only held a “contingent future possessory interest in the funds” insufficient to constitute legal title to the blocked EFT.120 Allowing attachment would only target property not owned by Iran.121 But in Estate of Levin, Iran was the originator of the blocked EFT.122 According to Estate of Levin, this distinction warrants a different federal common law rule. While applying U.C.C. Article 4A in Heiser would protect innocent third parties’ property interests, doing the same in Estate of Levin would frustrate the larger federal scheme of economic sanctions in opposition to the rule that “when federal courts incorporate state law as federal common law, such incorporation must be done ‘as to a single issue at a time’ and the court must consider whether the ‘issue’s outcome’ is consistent with the ‘federal program.’”123

Drawing from Judge Chin’s dissent in Doe, Estate of Levin deviated from the Second Circuit in arguing that U.C.C. Article 4A is fundamentally incompatible with OFAC sanctions.124 Aimed at the miscarriage of bank EFTs, Estate of Levin declared that U.C.C. Article 4A’s purpose is to “minimize disruptions” by “unraveling . . . uncompleted electronic transfers” and allocating risks accordingly.125 On the other hand, the OFAC sanctions’ “purpose is to disrupt terrorist electronic fund transactions,” thus entailing “no unraveling.”126 Restitutive statutes like TRIA section 201, which specifies that terrorists’ assets subject to victims’ monetary judgments “can be attached ‘[n]otwithstanding any other provision of law,’” complement OFAC sanctions in a double-barreled federal scheme to combat terrorist financing and make terrorism victims whole.127

But if, under U.C.C. Article 4A, EFTs belong solely to intermediary banks while blocked midstream, then OFAC—whose sanctioning power is limited to terrorists’ property—would not have any authority to block those EFTs in the first place.128 Because Heiser also recognized that U.C.C. Article 4A does not infringe on TRIA section 201’s status as controlling federal law, Estate of Levin deemed Heiser non-preclusive to its decision that U.C.C. Article 4A does not apply.129 Rather, Estate of

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120 Id. at 420-21.
121 Id. at 421.
122 See id. at 423.
123 Id. at 421.
124 See id. at 423.
125 Id. at 422.
126 Id.
127 Id.
128 See id. at 423 (citing Doe v. JPMorgan Chase Bank, 899 F.3d 152, 161 (2d Cir. 2018) (Chin, J., dissenting)).
129 See id. at 421.
Levin considered Heiser to be aligned with its rule that “blocked funds can be attached only if no intermediary or upstream bank asserts an interest as an innocent third party.”  

Since the blocked EFT only imposes financial loss on Taif—not Wells Fargo, Lloyds Bank, or HFW, none of whom have asserted a claim—Estate of Levin concluded that the blocked EFT is an attachable asset belonging to Iran.

Rather than look to state law, Estate of Levin then proposed tracing as an alternative to U.C.C. Article 4A that also harmonizes with OFAC regulations. Explicitly recognized by the Supreme Court as a well-established federal law principle to determine property rights in contexts such as fraud, pension rights, bankruptcy, and trusts, Estate of Levin determined tracing to be the best tool to fill TRIA section 201’s statutory gap in a way that accomplishes the federal objective—redirecting funds from terrorists to the victims they have harmed.

D. Estate of Levin’s Concurrence

In her concurrence, Judge Cornelia Pillard critiqued tracing as an insufficient solution leaving a meaningful gap in effectuating TRIA section 201—namely, “that the terrorist party be shown to have ‘an ownership interest’ in the funds sought.” Especially in the context of broad OFAC blocking regulations encompassing funds beyond those owned by terrorists, Judge Pillard emphasized that the dispositive question for terrorism victims seeking attachment is whether the blocked funds can be traced to a terrorist owner. Because “tracing presupposes ownership,” rather than identifying any legal rule for establishing it, Judge Pillard argued that a tracing-only solution shortchanges the majority holding of adequate legal basis. In particular, Judge Pillard noted that the majority failed to articulate a rule that properly justifies limiting attachment to circumstances that do not involve upstream banks’ innocent third-party interests. This generates uncertainty as to whether banks can assert ownership interest after victims have attached the blocked funds.

As a second alternative, Judge Pillard proposed applying common law ownership and agency principles that have been validated by the Supreme

130 Id. at 423.
131 See id. at 422-23.
132 See id. at 423.
133 See id.
134 Id. at 424.
135 Id.
136 Id.
137 Id.
138 See id.
Court in the analogous context of banking relationships. For instance, *Commercial National Bank v. Armstrong* recognized that “traceable funds intended as cash payment on [a] check belonged to the principal, rather than the agent bank, even if those funds were stopped mid-transfer.” In the context of determining ownership interests under TRIA, treating entities transferring terrorists’ funds as agents would ensure that terrorists are clearly designated as owners, thus providing an unambiguous pathway for victims to attach blocked funds. This would hew more closely to Congress’s intent in TRIA to subject terrorists’ property to attachment regardless of the means through which the transaction was conducted. In other words, whether a transfer of terrorists’ funds is done via EFT or check does not result in potentially different ownership interests because intermediary banks are merely agents. Applying common law ownership and agency principles in *Estate of Levin* would therefore guarantee that only Taif would retain ownership interest in the blocked EFT even as it circulated through HFW and Lloyds Bank until being frozen at Wells Fargo.

### III. DEFINING OWNERSHIP INTERESTS USING AGENCY AND TRACING PRINCIPLES AS A SOLUTION

The blocked EFT involved in *Estate of Levin* is not simply an isolated attempt by Iran to evade U.S. sanctions. Rather, the blocked EFT is one component of an expansive underground network of Iranian government-affiliated firms establishing proxy shell companies to sell oil and other commodities through foreign bank accounts. This network has been so effective in laundering tens of billions of dollars that it has roughly restored Iranian trade to levels pre-dating U.S. economic sanctions. Neutralizing U.S. economic sanctions has had palpable geopolitical ripple effects. Iran’s recovering economy has granted it greater leverage in multilateral nuclear negotiations to revive the Joint Comprehensive Plan

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139 *Id.* at 425.
142 *See id.*
143 *Id.*
144 *Id.*
146 *See id.*
147 *See id.*
of Action (“JCPOA”). Of particular concern is Iran’s secret offer to
share its successful sanctions-evasion tactics in exchange for Russia’s
support in the JCPOA deal.

Meanwhile, compensation for victims of Iranian-sponsored terrorism
remains elusive. Judge Boasberg criticized the Estate of Levin plaintiffs
for circumventing the “orderly and equitable” claims payment process
established by Congress in the U.S. Victims of State Sponsored Terrorism
Fund (“USVSST”), in addition to preventing the government from
contributing to USVSST’s funds via its asset forfeiture action against the
blocked EFT. But the USVSST is not a panacea for satisfying terrorism
victims’ judgments against Iran, nor should it preclude alternative avenues
for compensation enshrined in TRIA and FSIA. It is unlikely that any
USVSST claimant will receive more than 30% of their award—after
which other claimants receive priority—given that disbursements must be
made on a pro rata basis based on the number of claimants, which has
substantially grown to include victims of the 9/11 terrorist attacks.

While initial USVSST claimants in 2017 received 13.66% of their award,
by January 2019, USVSST claimants only received 4.3% of their award
as a result of the larger claimant pool. USVSST will also reduce
disbursements for claimants who receive compensation from other

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148 See id.
149 See Con Coughlin, Iran’s Secret Offer to Help Russia Evade Sanctions in Exchange
for New Nuclear Deal, THE TELEGRAPH (Mar. 23, 2022, 6:20 PM),
https://www.telegraph.co.uk/world-news/2022/03/23/irans-russian-backed-new-nuclear-
deal-could-give-moscow-chance/.
151 Bryan S. Peeples, Combating International Terrorism with Civil Causes of Action, 5
J. GLOB. L. POL’Y 25, 45-46 (2019) (“Eligible claims are paid on a pro rata basis out of
available funds . . . These payouts will continue until all claimants have been paid their
capped compensatory damage awards . . . In order to prevent earlier claimants from
receiving disproportionately larger amounts than those who get judgments nearer to the
expiration of the Fund, individual payments will be suspended after a claimant has been
paid 30% of the award. Payments to these claimants will not restart until all the other
outstanding claimants have received 30% of their judgments, at which time payments will
continue for all claimants. Therefore, it is unlikely that any claimant will ever receive more
than 30% of her award.”).
152 See Frances Stead Sellers, Americans Held in Iran Waited Decades for Relief. Now
They Face a New Challenge., WASH. POST (Feb. 23, 2019, 7:00 AM), https://www.wash
ingtonpost.com/national/americans-held-in-iran-waited-decades-for-relief-now-they-face-
a-new-challenge/2019/02/22/c8b03de4-308f-11e9-8ad3-9a5b113ecd3c_story.html
(explaining the struggle of the Tehran hostage crisis’s victims to satisfy monetary
judgments against Iran through USVSST when family members of 9/11 victims have also
gained access to the USVSST, thus diluting disbursements).
153 Id.
Moreover, the statute governing the USVSST restricts the contributions by successful asset forfeiture actions as it allocates 25% of proceeds to the government. The Levins are not registered claimants under the USVSST, likely due to the uphill prospects of receiving satisfactory disbursements.

Allowing the attachment of blocked EFTs originating from state sponsors of terrorism to satisfy terrorism victims’ judgments thus serves dual purposes: (1) the permanence of attaching and disbursing funds beyond merely freezing them subject to potential legal challenge heightens the punishment against state sponsors of terrorism like Iran that run successful sanctions-evading trading networks; and (2) compensating terrorism victims using funds that could otherwise contribute to terrorist financing transmutes harm into restitution.

The novel split between the Second and D.C. Circuits arising from Estate of Levin is ripe for Congressional intervention. Estate of Levin’s holding remains limited because it did not address ownership interests under FSIA section 1610(g). By defining EFT ownership interests via legislative amendments to both TRIA section 201 and FSIA section 1610(g), Congress can clearly articulate its longstanding commitment towards expanding the categories of attachable assets for terrorism victims. This avoids having the judiciary fill statutory gaps by making inconsistent choices between federal interstitial rulemaking, state law, and federal common law based on varying interpretations of Congressional intent.

Judge Pillard’s concurrence in Estate of Levin is a ready-made proposal for a principal-agent model of EFT ownership interests that best effectuates TRIA section 201 and FSIA section 1610(g) consistent with federal common law. The Supreme Court has interpreted that “the relationship created between the banks as to uncollected paper was that of principal and agent.” The Fifth and Eighth Circuits have applied this rule to the transfer of funds where the owner serves as the principal whose

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154 Peeples, supra note 151, at 46 (“[P]ayments from other sources will be taken into consideration when determining the overall payment percentage, and when calculating the amount that a particular claimant will be paid.”).


bank is its agent,\footnote{See City of Miami v. First Nat’l. Bank, 58 F.2d 561, 562 (5th Cir. 1932) (“It is held generally that a bank receiving items for collection and remittance is, before collection, the agent of the sender or owner of the item.”); First Nat’l. Bank v. Fed. Rsrv. Bank of Kan. City, 6 F.2d 339, 341 (8th Cir. 1925) (“Under the Massachusetts rule, the bank to which the initial bank forwards the paper for collection becomes the agent of the owner.”).} while downstream banks function as subagents.\footnote{Id. at 564.} Before the transfer is complete, funds “held by the collecting agent, [are held] not as its own money, but as money of its principal.”\footnote{Id. at 564.}

Additionally, Judge Pillard’s rule is in line with a more accurate reading of U.C.C. Article 4A.\footnote{See Brief of Commercial Law Professors as Amicus Curiae in Support of the Levin Appellants and in Support of Reversal at 15-21, Estate of Levin v. Wells Fargo Bank, N.A., 45 F.4th 416 (D.C. Cir. 2022) (Nos. 21-7036, 21-7041, 21-7044, 21-7052, 21-7053) (discussing how a more accurate reading of U.C.C. Article 4A results in blocked EFTs’ ownership interests residing in the originator).} According to the Second Circuit and the District Court for the District of Columbia, U.C.C. Article 4A confers ownership interests from the originator to its bank in the context of blocked EFTs.\footnote{See Calderon-Cardona v. Bank of N.Y. Mellon, 770 F.3d 993, 1001 (2d Cir. 2014) (explaining that in the context of blocked EFTs, “‘the only party with a claim [to a blocked EFT] against an intermediary bank is the sender to that bank, which is typically the originator’s bank.’”); \textit{see also} Levin v. Islamic Republic of Iran, 523 F.Supp.3d 14, 22 (“‘[W]hen a funds transfer is not completed, the intermediary bank receiving payment’ is obligated to refund payment \textit{only} to the immediately prior sender (the originator’s bank) and has no obligation to the originator.” (quoting United States v. BCCI Holdings (Luxembourg), S.A., 977 F. Supp. 12, 18 (D.D.C. 1997), aff’d, 159 F.3d 637 (D.C. Cir. 1998))).} However, this interpretation misreads U.C.C. section 4A-402(e), which provides that:

If a funds transfer is not completed [] and an intermediary bank is obliged to refund payment as stated in subsection (d) but is unable to do so because not permitted by applicable law or because the bank suspends payments . . . [t]he first sender in the funds transfer that issued an instruction requiring routing through that intermediary bank is subrogated to the right of the bank that paid the intermediary bank to refund.\footnote{U.C.C. § 4A-402(e) (AM. L. INST. & UNIF. L. COMM’N 2023).}

The Official Comments explain that this provision purports to protect the originator’s ownership rights in the event of a failed transfer:
The money-back guarantee is particularly important to Originator if noncompletion of the funds transfer is due to the fault of an intermediary bank rather than Bank A. In that case Bank A must refund payment to Originator, and Bank A has the burden of obtaining refund from the intermediary bank that it paid.164

In other words, a failed EFT where the originator is not at fault triggers a series of refunds going upstream until the ultimate owner is made whole. The fact that the originator’s bank must compensate the originator for a failed EFT means that U.C.C. Article 4A’s subrogation rights “do not change any underlying property rights” of the originator.165

Judge Pillard’s rule recognizes that the intermediary transfer of funds via agents does not infringe on the originator’s underlying ownership interests. As a solution that harmonizes both federal common law and the U.C.C., Judge Pillard’s rule on defining EFT ownership interests is ideal for Congressional codification in future amendments to TRIA section 201 and FSIA section 1610(g).

CONCLUSION

Any doubt about Iran’s ownership interest in the blocked EFT should be vanquished by the fact that in January 2020, Iranians hijacked the Nautic after Crystal Holdings initiated an arbitration to recover the $9.98 million balance from Taif Mining.166 One hijacker even attributed the hijacking to the blocked EFT, explaining, “We just want the ship. We had paid the money and the payment was stopped. It’s not our fault.”167 The Nautic was later discovered in Iranian waters working as a “ghost ship” ferrying Iranian oil in breach of sanctions.168 There is no evidence in the record that Lloyd’s Bank tried to recover either the blocked $9.98 million.

While the U.S. may not necessarily be able to prevent future violations by state sponsors of terrorism, it can redirect terrorist funding to remedy past harms. Victims like the Levins should not have to await compensation even after death. Given courts’ inconsistent use of federal interstitial rulemaking and state law to fill statutory gaps left by Congress’s failure to define property interests in TRIA section 201 and FSIA section 1610(g),

164 Id. at cmt. 2.
165 See Brief of Commercial Law Professors as Amicus Curiae in Support of the Levin Appellants and in Support of Reversal, supra note 161, at 18-19.
166 Estate of Levin v. Wells Fargo Bank, N.A., 45 F.4th 416, 424 (D.C. Cir. 2022)
168 Id.
Congress should reaffirm TRIA section 201 and FSIA section 1610(g)’s purpose of expanding terrorist victims’ compensation options via amendments incorporating tracing and agency principles to define EFT ownership interests.