

Marriott Bombing Case May Create New Liability Theory

Law360, New York (November 04, 2013, 5:27 PM ET) -- The U.S. Court of Appeals for the Fourth Circuit recently reversed a Maryland U.S. district court decision to dismiss a wrongful death suit brought against Marriott International based on a terrorist bombing that occurred at a franchised hotel in Pakistan. Based on this ruling, Marriott will now have to defend the suit in Bethesda, Md., where Marriott's headquarters are located.

The bombing event, known as "Pakistan's 9/11," occurred at the Marriott Islamabad Hotel on Sept. 20, 2008, when a large dump truck filled with explosives unsuccessfully tried to ram the security gate barrier. The driver initially attempted to detonate the explosives, but only caused a small fire in the cab of the truck.

The hotel security staff thought that it was a traffic accident and attempted to find a fire extinguisher to put out the fire in the cab of the truck, so it did not issue any warning to its guests. A short time later the truck exploded, killing 56 people and injuring 266 others. The explosion occurred during Ramadan as approximately 1,500 guests were breaking their fast. The hotel was operating at "Threat Condition Red."

Among those killed was Albert DiFederico, a former naval officer who was serving as a civilian contractor for the U.S. State Department. The wrongful death suit was filed in Bethesda by DiFederico's widow and their three sons. They did not sue the franchisee, a Pakistani company.

The trial court initially dismissed the case on the basis of the forum non conveniens doctrine and held that Pakistan was an adequate and more convenient location to hear the case because of the location of evidence and witnesses. However, this essentially meant that Mary DiFederico and her three sons were without a venue because the statute of limitations had already run in Pakistan.

But the Fourth Circuit reversed and ordered Marriott to face trial in Maryland, giving the plaintiff strong deference to the original selection of Marriott's "legal backyard" as a venue.

The court was persuaded that it would be unfair to force the plaintiff to have to travel to the site of the crime, where violence rages on, in order to pursue her claims against Marriott. The court stated that it would be "a perversion of justice to force a widow and her children to place themselves in the same risk-laden situation that led to the death of a family member."

The Fourth Circuit also noted that "to the extent that Americans recognize and utilize the Marriott brand, Americans have a localized interest in resolving a dispute related to Marriott. This is a case of American citizens suing an American corporation. The defendant is a corporate member and employer within the community where this case would be tried."

Thus the case returned to Maryland for a decision based on the merits. The plaintiffs alleged that Marriott was negligent in developing and implementing its anti-terrorism security plan at the hotel and otherwise failing to protect DiFederico.

Specifically, the DiFedericos alleged that Marriott failed "to design and implement a proper and satisfactory security protocol given the history and threat of terrorist activity in the area." The plaintiffs are also claiming that Marriott corporate staff knew the threat level at the hotel and took no action.

Upon remand back to the trial court in Maryland, Marriott filed a new motion to dismiss based on the traditional defenses of a franchisor to liability from an event at a franchised location, relying on the franchise agreement and the absence of the franchisor's control over the management of the hotel. They point out that this attack occurred on foreign soil, by international terrorists at a hotel owned and operated by a Pakistani company.

The narrow focus on the adequacy of Marriott's security plans for its franchisee that the plaintiffs adopted to work around the forum non conveniens arguments means that the case will turn on how well Marriott planned and instructed its franchisee, given Marriott's apparent notice of the history of violence at the hotel. Does a U.S. franchisor owe a duty to guests of its foreign franchised hotels to compel the franchisee to implement a franchisor-prescribed security plan?

Marriott is taking the position that it was the implementation (or lack thereof) of Marriott's security plan that was the true cause of DiFederico's demise, and since the family has stipulated that they are not pursuing any vicarious liability claims against the Pakistani company that owned the hotel, the case should be dismissed on the merits. Marriott's motion to dismiss is scheduled to be heard on Nov. 6, 2013.

The plaintiffs have responded to Marriott's effort to dismiss the complaint on remand by pointing out that Marriott is refusing to produce evidence in discovery relating to the issue of "control" at the hotel. The plaintiffs also rely heavily on public testimony of the head of Marriott's crisis management team, Alan Orlob (a retired Green Beret, Special Forces officer), who has represented that Marriott's corporate offices control all aspects of counterterrorism at properties in its franchise system.

Specifically, Orlob stated that "[i]nstead of requiring general managers to make risk assessments and implement appropriate countermeasures without support, Marriott provides professional analysis and direction."

Indeed, in 2009, after the Islamabad bombing that killed DiFederico, Marriott's Orlob testified before the United States Senate Committee on Homeland Security and Governmental Affairs. He testified that Marriott has "developed advanced training programs for our security officers working in high risk locations ... [and] we recently developed an active shooter program, combining physical security with operational security and awareness programs."

Marriott has also taken the position, in attempting to avoid a jury trial, that the plaintiffs do not know precisely how DiFederico died.

"Plaintiffs cannot blame Marriott for negligence when no one knows what caused Mr. DiFederico's death." Marriott speculates that DiFederico may have been merely walking near the hotel when the explosion occurred, or, perhaps, if he was in the hotel, he did not properly follow any emergency instructions provided by hotel staff, or, perhaps the hotel staff acted negligently in somehow placing him in harm's way.

Marriott also contends that even if it developed security protocols and provided professional risk assessment advice, it would still be up to the franchisee to implement such guidance.

The case may give rise to a new legal theory for franchisor liability from incidents at offshore franchises in higher risk locations.

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