

12-1318-cv(L) et al.

*In re Terrorist Attacks on September 11, 2001 (Kingdom of Saudi Arabia et al.)*

1  
2 UNITED STATES COURT OF APPEALS  
3 FOR THE SECOND CIRCUIT  
4

5 August Term, 2012

6 (Argued: March 20, 2013

Decided: December 19, 2013)

7 Docket Nos.

8 12-1318-cv(L), 12-1350-cv(CON), 12-1441-cv(CON), 12-1476-cv(CON),  
9 12-1477-cv(CON), 12-1519-cv(CON)  
10

11 IN RE TERRORIST ATTACKS ON SEPTEMBER 11, 2001 (KINGDOM OF SAUDI ARABIA ET  
12 AL.)

13  
14 FEDERAL INSURANCE COMPANY ET AL.

15  
16 *Plaintiffs-Appellants,*

17 - v. -

18  
19 KINGDOM OF SAUDI ARABIA, SAUDI HIGH COMMISSION FOR RELIEF OF BOSNIA AND  
20 HERZEGOVINA

21  
22 *Defendants-Appellees.\**  
23

24 Before: WINTER, CABRANES, AND STRAUB, *Circuit Judges.*

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\* The Clerk of Court is directed to amend the caption of this case to conform to the listing of the parties shown above.

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2 Appeal from an order of the United States District Court for the Southern  
3 District of New York (George B. Daniels, *Judge*) denying the plaintiffs' Rule 60(b)  
4 motion to reopen the District Court's judgment dismissing sovereign defendants  
5 pursuant to the Foreign Sovereign Immunities Act. We hold that the District  
6 Court's decision rested on an error of law and that the motion should have been  
7 granted. Accordingly, we **REVERSE** the order denying the Rule 60(b) motion  
8 and **REMAND** to the District Court for further proceedings consistent with this  
9 opinion.

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27

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1 STRAUB, *Circuit Judge*:

2 This is a tale of two cases: *Doe v. Bin Laden* and the case now before us, *In re*  
3 *Terrorist Attacks on September 11, 2001* (“*Terrorist Attacks*”). In both cases, the  
4 plaintiffs sought damages for injuries or deaths caused by the September 11, 2001  
5 terrorist attacks. In both cases, the plaintiffs sued defendants who argued that  
6 they were immune from suit under the Foreign Sovereign Immunities Act. In  
7 both cases, the plaintiffs contended that the statute’s “tort exception” to  
8 sovereign immunity applied.

9 In *Terrorist Attacks*, we ruled that the existence of the “terrorism exception”  
10 to sovereign immunity precluded the availability of the tort exception when the  
11 alleged tort was an act of terrorism. Three years later, in *Bin Laden*, we overruled  
12 that conclusion by “mini-en banc.” We held that even if the tort is an act of  
13 terrorism, the tort exception is available when the terrorism exception is  
14 inapplicable.

15 The *Terrorist Attacks* plaintiffs moved for relief from judgment under Rule  
16 60(b) in order to appeal the District Court’s alternative ground for finding  
17 sovereign immunity – a ground that we declined to reach in our prior opinion.  
18 The District Court (George B. Daniels, *Judge*) denied the motion under the

1 impression that we would be able to consider that unreviewed issue on appeal  
2 from the denial. But we cannot.

3 We conclude that this was an error of law and that “extraordinary  
4 circumstances” exist warranting relief under Rule 60(b). For this reason, we  
5 **REVERSE** the order denying the Rule 60(b) motion and **REMAND** to the District  
6 Court for further proceedings consistent with this opinion.

### 7 **BACKGROUND**

8 The factual background of this multi-district litigation has been discussed  
9 in detail in several of our opinions. *See Terrorist Attacks (Asat Trust Reg. et al.)*,  
10 714 F.3d 659, 666-73 (2d Cir. 2013); *Terrorist Attacks III*, 538 F.3d 71, 76-79 (2d Cir.  
11 2008).<sup>1</sup> Briefly, the plaintiffs “are persons who incurred losses in the September  
12 11, 2001 terrorist attacks: those who suffered personal injuries, the families and  
13 representatives of those who died, insurers and property owners.” *Terrorist*

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<sup>1</sup> There have been many decisions concerning *Terrorist Attacks*. The three most frequently mentioned in this opinion are *Terrorist Attacks I*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005); *Terrorist Attacks II*, 392 F. Supp. 2d 539 (S.D.N.Y. 2005); and the Second Circuit opinion addressing the appeal from those two decisions: *Terrorist Attacks III*, 538 F.3d 71 (2d Cir. 2008), *overruled by Doe v. Bin Laden*, 663 F.3d 64, 70 n.10 (2d Cir. 2011) (per curiam). The late Judge Richard Conway Casey decided *Terrorist Attacks I* and *II*. The case was then reassigned to Judge George B. Daniels, who issued the ruling below.

1 *Attacks III*, 538 F.3d at 75. The defendants subject to this appeal are the Kingdom  
2 of Saudi Arabia (“Kingdom”) and the Saudi High Commission for Relief of  
3 Bosnia and Herzegovina (“SHC”).

4 The issues before us primarily involve the case’s procedural history. The  
5 Kingdom and the SHC moved to dismiss the claims against them on the ground  
6 that they were immune from suit under the Foreign Sovereign Immunities Act,  
7 28 U.S.C. §§ 1330, 1602 *et seq.* See *Terrorist Attacks I*, 349 F. Supp. 2d at 802-04  
8 (Kingdom); *Terrorist Attacks II*, 392 F. Supp. 2d at 551-53 (SHC).

9 The District Court concluded that both the Kingdom and the SHC fell  
10 within the statutory definition of “foreign states,” which under the statute are  
11 generally “immune from the jurisdiction of the courts of the United States.” 28  
12 U.S.C. § 1604; see *Terrorist Attacks I*, 349 F. Supp. 2d at 802 (Kingdom); *Terrorist*  
13 *Attacks II*, 392 F. Supp. 2d at 553 (SHC).

14 There are, however, exceptions to this immunity, including a “terrorism  
15 exception” and a “tort exception.” See 28 U.S.C. §§ 1605(a)(5), 1605A. But the  
16 statute gets more complicated. There is a “discretionary function limitation” on  
17 the tort exception: the tort exception does not apply to claims based on the

1 performance of, or failure to perform, a discretionary function. 28 U.S.C.

2 § 1605(a)(5)(A).

3         The District Court concluded that the plaintiffs' claims fell within the  
4 discretionary function limitation, and it dismissed the claims against the  
5 Kingdom and the SHC. *Terrorist Attacks I*, 349 F. Supp. 2d at 803-04 (Kingdom);  
6 *Terrorist Attacks II*, 392 F. Supp. 2d at 555 (SHC). In doing so, the court also  
7 concluded that jurisdictional discovery was unnecessary. *Terrorist Attacks I*, 349  
8 F. Supp. 2d at 804 (Kingdom); *Terrorist Attacks II*, 392 F. Supp. 2d at 555  
9 (concluding that the SHC provided undisputed evidence establishing that the  
10 discretionary function limitation applied).

11         The plaintiffs appealed, and we affirmed the District Court's decision, but  
12 on different grounds. *Terrorist Attacks III*, 538 F.3d at 86-90. We concluded that  
13 where claims are based on acts of terrorism, only the terrorism exception – and  
14 not the tort exception – could be used to lift the statute's protection of foreign  
15 states. *Id.* at 90. Because we ruled that the tort exception was not available to the  
16 plaintiffs, we never reached the issue of whether the discretionary function  
17 limitation on the tort exception applied. *Id.* at 90 n.15.

1           After *Terrorist Attacks III*, we reversed course in *Doe v. Bin Laden*, 663 F.3d  
2 64 (2d Cir. 2011) (per curiam). There, the plaintiff sued Afghanistan, among  
3 other defendants, for the death of his wife in the September 11 attacks. *Id.* at 65.  
4 He also argued that the defendant was not immune from suit based on the tort  
5 exception. *Id.* For a time, *Bin Laden* was not centralized as part of the *Terrorist*  
6 *Attacks* multi-district litigation. During this period, the District Court for the  
7 District of Columbia concluded that the terrorism exception did not preclude use  
8 of the tort exception for claims based on acts of terrorism. *Doe v. Bin Laden*, 580 F.  
9 Supp. 2d 93, 97 (D.D.C. 2008). It reached this decision only a month and a half  
10 before our opposite conclusion in *Terrorist Attacks III*. *Bin Laden* was later  
11 transferred to the Southern District of New York for centralization with *Terrorist*  
12 *Attacks*, and the appeal pending before the Court of Appeals for the District of  
13 Columbia was transferred to us. *See Bin Laden*, 663 F.3d at 66.

14           On appeal in *Bin Laden*, we overruled our conclusion in *Terrorist Attacks III*  
15 that where the alleged tort is an act of terrorism, the tort exception is  
16 inapplicable. *Bin Laden*, 663 F.3d at 70. This was done by a procedure we have  
17 called “mini-en banc.” *Id.* at n.10. Recognizing that its holding was inconsistent  
18 with *Terrorist Attacks III*, the *Bin Laden* panel circulated its opinion to the

1 members of the *Terrorist Attacks III* panel and all the other active judges on the  
2 Court. *Id.* No judge objected to the issuance of the *Bin Laden* opinion. *Id.*

3         The *Bin Laden* decision led to inconsistent results for September 11 attack  
4 victims. Our final word to the *Bin Laden* plaintiff was that the tort exception was  
5 available to him and that the parties should proceed with jurisdictional  
6 discovery. Our final word to the *Terrorist Attacks* plaintiffs was that the tort  
7 exception was unavailable and that their lawsuit against Saudi Arabia and the  
8 SHC could not go forward.

9         This put the *Terrorist Attacks* plaintiffs in an awkward, if not impossible  
10 bind. The reasoning behind our decision in their case had been overruled. But  
11 we never reviewed the District Court's reason for reaching the same result – that  
12 the discretionary function limitation applied. Trying to find a mechanism to  
13 enable us to review the discretionary function issue, the plaintiffs moved for  
14 relief from judgment under Rule 60(b). The District Court denied the motion,  
15 concluding that opening the judgment was not necessary to allow us to consider  
16 the merits of the District Court's prior application of the discretionary function  
17 limitation. This timely appeal followed.



1 determine “whether or not they have a different determination with regard to  
2 the sufficiency of the complaint with regard to Saudi Arabia to assert a claim or  
3 to provide jurisdiction . . . .” Joint App’x at 2228.

4 That conclusion was not correct. “The appeal from the denial of a motion  
5 to vacate pursuant to Rule 60(b) brings up for review only the validity of that  
6 denial, not the merits of the underlying judgment itself.” *S.E.C. v. McNulty*, 137  
7 F.3d 732, 741 (2d Cir. 1998); *see also Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir.  
8 1986) (“An appeal from an order denying a rule 60(b)(6) motion brings before us  
9 only the denial of the motion, not the merits of the underlying judgment.”).  
10 Thus, the District Court’s decision rests on an error of law.

11 “[A]s a general matter, a mere change in decisional law does not constitute  
12 an ‘extraordinary circumstance’ for the purposes of Rule 60(b)(6).” *Marrero*  
13 *Pichardo v. Ashcroft*, 374 F.3d 46, 56 (2d Cir. 2004). That general rule, however, is  
14 not absolute. *See id.* And it should not be followed here. The procedural history  
15 of this case produced inconsistent results between two sets of plaintiffs suing for  
16 damages based on the same incident. It also allowed the District Court’s  
17 application of the discretionary function limitation to go unreviewed. We

1 conclude that the circumstances here are “extraordinary” and warrant relief  
2 under Rule 60(b)(6).

3 “Properly applied Rule 60(b) strikes a balance between serving the ends of  
4 justice and preserving the finality of judgments.” *Nemaizer v. Baker*, 793 F.2d 58,  
5 61 (2d Cir. 1986). Whenever the law changes, parties who lost a prior case  
6 because of the now-altered law may feel that justice was not done. Generally, the  
7 interest in finality outweighs that concern.

8 However, as the Supreme Court determined in *Gondeck v. Pan American*  
9 *World Airways, Inc.*, the interest in finality is outweighed by the interest in  
10 treating victims of the same tort consistently. 382 U.S. 25, 26-27 (1965) (per  
11 curiam). In that case, the Supreme Court faced a petition for rehearing. Two  
12 men had been killed in an automobile accident outside a defense base where they  
13 were employed. *Id.* at 26. For one, Frank Gondeck, the district court set aside an  
14 award made by the Department of Labor to his survivors, and the Fifth Circuit  
15 affirmed. *Id.* The Supreme Court denied certiorari and denied rehearing. *Id.*  
16 The Fourth Circuit reached the opposite result for the other employee. *Id.* at 27.  
17 Over three years after the original certiorari petition was denied, Gondeck

1 petitioned the Supreme Court for rehearing again, this time successfully. *See id.*  
2 at 26, 28.

3         The Supreme Court noted that Gondeck’s survivors were the only ones  
4 who were eligible for compensation from the accident who did not receive it. *Id.*  
5 at 27. This, according to the Court, “justif[ied] application of the established  
6 doctrine that the interest in finality of litigation must yield where the interests of  
7 justice would make unfair the strict application of [the Court’s] rules.” *Id.* at 26-  
8 27 (internal quotation marks omitted). The Court vacated its order denying  
9 certiorari and reversed the decision of the Fifth Circuit. *Id.* at 28; *see also Pierce v.*  
10 *Cook & Co., Inc.*, 518 F.2d 720, 723 (10th Cir. 1975) (en banc) (applying *Gondeck* in  
11 the context of a Rule 60(b) motion).

12         While the allegations regarding the September 11 attacks are far more  
13 intricate than a common traffic accident, the Supreme Court’s reasoning still  
14 applies. We treated cases arising from the same incident differently. One  
15 victim’s suit was allowed to proceed while others’ were not based on opposite  
16 interpretations of the same statutory provisions. As in *Gondeck*, the interest in  
17 finality must yield to the interests of justice.

1           The disparity between the *Terrorist Attacks* plaintiffs and the *Bin Laden*  
2 plaintiff is particularly troubling because of *Bin Laden's* late centralization with  
3 the *Terrorist Attacks* multi-district litigation. That occurred nearly a year after our  
4 decision in *Terrorist Attacks III*. Had it happened earlier, the *Bin Laden* plaintiff's  
5 claims could have been resolved at the same time – and in the same way – as  
6 those of the other *Terrorist Attacks* plaintiffs. In fact, the September 11 cases were  
7 centralized in part in order to “prevent inconsistent pretrial rulings.” *Terrorist*  
8 *Attacks*, 295 F. Supp. 2d 1377, 1378 (J.P.M.L. 2003); *see also* Transfer Order at 1,  
9 *Doe v. Bin Laden*, 09-cv-7055 (S.D.N.Y. Aug. 10, 2009), ECF No. 1 (transferring *Bin*  
10 *Laden* to the Southern District of New York for the same reasons as the original  
11 centralization order). The disparate treatment of two sets of litigants suing for  
12 the same underlying tort is especially anomalous where, as here, the cases are  
13 ongoing in the same court, yet subject to different rules based on this Court's use  
14 of the unusual “mini-en banc” process by which one panel overrules another.

15           For all these reasons, we follow the Supreme Court's guidance in *Gondeck*  
16 and conclude that the circumstances of this case are extraordinary and that relief  
17 under Rule 60(b)(6) is warranted.

1            *United Airlines, Inc. v. Brien* does not require a contrary result. 588 F.3d 158  
2 (2d Cir. 2009). *Brien* involved two cases in which the Immigration and  
3 Naturalization Service (“INS”) imposed fines on airlines for bringing non-  
4 citizens into the United States without proper documentation. *Id.* at 161-62. In  
5 the first, Air India had brought a lawful permanent resident into the United  
6 States without the required reentry permit or visa. *Id.* at 164-65. Air India was  
7 fined despite the INS’s waiver of that requirement based on “good cause” under  
8 8 C.F.R. § 211.1(b)(3). *Id.* at 165. The District Court ruled that the fine was  
9 unlawful. *Id.* at 164-67.

10            In the second, the District Court let stand a fine against United Airlines for  
11 bringing a non-immigrant into the country without a valid passport and/or visa,  
12 even though that person qualified for a waiver based on an “unforeseen  
13 emergency” under 8 C.F.R. § 212.1(g) (pre-1996). *Id.* at 162-64. Based on the  
14 second ruling, the INS moved for relief from the first under Rule 60(b)(6). *Id.* at  
15 167-68. The District Court granted the motion, and we reversed. *Id.* at 176.

16            The differences between *Brien* and the case now before us highlight why  
17 Rule 60(b)(6) relief is warranted here. First, the *Brien* cases were based on fines  
18 imposed for different incidents – incidents governed by a “different set of

1 statutes and regulations.” *Id.* at 162. The plaintiffs in *Terrorist Attacks* and *Bin*  
2 *Laden* are all suing based on a single underlying tort governed by the same  
3 statute. As discussed above, inconsistent results for victims of the same incident  
4 poses a unique problem of unfairness.

5 Second, we ruled in *Brien* that the INS’s argument failed primarily because  
6 it was “based not on mandatory authority from the Circuit but only on  
7 persuasive authority from the district court.” *Id.* at 176. Here, the Rule 60(b)  
8 motion is based on two conflicting opinions of this Court – one overruling the  
9 other.

10 Finally, while the INS and Air India each initially appealed the district  
11 court’s original decision, the parties later stipulated to dismiss their appeals. We  
12 noted that “Rule 60 does not allow district courts to indulge a party’s discontent  
13 over the effects of its bargain, such as where the party has made a deliberate,  
14 strategic choice to settle.” *Id.* (internal quotation marks omitted). In contrast, the  
15 *Terrorist Attacks* plaintiffs never made a tactical decision to abandon their claims.  
16 They used every avenue for appeal available to them, including an unsuccessful  
17 petition to the Supreme Court for a writ of certiorari. *See Federal Ins. Co. v.*  
18 *Kingdom of Saudi Arabia*, 557 U.S. 935 (2009) (denying petition). Yet by virtue of

1 the procedural posture of this case, they were never able to obtain review of the  
2 District Court's basis for dismissing their claims.

3 **CONCLUSION**

4 Our incorrect decision in *Terrorist Attacks III* caused a disparity between  
5 the *Terrorist Attacks* plaintiffs and the *Bin Laden* plaintiff where none should ever  
6 have existed. We conclude that the circumstances of this case are  
7 "extraordinary," warranting relief under Rule 60(b).

8 Because we cannot reach the underlying merits of the judgment, we will  
9 not address the plaintiffs' argument that the District Court should not have  
10 applied the discretionary function limitation or, at a minimum, should have  
11 granted jurisdictional discovery. Nor will we address the defendants' arguments  
12 that the complaints should be dismissed because the "entire tort" rule applies or  
13 because the plaintiffs have not sufficiently shown causation. All these issues  
14 may be considered by the District Court on remand.

15 Accordingly, we **REVERSE** the order denying the Rule 60(b) motion and  
16 **REMAND** to the District Court for further proceedings consistent with this  
17 opinion.