

Second Circuit Construes Civil RICO's "Domestic Injury" Requirement

IN SHORT

The Background: A Chilean plaintiff filed a civil RICO action against a Chilean defendant based on the latter's pattern of misappropriation of the former's assets.

The Issue: The defendant sought to dismiss the action based on a recent U.S. Supreme Court decision limiting the territorial reach of the civil RICO cause of action.

The Outcome: Although the district court dismissed the action in full, the Second Circuit reversed in part, holding that the alleged misappropriation of tangible assets located in the United States could qualify as a "domestic" injury sufficient to ground the claim, despite the plaintiff's foreign residency.

A recent decision by the Second Circuit is one of the first in the nation to construe the U.S. Supreme Court's important 2016 holding in *RJR Nabisco, Inc. v. European Community*. In *RJR Nabisco*, the Court limited the extraterritorial application of the civil enforcement provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Specifically, the Court held that civil RICO does not provide a remedy for foreign injuries. But the Court did not resolve what constitutes a "foreign" versus "domestic" injury; the Second Circuit is the first appellate court to weigh in on that critical question.

The Second Circuit case, *Bascunan v. Elsaca*, arose from a dispute between two Chilean cousins. The plaintiff alleged that the defendant had misused a power of attorney to misappropriate the plaintiff's assets through a variety of schemes and filed a civil RICO action in federal district court in New York. Reasoning that economic injuries are ordinarily felt where the victim resides, the district court held that the financial injury suffered by the Chilean-resident plaintiff was "foreign" in nature, and the court therefore dismissed his suit under *RJR Nabisco*.



The *Bascunan* decision is an important step in the elucidation of the *RJR Nabisco* rule.



The Second Circuit agreed that the relevant question is whether the injury caused by the civil RICO violation is better characterized as "domestic" or "foreign." But the panel disagreed, in part, with how the district court answered the question. Making clear that the analysis must focus carefully and separately on each of the specific injuries alleged, the panel held that the loss or theft of "tangible property located in the United States" qualifies as domestic injury, even if its owner resides abroad. Because the plaintiff had alleged the misappropriation of two particular pieces of tangible property in New York—funds in a New York bank account and bearer shares located in a New York safety deposit box—the court concluded that he had sufficiently alleged domestic injuries. Property located in the United States, the court reasoned, should be protected by U.S. laws, and recognizing as much does not offend the presumption against extraterritoriality.

The Second Circuit agreed, however, that many of the plaintiff's other alleged injuries were indeed "foreign" and thus not recoverable. As to misappropriation of property not physically located in the United States, for example, it did not suffice that the defendant had allegedly hidden his crimes using U.S. bank accounts and transactions. "Because of the primacy of American banking and financial institutions," the court explained, "a transnational RICO case is often likely to involve in some way, however insignificant, financial transactions with American institutions." That type of unilateral action by a defendant cannot overcome the presumption against extraterritoriality or the reasoning behind *RJR Nabisco*.

The *Bascunan* decision is an important step in the elucidation of the *RJR Nabisco* rule. On the one hand, it gives teeth to the Supreme Court's decision, refusing to allow RICO plaintiffs to circumvent the "domestic injury" limitation by pointing to the incidental use of U.S. accounts or wire transfers. On the other hand, it makes clear that a RICO plaintiff's foreign nationality or residence will not suffice to dismiss an action, if there is a genuine injury to property in the United States. Civil RICO defendants, no matter the jurisdiction, should pay careful attention to this decision, which is likely to prove highly influential in the law's development.

Jones Day represented RJR Nabisco in RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016).

THREE KEY TAKEAWAYS

1. In a civil RICO action, the alleged injuries must be analyzed individually to determine whether they are "domestic" (and therefore cognizable) or "foreign" (and therefore not recoverable).
2. The merely incidental use of U.S. wires or accounts by a defendant will not, standing alone, transform an otherwise foreign injury into a domestic one.
3. The loss of tangible property located in the United States can qualify as a "domestic" injury for these purposes, even if the victim resides abroad.



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