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The Far-Reaching New 'Domestic Injury' Rule Under Civil RICO

By **Paul Chan and Gopi Panchapakesan**

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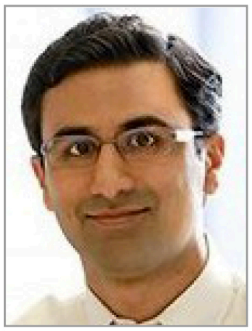

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Law360, New York (June 29, 2017, 12:32 PM EDT) -- United States courts are often an attractive forum for potential foreign plaintiffs. The reasons are well-documented: Compared to foreign jurisdictions, the scope of civil discovery is generally much broader in the United States, and our statutory penalty and damage regimes often provide for far more generous recoveries than their foreign counterparts.[1] Moreover, foreign litigants can gain direct access to United States federal courts through diversity jurisdiction, even where the parties on both sides of the dispute are foreign citizens (sometimes referred to as "alienage jurisdiction").[2] And of course, federal courts have original jurisdiction over cases that implicate questions arising under the Constitution, federal statutes, and treaties.[3] Federal question jurisdiction applies to cases arising under federal securities laws, the Racketeer Influenced and Corrupt Organizations Act, and the Alien Tort Statute, all statutes frequently invoked by foreign plaintiffs.

There are, however, several important protections available to foreign defendants who have been improperly haled into a United States court. As a threshold matter, a United States court must determine that it has personal jurisdiction over a foreign defendant before it can proceed with any action brought against that defendant.[4] Federal courts may also in their discretion dismiss a case for forum non conveniens where an alternative forum has jurisdiction over a given case and the domestic forum would seriously inconvenience the defendant.[5] And consistent with the principle that federal courts are courts of limited jurisdiction, courts have developed a now well-established presumption against federal laws applying extraterritorially to conduct occurring abroad.[6]

In a series of recent cases, the U.S. Supreme Court has seized upon this limiting principle in restricting the extraterritorial reach of federal statutes frequently invoked by foreign plaintiffs. For example, in Morrison v. Nat'l Australia Bank Ltd., a 2010 decision, the Supreme Court held that section 10(b) of the Securities and Exchange Act concerns only "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[7] And in Kiobel v. Royal Dutch Petroleum Co., a 2013 decision, the court held that the Alien Tort Statute does not apply to tortious conduct that takes place outside of the United States, proclaiming that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[8]

Most recently, in RJR Nabisco Inc. v. European Community, the Supreme Court last year sharply restricted the extraterritorial reach of RICO by requiring that the putative plaintiffs be able to establish a resulting domestic — and not merely foreign — injury.[9] By its terms, the federal RICO statute addresses "racketeering activity," which is comprised of numerous state and federal offenses referred to as "predicate acts."[10] A series of such predicate acts constitutes a "pattern of racketeering activity," which has the potential to create the "existence or threat of continued criminal activity."[11] Domestic plaintiffs who can establish these requisite elements can typically pursue a cause of action under 18 U.S.C. § 1964(c).

But in RJR Nabisco, the Supreme Court held that under RICO's private right of action, a putative foreign plaintiff must also "allege and prove a domestic injury to business or property," because the RICO statute "does not allow recovery for foreign injuries."[12] The court's new "domestic injury" requirement poses a significant hurdle to foreign plaintiffs seeking to invoke the civil RICO provisions against both domestic and fellow foreign adversaries, and raises difficult questions about what exactly constitutes "a domestic injury to business or property."

In RJR Nabisco, the plaintiffs, the European Community and 26 of its member states, alleged that RJR Nabisco and various related entities had violated RICO by using proceeds from drug trafficking to fund shipments of RJR Nabisco cigarettes into Europe.[13] The plaintiffs alleged, among other injuries, competitive harm to their state-owned cigarette businesses and lost tax revenue.[14] On appeal from the Second Circuit, the Supreme Court addressed two questions: (1) whether RICO's substantive prohibitions apply extraterritorially and (2) whether RICO's private right of action under 18 U.S.C. § 1964(c) covers foreign injuries.[15]

With respect to the first question, the court followed established precedents and held that because some of the predicate acts incorporated in the RICO statute explicitly apply extraterritorially, a violation of RICO may be premised on a pattern of racketeering activity occurring abroad, so long as the pattern includes these select predicate offenses that apply extraterritorially.[16]

However, the court's answer to the second question — concerning the territorial reach of RICO's private right of action — has potentially much more far-reaching implications for RICO litigants. On its face, RICO's private right of action provides redress for "[a]ny person injured in his business or property by reason of a violation" of RICO, along with treble damages and recovery of reasonable attorney's fees.[17] But the Court held that notwithstanding the seemingly broad language of this provision, the statute's private right of action is still subject to the judicial presumption against the extraterritoriality of federal statutes.[18] As such, the court concluded that a foreign injury to a foreign RICO plaintiff will not suffice to establish a private right of action, and the foreign plaintiff must still "allege and prove a domestic injury to its business or property."[19] The court explained that there is a distinction between, on the one hand, regulating foreign conduct and providing private remedies for such conduct, and on the other, providing a private right of action under RICO in the United States, noting that "[a]llowing recovery for foreign injuries in a civil RICO action, including treble damages, presents the ... danger of international friction."[20]

Ultimately, the RJR Nabisco court did not have to define exactly what events suffice to constitute a "domestic" injury to business and property, because the plaintiffs in the case had previously stipulated to waive their damages claims for domestic injuries.[21] In an observation that has since proven prescient, the court noted only that "[t]he application of this rule in any given case will not always be self-evident, as disputes may arise as to whether a particular alleged injury is 'foreign' or 'domestic.'"[22]

Since RJR Nabisco, lower courts have grappled with the question of what constitutes a "foreign" versus "domestic" injury to a foreign plaintiff and its United States interests, at times struggling to articulate a clear framework on which future RICO litigants can rely. To date, the most fulsome analysis of the domestic injury question was set forth in Bascuñan v. Daniel Yarur ELS Amended Complaint, a RICO case in the Southern District of New York.[23]

In Bascuñan, the plaintiffs, a Chilean citizen and other foreign entities holding some of Bascuñan's assets, alleged that the defendants illegally siphoned money from Bascuñan's estate, including fraudulently wiring money from Bascuñan's New York bank accounts to the defendants' bank accounts, some of which were also located in New York.[24] In determining whether the plaintiffs' alleged injuries were domestic in nature, the court looked to New York's conflict-of-law rules concerning the location of an alleged economic injury, in which courts ask the questions: "Who became poorer?" and "Where did they become poorer?"[25] Applying this analysis, the court dismissed the plaintiffs' RICO claim, reasoning that because Bascuñan was a Chilean resident, his alleged economic loss would be felt exclusively in Chile, even though his loss of funds occurred in New York.[26] Similarly, the court held that the corporate plaintiffs, whose principal places of business were in the British Virgin Islands and Chile, would suffer any losses abroad as well.[27]

Other district courts across the country have followed suit, generally holding that a plaintiff suffers an economic injury under RICO (the only type of injury recognized under RICO)[28] at his or her place of residence, and in the case of a corporation, at its principal place of business.[29] There are a handful of courts, however, that have departed from this general rule.

For example, in Tatung Co. Ltd. v. Hsu,[30] a case in the Central District of California, the court declined to follow Bascuñan, holding that "[i]t cannot be the case that the mere fact that a loss is economic means that foreign corporations are unable to avail themselves of the protections of civil RICO."[31] In Tatung, a Taiwanese company alleged that the defendants, largely Taiwanese citizens, conspired to defraud the plaintiff out of collecting on a commercial debt incurred in connection with the plaintiff's business dealings with an American company (not a defendant in the case), as well an arbitration award against the American company.[32] The court found that Tatung had shown it had suffered a domestic injury under RICO, reasoning that the defendants "specifically targeted their conduct act California" by "thwarting Tatung's rights in California," i.e., by allegedly hindering its ability to collect on a California arbitration award.[33]

Another federal court, facing nearly identical facts as in Tatung, held the opposite, however. In Armada (Singapore) Pte Ltd. v. Amcol Int'l Corp.,[34] a case in the Northern District of Illinois, the court held that the plaintiff's alleged injury — also the "inability to collect on the arbitral award it obtained" — was "pecuniary" and therefore suffered exclusively in its principal place of business, Singapore.[35] The court's holding in Armada, an extension of the general rule articulated in Bascuñan, comports closely with the Supreme Court's ruling in RJR Nabisco. As the Armada court observed, under RJR Nabisco, the relevant question is not whether a plaintiff's "business or property was injured in the United States," but whether it "felt its injuries in the United States or abroad."[36] In practical terms, this means that the reach of the civil RICO statute will be more limited for foreign plaintiffs than domestic plaintiffs, even when facing the same injury as their domestic counterparts. Even Justice Ruth Bader Ginsburg, dissenting in RJR Nabisco, recognized this distinction, noting that "U.S. defendants commercially engaged here and abroad would be answerable civilly to U.S. victims of their criminal activities, but foreign parties similarly injured would have no RICO remedy."[37]

The Supreme Court's decision in RJR Nabisco provides important protections for defendants (foreign and domestic alike) facing potential RICO liability against foreign plaintiffs. Foreign plaintiffs may be hard-pressed to plead a "domestic" injury under RICO,

particularly in cases where such plaintiffs have no business presence or assets in the United States.[38] But unless and until the Supreme Court provides further guidance, difficult questions will continue to arise in cases where the foreign plaintiff has some sort of connection to the United States, like, for example, an American subsidiary or business dealings with American companies.[39] In these instances, district courts will likely continue to exert wide latitude in determining whether a given injury alleged under RICO is domestic or foreign — and RICO litigants will be afforded continued opportunities to creatively frame the nature and location of their alleged RICO injuries.

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[1] See, e.g., Elizabeth T. Lear, National Interests, Foreign Injuries, and Federal Forum Non Conveniens, 41 U.C. Davis L. Rev. 559, 578 (2007).

[2] See 28 U.S.C. § 1332(a)(2) (providing for diversity jurisdiction in federal courts where the parties are "citizens or subjects of a foreign state."). This form of diversity jurisdiction is "sometimes referred to as alienage jurisdiction." Sadat v. Mertes, 615 F.2d 1176, 1182 (7th Cir. 1980). The rationale behind granting federal courts original jurisdiction over disputes between aliens is to "provide the federal courts with a form of protective jurisdiction over matters implicating international relations where the national interest [is] paramount." Id.

[3] See 28 U.S.C. § 1331.

[4] See Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945) ("due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.") (unless otherwise noted, internal quotation marks and citations have been omitted herein).

[5] See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241, 102 S. Ct. 252, 258, 70 L. Ed. 2d 419 (1981) ("[W]hen an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience, or when the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems, the court may, in the exercise of its sound discretion, dismiss the case.").

[6] See E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248, 111 S. Ct. 1227, 1230, 113 L. Ed. 2d 274 (1991), superseded by statute on other grounds ("It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . . It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.").

[7] 561 U.S. 247, 266-67, 130 S. Ct. 2869, 2883-84, 177 L. Ed. 2d 535 (2010).

[8] 133 S. Ct. 1659, 1669, 185 L. Ed. 2d 671 (2013).

[9] 136 S. Ct. 2090, 195 L. Ed. 2d 476 (2016).

[10] Id. at 2096; see also 18 U.S.C. § 1961(1).
[11] RJR Nabisco, 136 S. Ct. at 2096-97; see also 18 U.S.C. § 1961(5), § 1962(a)-(d).

[12] RJR Nabisco, 136 S. Ct. at 2111.

[13] Id. at 2098.

[14] Id.

[15] Id. at 2099-2100.

[16] Id. at 2102.

[17] 18 U.S.C. § 1964(c).

[18] RJR Nabisco, 136 S. Ct. at 2106.

[19] Id. (emphasis in original).

[20] Id. at 2106-07.

[21] Id. at 2111.

[22] Id.

[23] No. 15-CV-2009 (GBD), 2016 WL 5475998 (S.D.N.Y. Sept. 28, 2016).

[24] Id. at *1-2.

[25] Id. at *4.

[26] Id. at * 6.

[27] Id.

[28] RJR Nabisco, 136 S.Ct. at 2108.

[29] See, e.g., Cevdet Aksüt Oğullari Koll. Sti v. Cavusoglu, No. CV 2:14-3362, 2017 WL 1157862, at *5 (D.N.J. Mar. 28, 2017) ("Other courts have considered the 'domestic injury' question under varying circumstances, but most of them did not focus on where the RICO predicate acts occurred; rather, most of the courts appear to have focused on where plaintiffs' injuries were felt."); Union Commercial Servs. Ltd. v. FCA Int'l Operations LLC, No. 16-CV-10925, 2016 WL 6650399, at *5 (E.D. Mich. Nov. 10, 2016) (holding that because "Plaintiff is an entity organized in the Cayman Islands or Republic of Angola, has its principal place of business in the Republic of Angola, and is owned by Angolan citizens [,] . . . the only specific injury of which plaintiff complains – lost sales and lost profits – occurred entirely outside of the United States."); Exeed Indus., LLC v. Younis, No. 15 C 14, 2016 WL 6599949, at *3 (N.D. Ill. Nov. 8, 2016) (holding that the "domestic" injury question "can only be answered by looking to Plaintiffs' business operations in the [United Arab Emirates].").

[30] No. SACV131743DOCANX, 2016 WL 6683201 (C.D. Cal. Nov. 14, 2016). The authors of this article were counsel of record in the Tatung case.

[31] Id. at * 7.

[32] Id.

[33] Id. at *8.

[34] No. CV 13 C 3455, 2017 WL 1062322 (N.D. Ill. Mar. 21, 2017).

[35] Id. at *4.

[36] Id.

[37] RJR Nabisco, 136 S.Ct. at 2115-16 (Ginsburg, J., dissenting).

[38] See, e.g., Xiaomei Li v. Hanqing Sun, No. 16-CV-02206-RS, 2016 WL 8377667, at *2 (N.D. Cal. Dec. 12, 2016) ("Nevertheless, in this case, there is no reasonable basis to claim that plaintiff suffered any 'domestic' injury. She is a citizen of China, residing in China, who dealt with defendants in China, and who allegedly was defrauded by defendants in China. The mere fact that defendants now reside in this country, and supposedly brought with them the funds they obtained from plaintiff, cannot mean plaintiff suffered a domestic injury here—regardless of the uses to which defendants may now be putting those funds.").
[39] See, e.g., Akishev v. Kapustin, No. CV 13-7152(NLH)(AMD), 2016 WL 7165714, at *7 –8 (D.N.J. Dec. 8, 2016) (holding that plaintiffs, citizens of Russia and Eastern Europe allegedly defrauded by American-owned car dealerships through internet sales, had proven a domestic injury under RICO, reasoning that an alternative result "would allow the United States to become a haven for internet fraud despite Congress' dual intent both to create a private cause of action under RICO and incorporate predicate acts of mail and wire fraud which extend expressly to transactions affecting foreign commerce.").
